

Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence

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I. INTRODUCTION

Pakistan's evidence laws have achieved a certain notoriety. On January 17, 2002, Pakistan's Joint Action Committee, a collective of civil society organizations, issued a plea to the Pakistani government to abolish laws discriminatory to women and minorities.¹ The committee specifically targeted Pakistan's blasphemy laws, criminal laws, and evidence laws, stating that they "undermine the equal status of women and minorities and are a legacy of [a] draconian martial law regime."² The committee stressed that it would support all efforts to "help in making Pakistan a free, democratic and tolerant society," and that the "[g]overnment still ha[d] to go a long way to realize the dream of [a] truly democratic Pakistan."³

In a similar view, on June 18, 2001, outgoing United States Ambassador to Pakistan William B. Milam reflected on his tour in the country in a speech before the English Speaking Union of Pakistan.⁴ He remarked that "[a] great deal need[ed] to be done to restore the judiciary's reputation as a safeguard for rights and liberties," specifically citing discrimination against women and religious minorities in the law of evidence.⁵

1. *Government Decision Lauded*, PAK. NEWSWIRE, Jan. 17, 2002, available at LEXIS, News Library, CURNWS File.

2. *Id.*

3. *Id.*

4. *USA Ambassador to Pakistan/English Speaking Union*, PAK. NEWSWIRE, June 18, 2001, available at LEXIS, News Library, CURNWS File.

5. *Id.* Human rights observers have also noted Pakistan's discriminatory evidence laws. See, e.g., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001, at

This Article examines the conflicts between *Shari'ah* (Islamic sacred law), as implemented and interpreted in the Islamic Republic of Pakistan, and women's rights, as guaranteed by the Constitution of Pakistan and by relevant international declarations and treaties, in the context of the Pakistani law of evidence. Additionally, an ideology and methodologies of legal reform are proposed to reconcile these conflicts.

Part II sets forth an analytical framework for thinking about women's rights in Pakistan. It identifies the sources of *Shari'ah* in Pakistani law, as well as the sources and nature of women's rights.

Part III examines the Pakistani law of evidence in detail. Discrimination against women in the law of evidence represents one of the most apparent misuses of Qur'anic verses and recitations of the *ahadith* (narrations of the traditions of the prophet Muhammad) to promote a conservative religious agenda based upon the customs of a patriarchal society.⁶ In Pakistan, and to varying degrees across the Islamic world, testimony of women is devalued in certain legal matters and barred in others; a legal doctrine which does not promote Qur'anic values and serves only to perpetuate stereotypes about Islamic women as incapable in political and social affairs.⁷ In Pakistan, this and related doctrines may even affect a woman's ability to be employed in certain occupations and to enjoy full access to political, economic, and social life.⁸

Part IV addresses the topic of reform. Both reformist and conservative Islamic religious scholars and jurists have been locked in a struggle to define the future of Islamic jurisprudence.⁹ This struggle can appropriately be described as a struggle between *ijtihad* and *taqlid*.¹⁰ *Ijtihad* is a theory of Islamic jurisprudence that promotes the idea that jurists are entitled to exercise reasoned judgment in the interpretation and implementation of *Shari'ah* in new factual situations and in the light of

<http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8237pf.htm> (Mar. 4, 2002) [hereinafter COUNTRY REPORTS FOR 2001]; Amnesty International, *Pakistan*, at <http://www.web.amnesty.org/web/ar2001.nsf/webasacountries/Pakistan> (2001) [hereinafter Amnesty International, *Pakistan*, 2001].

6. See generally Jan v. Dad, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558 (1964) (discussing the importance of adhering to the traditional interpretations of the Qur'an and *ahadith*). The Qur'an contains little in the way of legislation. KAREN ARMSTRONG, *ISLAM A SHORT HISTORY* 49 (Random House, Inc. 2000). Furthermore, what legislation it does contain was designed for a much less rule-based society. *Id.* As a result, early jurists collected reports about the Prophet, called the *ahadith*, in an attempt to discern legal principles from the Prophet's actions. See *id.*

7. See discussion *infra* Part III.B.

8. See discussion *infra* Part III.B.4.

9. See discussion *infra* Part IV.

10. See discussion *infra* Part IV.B.

modern societal conditions.¹¹ *Taqlid* (imitation of previous scholars), still a very powerful and often discussed theory of Islamic jurisprudence, is a doctrine which promotes the idea of a literal interpretation of *Shari'ah* based upon the Qur'an and the *ahadith* as developed and institutionalized by the great medieval Islamic scholars.¹² This doctrine is essentially antithetical to the idea of a reformist revisiting of *Shari'ah*.

Part IV proposes that Pakistan is in a unique position within the Islamic world to adopt a reformist approach, based on several factors. These factors include the history of adoption and development of Islamic law on the Indian subcontinent, the ideology of the founder of the Pakistani state, provisions of the Constitution of Pakistan and relevant legislation, repeated instances of the assertion of judicial independence in the Pakistani case law, and recent commentary on the subject of reform from prominent Pakistani justices and from the current Pakistani President, General Pervez Musharraf.

II. *SHARI'AH* AND WOMEN'S RIGHTS IN PAKISTAN—THE ANALYTICAL FRAMEWORK

A. *Implementation of Shari'ah in Pakistani Law*

The Constitution of Pakistan contains a number of provisions that implement *Shari'ah* in Pakistani law. Although the Constitution was suspended in October 1999 following a military coup,¹³ its terms remain relevant by virtue of a provisional order directing that "[n]otwithstanding the abeyance of the provisions of the Constitution . . . Pakistan shall . . . be governed, as nearly as may be, in accordance with the Constitution."¹⁴

The introductory articles of the Pakistani Constitution set the basis for the application of *Shari'ah*. Article 1 declares that Pakistan's official

11. *Id.*

12. *Id.*; see also WAEL B. HALLAQ, AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW 86-120 (2001).

13. COUNTRY REPORTS FOR 2001, *supra* note 5. In October 1999, former Prime Minister Mian Nawaz Sharif's popularly elected civilian government was ousted in a coup led by Army Chief of Staff General Pervez Musharraf. *Id.* "In consultation with senior military commanders, General Musharraf designated himself Chief Executive, and suspended the Constitution, the Parliament, and the national and provincial assemblies." *Id.* In August 2002, President General Pervez Musharraf promulgated the Legal Framework Order. See Legal Framework Order (2002) (Pak.), available at <http://www.dawn.com/2002/08/022/top3.htm> (Aug. 22, 2002). This order provides that the Constitution shall stand revived on such day as the Chief Executive may appoint, and that different constitutional provisions may be revived on different dates. *Id.* Although it amends the Constitution, this order does not revive the Constitution, which officially remains in abeyance. See *id.*

14. Provisional Constitution Order No. 1, § 2(1) (1999) (Pak.), reprinted in 51 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 446, 446 (1999).

name is the Islamic Republic of Pakistan.¹⁵ Article 2 declares that Islam is the state religion.¹⁶ Article 2A, incorporating the Objectives Resolution of the Preamble as substantive constitutional law, in effect requires all laws to be brought into conformity with *Shari'ah*, specifically defined as the Qur'an and *Sunnah*.¹⁷ Articles 203A to 203J establish the Federal Shariat Court, which has authority to review any law that may be "repugnant" to the Qur'an and *Sunnah* and to review criminal court decisions involving *hudood*¹⁸ penalties.¹⁹ Finally, Articles 227 to 231 reassert the directive that no laws "repugnant" to the "Injunctions of Islam" are to be enacted and direct the establishment of a Council of Islamic Ideology to formulate and recommend legislation consistent with *Shari'ah*.²⁰

The constitutional provisions implementing *Shari'ah* as the supreme law of the land should stand on an equal footing with all other constitutional provisions, including provisions seeking to guarantee women's rights.²¹ These provisions should be construed harmoniously to the extent possible.²²

However, when the Constitution of Pakistan was suspended in October of 1999, a proposed Fifteenth Amendment to the Constitution was stalled in Parliament.²³ This proposed amendment would provide

15. PAK. CONST. art. 1.

16. *Id.* art. 2.

17. *Id.* art. 2A; *id.* pmbl. *Sunnah* refers to the statements, ways, and traditions of the prophet Muhammad. *See* Jan v. Dad, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558, 570 (1964).

18. *Hudood* offenses are among the most serious criminal offenses in Islamic law. *See* discussion *infra* Part III.

19. PAK. CONST. arts. 203A-203J. The Federal Shariat Court is a religious court that has original jurisdiction to examine any law in the country for its consistency with the "Injunctions of Islam." *Id.* art. 203D. The Federal Shariat Court is comprised of at most eight Muslim judges including the Chief Justice, who is appointed by the President. *Id.* art. 203C(2). Of the remaining judges, four are persons qualified to serve on the Pakistani High Courts, while three are *ulema* (religious scholars well versed in Islamic Law). *Id.* art. 203C(3A). Appeals from Federal Shariat Court rulings lie with the Supreme Court of Pakistan's Shariat Appellate Bench. *Id.* art. 203F. Some appeals are taken by mandate, others by discretion. *Id.* If a law is found to be repugnant to the Injunctions of Islam, the Federal Shariat Court forwards a written decision to the governmental entity (e.g., federal or regional) responsible for its administration. *Id.* art. 203D. The governmental authority is directed to amend the law to the extent of its repugnancy to the Injunctions of Islam, barring which the repugnant law ceases to have effect as of the date specified in the court's opinion. *Id.*

20. *Id.* arts. 227-31.

21. *See* discussion *infra* Part II.B.

22. *See, e.g.,* Munir v. Punjab, 43 ALL PAK. LEGAL DECISIONS, SC 295, 311 (1990) (holding that constitutional provisions that are not repugnant to one another can be read harmoniously).

23. *See* PAK. CONST. amend. 15 (proposed 1998), *available at* http://www.pakistani.org/pakistan/constitution/amendments/15amendment_new.html (Oct. 9, 1998). The proposed amendment had been approved by the National Assembly but not yet by the Senate. *Id.*

that *Shari'ah* is the supreme law of Pakistan “*notwithstanding* anything contained in the Constitution.”²⁴ In other words, all other constitutional provisions would be expressly subordinated to *Shari'ah*. Human rights observers remarked that this proposed amendment posed a potentially serious threat to safeguarding human rights.²⁵

B. Sources of Women's Rights

1. Constitution of Pakistan

The Constitution of Pakistan contains numerous provisions guaranteeing civil, political, and social rights, which do not, in any fashion, differentiate between the sexes. In addition, several provisions specifically relate to equality between the sexes and to women's rights.

The introductory declarations regarding the philosophy of government, contained in Part I of the Constitution, do not differentiate between the sexes.²⁶ The Objectives Resolution of the Preamble, incorporated by Article 2A, espouses principles of “democracy, freedom, equality, tolerance and social justice.”²⁷ Article 3 requires the “elimination of all forms of exploitation.”²⁸ Article 4, which has been referred to as a “due process clause,”²⁹ contains broad protection against deprivation of “life, liberty, body, reputation or property . . . except in accordance with law.”³⁰

Part II, Chapter 1, sets forth various “fundamental rights,” which again contain no distinctions based on sex.³¹ Article 9 provides that “[n]o person shall be deprived of life or liberty save in accordance with law.”³² The Supreme Court of Pakistan³³ has interpreted this to require the state

24. *Id.* § 2(1)(4) (emphasis added).

25. Amnesty International, *Annual Report on Pakistan* (1999), at <http://www.amnesty.org/ailib/aireport/ar99/asa33.htm> (last visited Mar. 24, 2003) [hereinafter Amnesty International, *Pakistan*, 1999].

26. PAK. CONST. arts. 1-6.

27. *Id.* art. 2A; *id.* pmbl.

28. *Id.* art. 3.

29. Dr. Muhammad Farogh Naseem, Constitutional Guarantees for the Rights of Women and Their Implementation, Address at the Pakistan Women Lawyers' Association Refresher Training Workshop held at Karachi (Dec. 26-30, 1997), *reprinted in* 50 ALL PAK. LEGAL DECISIONS, J. 31, 31 (1998).

30. PAK. CONST. art. 4.

31. *Id.* arts. 7-28.

32. *Id.* art. 9.

33. The higher appellate judiciary of Pakistan consists of the Supreme Court, the Federal Shariat Court, and High Courts in Pakistan's four provinces: Karachi (Sindh Province), Lahore (Punjab Province), Peshawar (Northwest Frontier Province), and Quetta (Baluchistan Province). *Judiciary*, Islamic Republic of Pakistan Official Website, at <http://www.pak.gov.pk/public/>

to provide persons with ample facilities and amenities to lead his or her life.³⁴ Article 14 declares the “dignity of man” to be “inviolable.”³⁵

Article 25 is potentially the most specific and important constitutional provision proclaiming equality between the sexes.³⁶ It provides that all citizens are entitled to equal protection of law and declares that “there shall be no discrimination on the basis of sex alone.”³⁷ In *Munir v. Punjab*, the Supreme Court of Pakistan relied on Article 25 in requiring admissions to a co-educational medical college to be based strictly on merit:

No discrimination on the ground of sex alone can be permitted except on the ground of reasonable and intelligible classification. Such classification in our [s]ociety permits for the present establishment of educational and professional institutions exclusively for the females or exclusively for the males. However, where co-education is permitted and the institution is not reserved for one sex alone, the fixation of number on the ground of sex will directly be opposed to the requirement of Article 25(2) unless it is justified as a protective measure for women and children under Article 25(3).³⁸

The Pakistani Constitution also addresses discrimination in Articles 26 and 27. Article 26 prohibits discrimination based on sex in access to specified public facilities.³⁹ Article 27 prohibits discrimination based on sex in appointments to the service of the country, subject to the important qualification that “specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex.”⁴⁰

2. International Declarations and Treaties

a. Universal Declaration of Human Rights (UDHR)

Apart from the basic rights given to women by the Pakistani Constitution, the international declarations and treaties which Pakistan has signed also strive to ensure equality among the sexes. Article 2 of the

govt/judiciary.htm (n.d.). The seats of the Supreme Court and the Federal Shariat Court are in Islamabad, but the courts run circuits at Karachi, Lahore, Peshawar, and Quetta. *Id.*

34. *Zia v. Wapda*, 46 ALL PAK. LEGAL DECISIONS, SC 693, 712-15 (1994).

35. PAK. CONST. art. 14; see discussion *infra* Part III.A.

36. PAK. CONST. art. 25.

37. *Id.* A qualification is added to this declaration ensuring the state’s ability to make “special provision for the protection of women and children.” *Id.*

38. *Munir v. Punjab*, 43 ALL PAK. LEGAL DECISIONS, SC 295, 311-12 (1990).

39. PAK. CONST. art. 26.

40. *Id.* art. 27; see discussion *infra* Part III.B.4.

UDHR provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴¹ Article 7 of the UDHR provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”⁴² Pakistan has also recognized the Beijing Platform for Action issued at the conclusion of the Fourth World Conference on Women.⁴³

b. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Broadly, CEDAW requires state parties to take all appropriate measures to assure equality for women in political, social, and economic matters.⁴⁴ More specifically, article 15 addresses the subject of equality between the sexes before the law:

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.⁴⁵

Clearly, discriminatory evidence laws would violate article 15 of CEDAW.⁴⁶

Pakistan acceded to CEDAW on March 12, 1996, with only one reservation.⁴⁷ Furthermore, a general declaration was made that Pakistan’s accession was subject to the provisions of the Constitution.⁴⁸

41. Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 2, U.N. GAOR, 3d Sess., 183d plen. mtg., A/810 (1948) [hereinafter UDHR].

42. *Id.* art. 7.

43. *Govt. to Ensure Equal Status to Women: Governor*, PAK. NEWSWIRE, Aug. 6, 2001, available at LEXIS, News Library, CURNWS File. The Platform for Action is a broad statement of principles designed to establish a framework for empowering women and advancing their status. MADELINE ALBRIGHT, WOMEN’S BUREAU, U.S. DEPT. OF LABOR, BRINGING BEIJING HOME 1 (1996). The hope is that governments will incorporate this framework into their public policy. *Id.*

44. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979) [hereinafter CEDAW].

45. *Id.* art. 15(2).

46. See Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women’s Convention and the Law as Stipulated in Shari’ah*, 2 BUFF. J. INT’L L. 1, 28 (1995).

47. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 240, 241, 247 (U.N. Publ’n 2001). The reservation is as follows, “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.” *Id.* Numerous Islamic countries have not yet acceded to CEDAW. See *id.* at

c. Cairo Declaration on Human Rights in Islam

The Cairo Declaration on Human Rights in Islam⁴⁹ was adopted August 5, 1990, at a conference attended by representatives from all members of the Islamic Conference, including Pakistan.⁵⁰ It also provides tools to promote equality between the sexes in matters of law. Article 1(a) states that all human beings “are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations.”⁵¹ Article 6(a) states that “[w]oman is equal to man in human dignity, and has rights to enjoy as well as duties to perform.”⁵² However, article 24 provides that “[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah.”⁵³

The Lahore High Court has explicitly recognized that the Pakistani state is obligated to “respect” both CEDAW and the Cairo Declaration.⁵⁴ In a case involving police misconduct in the arrest of an abused woman, the court recited relevant portions of both documents and stated that as a

240-41. As of April 4, 2002, the convention had not been adopted by Afghanistan, Bahrain, Iran, Oman, Qatar, Somalia, Sudan, Syrian Arab Republic, and the United Arab Emirates. *Id.*

48. *Id.* at 247. The declaration is as follows, “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.” *Id.*

49. Cairo Declaration on Human Rights in Islam, *reprinted in* EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 176, 176-78 (Taylor & Francis, 2d ed. 1996) [hereinafter Cairo Declaration]. The text of the Cairo Declaration was later circulated as a document of the United Nations General Assembly (U.N. Doc. A/45/421) and at the World Conference on Human Rights held in Vienna, Austria, in 1993. *Id.* at 176.

50. *Id.*; *Mehmood v. State*, 51 ALL PAK. LEGAL DECISIONS, LAHORE, 494, 513 (1999). The Organization of the Islamic Conference aims to promote Islamic solidarity. U.S. CIA, *THE WORLD FACTBOOK 2002* (Central Intelligence Agency 2002), *available at* <http://www.cia.gov/cia/publications/factbook/appendix/appendix-b.htm> (last visited Mar. 24, 2003). Its members include Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei, Burkina Faso, Cameroon, Chad, Comoros, Code d’Ivoire, Djibouti, Egypt, Gabon, The Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, *Pakistan*, the Palestine Liberation Organization, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, the United Arab Emirates, Uzbekistan, and Yemen. *Id.*

51. Cairo Declaration, *supra* note 49, art. 1(a).

52. *Id.* art. 6(a). However, the Cairo Declaration has been criticized as being purposefully evasive, speaking in generalities about the equal “dignity” between the sexes rather than about the specific rights of women. ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS* 86 (Westview Press, 3d ed. 1999).

53. Cairo Declaration, *supra* note 49, art. 24.

54. *Mehmood*, 51 ALL PAK. LEGAL DECISIONS, LAHORE at 512-13.

“Member of the International Comity of Nations we must respect the International Instruments of Human Rights to which we are a party.”⁵⁵

III. DISCRIMINATION AGAINST WOMEN IN THE PAKISTANI LAW OF EVIDENCE—HOW DID WE GET HERE?

A. *General Observations*

At the outset, it must be noted that the Qur'an contains many conflicting verses regarding the status of women.⁵⁶ Some are inescapably discriminatory against women,⁵⁷ but others promote the concept of equality between the sexes.⁵⁸ The disparate treatment of women can perhaps best be illustrated by comparing two Qur'anic verses. Verse 4:34 establishes a man as the head of the household and expressly recognizes his right to discipline his wife:

Men are appointed guardians over women, because of that in respect of which Allah has made some of them excel others, and because the men spend of their wealth. So virtuous women are obedient and safeguard, with Allah's help, matters the knowledge of which is shared by them with their husbands. Admonish those of them on whose part you apprehend disobedience, and leave them alone in their beds and chastise them. Then if they obey you, seek no pretext against them. Surely, Allah is High, Great.⁵⁹

55. *Id.* at 512.

56. The Qur'anic verses set forth in this Article have been quoted from a modern translation appearing in *THE QUR'AN, THE ETERNAL REVELATION VOUCHSAFED TO MUHAMMAD, THE SEAL OF THE PROPHETS* (Muhammad Zafrulla Khan trans., Olive Branch Press 1997) [hereinafter *THE QUR'AN*]. This translation was compared to a very popular translation appearing in *THE KORAN* (N.J. Dawood trans., Penguin Group 1990) [hereinafter *Dawood*]. The prefaces to these translations indicate that Khan consciously attempted to maintain a fairly strict adherence to Arabic idiom, while Dawood sought a translation more readable in contemporary English. *THE QUR'AN*, *supra*, at viii; *Dawood*, *supra*, at 3. With reference to the verses set forth in this Article no material differences in essential meaning were noted. Furthermore, please note that various translations of the Qur'an employ different verse numbering systems. *THE QUR'AN*, *supra*, at viii-ix. Every chapter of the Qur'an, except for the ninth, begins with, “In the name of Allah, Most Gracious, Ever Merciful.” *Id.* Some translations, including Khan's translation, number this invocation as the first verse of each chapter. *Id.* However, the most commonly cited translations do not. The verse numbers cited in this Article are the numbers most commonly cited in the literature. As a result, with the exception of the ninth chapter, each verse number cited in this Article will be one short of the verse number given to the same verse in Khan's translation. For example, verse 4:20 in Khan's translation is referred to in this Article as 4:19.

57. See Lisa Hajjar, *Domestic Violence and Shari'a: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia*, in *THEMATIC STUDIES*, at <http://law.emory.edu/IFL/thematic/Violence.htm> (n.d.).

58. See *infra* note 60.

59. *THE QUR'AN*, *supra* note 56, at 78. In other translations of the Qur'an, the words “beat them” appear in place of “chastise them.” See Hajjar, *supra* note 57. Some translators have

However, verse 4:19 states, “Consort with them [women] in kindness. If you dislike them, it may be that you dislike something in which Allah has placed much good.”⁶⁰

In short, proponents of a patriarchal society and proponents of a gender neutral society each have available to them Qur’anic verses to draw upon. And it is in this setting of conflicting Qur’anic verses that we approach the law of evidence in Pakistan.

B. *The Pakistani Law of Evidence*

1. Evidence in *Shari’ah*

a. Traditional Rules of Interpretation in Islamic Jurisprudence

Before turning to the specific Qur’anic verses which are relevant to the subject of evidence, it is useful to review traditional rules of interpreting *Shari’ah* in Islamic jurisprudence. The Constitution of Pakistan defines *Shari’ah* as the Qur’an and the *Sunnah*.⁶¹ The *Sunnah*, the statements, ways, and traditions of the prophet Muhammad, is

added the word “lightly” after “beat them.” M. Rafiqul-Haqq & P. Newton, *The Place of Women in Pure Islam* (1996), at <http://debate.domini.org/newton/womeng.html> (last visited Mar. 24, 2003). There seems to be general agreement that the beating should not cause injury. *See id.*

60. Numerous other verses in the Qur’an promote the equality of men and women. *See, e.g.*, THE QUR’AN, *supra* note 56, at 72 (verse 3:195, “Their Lord would answer their supplication: I will not suffer the labour of any labourer from among you, male or female, to perish. You are spiritually akin one to another.”); *id.* at 91 (verse 4:124, “Whoso does good, whether male or female, and is a believer, shall enter Paradise and they shall not be wronged a whit.”); *id.* at 260 (verse 16:97, “Of the believers whoso acts righteously, whether male or female, We will surely grant such a one a pure life; and We will certainly reward them according to the measure of the best of their works.”); *id.* at 73 (verse 4:1, “O mankind, be mindful of your duty to your Lord, Who created you from a single soul and from it created its mate and from the two created and spread many men and women.”). Moreover, Justice (ret’d) Tanzil-ur-Rahman of the High Court of Sindh relied on Qur’an 4:1 as promoting equality between the sexes. Justice Tanzil-ur-Rahman, *Law and Women in Pakistan, Address to the Muslim Women Cultural Association, Durban, South Africa* (Aug. 25, 1987), *reprinted in* 40 ALL PAK. LEGAL DECISIONS, J. 189 (1987). Beyond the Qur’an, the prophet Muhammad urged men to be kind to women:

[According to the *ahadith*] for perfection as a Momin [a Muslim standing for peace] it is a necessary qualification that he should be “best among them to his women folk[.]” (in treatment). And when calling her “crystal” . . . the Prophet (P.B.U.H.) amongst others, wanted to give a measure of the best treatment. “Crystalloid” [sic] conveys a lot more than what appears on ordinary reading. In the present context, these injunctions, when read together, enjoin upon men the protection of their [women’s] rights in every field.

Ali v. Naqvi, 42 ALL PAK. LEGAL DECISIONS, SC 1, 19-20 (1990). For additional discussion regarding the role played by the *ahadith*, see Jan v. Dad, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558 (1964).

61. *See* PAK. CONST. art. 2A; *id.* pmbl.

reported in a compilation of recollections called the *ahadith* (singular *hadith*).⁶²

Fiqh is the science of interpreting *Shari'ah*.⁶³ *Fiqh* literally means "knowledge, understanding and comprehension."⁶⁴ In traditional Islamic scholarship, *fiqh* encompasses both *ijma* and *qiyas*.⁶⁵ *Ijma* is consensus or unanimity of Islamic scholars.⁶⁶ In other words, where the Qur'an and *Sunnah* did not provide any clear edict, the consensus of Islamic scholars (almost invariably Medieval) was relied upon as a source of jurisprudence.⁶⁷ *Qiyas* refers to reasoning by analogy.⁶⁸ If the Qur'an, *Sunnah*, and *ijma* failed to provide a clear ruling, a judge could apply a precedent ruling to a new factual situation by analogy.⁶⁹

One of the primary goals of *fiqh* is to determine whether the admonitions of a particular Qur'anic verse are mandatory, in which case they form the basis of a rule of law, or merely advisory, in which case they do not.⁷⁰ A primary focus is whether a particular behavior is a ground for punishment or blame.⁷¹ Additionally, the linguistics of the verse is also highly relevant to its interpretation.⁷²

b. The Debt Verse

The Qur'an contains a number of verses regarding the duty to testify to the truth. These verses apply equally to Muslim men and women. For example verse 4:135 states:

O ye who believe, be strict in observing justice and bear witness only for the sake of Allah, even if it be against your own selves or against parents or kindred. Whether the person be rich or poor, in either case, Allah is more regardful of him than you could be. Therefore, follow not vain desires so

62. See *Jan*, 16 ALL PAK. LEGAL DECISIONS, LAHORE at 570.

63. JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 130 (Syracuse Univ. Press, 2d ed. 2001).

64. *Shari'ah and Fiqh*, Islamic Server of MSA-USC, at <http://www.usc.edu/dept/MSA/law/shariahintroduction.html> (n.d.); see also ESPOSITO, *supra* note 63, at 152 (*fiqh* is "the product of human understanding, interpretation, and application").

65. ESPOSITO, *supra* note 63, at 143.

66. *Jan*, 16 ALL PAK. LEGAL DECISIONS, LAHORE at 559.

67. See *id.* at 562-64.

68. *Id.* at 560.

69. *Id.*

70. See generally BERNARD G. WEISS, THE SEARCH FOR GOD'S LAW: ISLAMIC JURISPRUDENCE IN THE WRITINGS OF SAYF AL-DIN AL-AMIDI (Univ. of Utah Press 1992). In *Shari'ah*, actions can be categorized as obligatory, recommended, neutral, disapproved, or forbidden. See *id.* at 86.

71. See *id.* at 99-100.

72. See *id.* at 117-50.

that you may act equitably. If you conceal the truth or evade it, then remember that Allah is well aware of that which you do.⁷³

Only one verse in the entire Qur'an (containing some 6000 or more verses)⁷⁴ contains any specific gender distinction regarding testimony, but it is on the basis of this verse that the testimony of women has been devalued and barred in traditional interpretations of *Shari'ah*.⁷⁵ Verse 2:282, the so called Debt Verse, states:

O ye who believe, when you take a loan, one from another, for a term, reduce the transaction to writing; and let a scribe record it in your presence faithfully. No scribe should refuse to set it down in writing, because Allah has taught him, so he should write. Let him who undertakes the liability dictate the terms of the contract, and in so doing let him be mindful of his duty to Allah, his Lord, and not keep back anything therefrom. If he who undertakes the liability should be of defective intelligence, or a minor, or unable to dictate, then let his guardian dictate faithfully. Procure two witnesses from among your men; and if two men be not available, then one man and two women, of such as you like as witnesses, so that if either of the two women should be in danger of forgetting, the other may refresh her memory.⁷⁶

73. THE QUR'AN, *supra* note 56, at 92-93. Other verses speak of the duty to search for and testify to the truth. *Id.* at 10 (verse 2:42, "Confound not truth with falsehood nor hide the truth deliberately"); *id.* at 89 (verse 4:108, "Be not thou a contender on behalf of the treacherous ones and ask forgiveness of Allah; surely, Allah is Most Forgiving, Ever Merciful. Plead not on behalf of those who are unfaithful to themselves. Surely Allah loves not those who are perfidious and persistent sinners."); *id.* at 517 (verse 49:6, "O ye who believe, when an untrustworthy person comes to you with serious intelligence, do check up on it, lest you harm a people in ignorance, and then be remorseful over that which you have done."); *see also* Justice (ret'd) Dr. Tanzil-ur Rahman, *Islamic Law of Evidence*, Dawn—the Internet Edition, Opinion (June 9, 2000), at <http://www.dawn.com/2000/06/09/op.htm> (June 9, 2000) (noting that witnesses in Islamic courts must pass certain conditions, such as being a "just" person).

74. There is disagreement in the literature as to exactly how many separate verses comprise the Qur'an. *Cf.* Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 17 (2001) (estimating the number of verses at roughly 6000); Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 662 n.52 (1994-1995) (listing the number of verses at 6219); K.M. Sharma, *What's in a Name?: Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 157 n.17 (1998) (identifying the number of verses as 6219); T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG Be Enforced When the Forum Is in an Islamic State?*, 9 INT'L LEGAL PERSP. 25, 69 (1997) (stating the number of verses as 6237); Khaliq, *supra* note 46, at 8 (counting the number of verses at 6666).

75. *See, e.g.*, Dr. Taha Jaber Al-Alwani, *The Testimony of Women in Islamic Law*, 13:2 AM. J. ISLAMIC SOC. SCI. (1996), available at <http://www.alhewar.com/TahaTestimony.htm> (1999).

76. THE QUR'AN, *supra* note 56, at 45. This subject continues in verse 2:283:

Several observations about this verse may be made. As previously noted, a basic goal of *fiqh* in interpreting the Qur'an is to determine whether a Qur'anic verse is a directive or mandatory injunction, as opposed to merely an advisory one.⁷⁷ The former is the basis of a rule of law while the latter is not.⁷⁸

On its face this verse seeks merely to advise Muslims on how to minimize disputes in debt contracts.⁷⁹ If the verse's tangential reference to women's testimony is deemed to be a mandatory injunction, it would seem that the numerous references to the desirability of reducing a financial contract to writing, which is the obviously the main point of the verse, should also be deemed mandatory injunctions. This is not the case, however. With respect to the requirement of a writing, Islamic jurists have interpreted these Qur'anic references to be merely advisory.⁸⁰ In fact, oral contracts are enforceable in *Shari'ah* countries.⁸¹

Even if the reference to women's testimony in verse 2:282 can be considered a mandatory injunction, this reference should be understood and interpreted in its context. At the time of Muhammad and at the time of the compilation of the *ahadith*, it was undoubtedly true that women had little knowledge of, or experience with, commercial transactions. The rule requiring two women to testify in the place of one man as to financial transactions might therefore have had some practical appeal. In

The witnesses should not refuse to testify when they are called upon to do so. Whether the transaction be large or small do not be disinclined to write it down, together with the appointed time of payment. This is more equitable in the sight of Allah, makes testimony surer and is more likely to exclude doubts. In case of ready transactions when goods and money pass from hand to hand, it shall be no sin for you not to reduce them to writing. Have witnesses when you buy or sell. Let no harm befall a scribe or a witness, and if you do such a thing it shall certainly be disobedience on your part. Be ever mindful of your duty to Allah. Allah grants you knowledge and Allah knows all things well. Should you be on a journey and not find a scribe, the alternative is a pledge with possession. When one of you entrusts something to another, then let him who is entrusted render back his trust when he is called upon to do so, and let him be mindful of his duty to Allah, his Lord. Conceal not testimony; whoever conceals it is one whose heart is certainly sinful. Remember Allah knows well all that you do.

Id. at 46.

77. See WEISS, *supra* note 70, at 99-100.

78. See *id.*

79. See Al-Alwani, *supra* note 75.

80. Akaddaf, *supra* note 74, at 28.

81. *Id.*; see also DR. S.E. RAYNER, THE THEORY OF CONTRACTS IN ISLAMIC LAW: A COMPARATIVE ANALYSIS WITH PARTICULAR REFERENCE TO THE MODERN LEGISLATION IN KUWAIT, BAHRAIN AND THE UNITED ARAB EMIRATES 162 (Graham & Trotman Ltd. 1991) (stating that because of poor literacy rates in the Arab world, from the time of Muhammad to the present, agreements not committed to writing were the norm and carried the same probative value as those which were formally recorded).

this connection, the rationale underlying the Debt Verse may be revealed in verse 43:18:

What! One who is nurtured in ornaments and can scarcely express its meaning in a contention! They make out the angels, who are the servants of the Gracious One, to be females. Did they witness their creation? If so, their testimony shall be recorded, and they shall be questioned.⁸²

Times change, however. Today not all women are brought up among “ornaments,” nor do they suffer difficulty expressing themselves in “contentions” or in disputes. Moreover, Pakistan has been served by a female prime minister on two occasions.⁸³ If a woman is capable of serving in the leading legislative role in an Islamic country, it is hard to understand why her testimony regarding the formation of a simple contract should be devalued relative to that of a man.

The Lahore High Court has explicitly recognized that even Qur’anic injunctions must be viewed in their temporal settings. The court stated, “A clear injunction in Qur’an and Sunnah is binding and no departure is permissible provided that if the effective cause of an injunction has disappeared or an injunction was confined to the facts of a particular case its extension is not warranted.”⁸⁴ Similarly, “all rules in the *Shari’ah* that are based upon customs change when customs change.”⁸⁵

Assuming for the sake of argument that the idea of a mandatory injunction regarding women’s testimony retains any validity in today’s society, the reference to women’s testimony in verse 2:282 of the Qur’an could and should be limited to its specific factual setting. The subject of this verse is the formation of a loan for a fixed term that is reduced to a writing.⁸⁶ It is not necessary to extend this injunction to other types of financial matters or to nonfinancial matters such as *hudood* and *qisa* criminal offenses.⁸⁷

82. THE QUR’AN, *supra* note 56, at 490.

83. Benazir Bhutto served as prime minister between 1988 and 1990 and again between 1993 and 1996. *Benazir Bhutto*, ABC News.com, at <http://abcnews.go.com/reference/bios/bhutto.html> (2001).

84. Jan v. Dad, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558, 590 (1964).

85. Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287, 308 (1997) (citing SOBHI MAHMASSANI, *FALSAFAT AL-TASHRI FI AL-ISLAM* [THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM] 116 (Farhat J. Ziadeh trans., 1987)).

86. See THE QUR’AN, *supra* note 56, at 45.

87. *Hudood* offenses are crimes which are specifically mentioned in the Qur’an and for which specific penalties are prescribed. See discussion *infra* Part III.B.3. *Qisa* offenses are crimes also specifically mentioned in the Qur’an and for which specific penalties are prescribed, but for which the remedy is not direct state punishment, but rather retaliation by the victim or his or her family. See *id.*

Limitation of the Debt Verse to its stated factual setting is supported by other Qur'anic verses which specifically equate the value of the testimony of men and women. Verses 24:6-11 state:

In the case of those who charge their wives with misconduct, and have not witnesses except their own selves, the evidence of such a one will suffice, if he bears witness four times in the name of Allah that he is telling the truth, and a fifth time that Allah's curse be upon him if he lies. The punishment shall be averted from her, if she bears witness four times in the name of Allah that he has lied, and a fifth time that the wrath of Allah be upon her if he has spoken the truth. Were it not for Allah's grace and His mercy upon you, and that Allah is Compassionate and Wise, you would have come to grief.⁸⁸

Thus, even accepting for the sake of argument that discriminatory valuation of testimony on the basis of sex is an acceptable practice, in matters in which men and women can be presumed to have generally equal knowledge their testimony should be valued equally. Nevertheless, seizing upon the oblique reference in verse 2:282 for the necessity of two women to appear to testify in the place of one man, and upon certain *ahadith* and *ijma* involving the evidentiary rules customary at the time of Muhammad, the medieval Islamic scholars institutionalized the devaluation of the testimony of women.

c. *Ahadith* and *Ijma*

Beyond the Debt Verse, additional restrictions against a woman's ability to testify have been adopted by all traditional Islamic schools of thought⁸⁹ on the basis of the *ahadith* and *ijma*. A *hadith* speaking to the subject of women's testimony is found in Sahih Bukhari:⁹⁰

Once Allah's Apostle went out to [offer a prayer]. . . . Then he passed by the women and said, "O women! Give alms, as I have seen that the majority of

88. THE QUR'AN, *supra* note 56, at 338-39. The procedure outlined in this verse, known in Islamic law as *lian*, can be invoked by a husband who suspects that his wife has been unfaithful to him and is carrying the child of another man, but has no specific proof. YUSUF AL-QARADAWI, THE LAWFUL AND THE PROHIBITED IN ISLAM 222 (Kamal El-Helbawy et al. trans., Am. Trust Publ'n 1994). He can take the case to a Muslim judge (*qadi*), and after the oaths are sworn the couple is separated permanently and the child bears his or her mother's name. *Id.*

89. The four major schools of Sunni Islamic thought are Hanafi, Hanbali, Maliki, and Shafi'i. See MOHD. HAMEEDULLAH KHAN, THE SCHOOLS OF ISLAMIC JURISPRUDENCE (Nusrat Ali Nasri 1991). The Hanafi school is the dominant school in Pakistan, India, and Turkey. JOHN RENARD, RESPONSES TO 101 QUESTIONS ON ISLAM 53 (Paulist Press 1998).

90. This compilation of *ahadith*, the work of Bukhari over sixteen years, is considered by many Muslims to be one of the most authentic reports of the *Sunnah*. M. Muhsin Khan, *Introduction to Translation of Sahih Bukhari*, Islamic Server of MSA-USC, at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/sbtintro.html> (n.d.).

the dwellers of Hell-fire were you (women).” They asked, “Why is it so, O Allah’s Apostle?” He replied, “You curse frequently and are ungrateful to your husbands. I have not seen anyone more deficient in intelligence and religion than you. A cautious sensible man could be led astray by some of you.” The women asked, “O Allah’s Apostle! What is deficient in our intelligence and religion?” He said, “Is not the evidence of two women equal to the witness of one man?” They replied in the affirmative. He said, “This is the deficiency in her intelligence. Isn’t it true that a woman can neither pray nor fast during her menses?” The women replied in the affirmative. He said, “This is the deficiency in her religion.”⁹¹

No mention is made in this *hadith* of the types of transactions in which women’s testimony should be devalued. Thus, one can easily see grounds for the medieval Islamic scholars to seek to broaden the Debt Verse’s admonitions regarding female testimony beyond its specific factual setting and to declare that the Debt Verse should be understood as a blanket condemnation of women’s intelligence in general. However, this *hadith* does not provide a specific factual context sufficient to reach this conclusion. In other words, it is not at all clear from the context of this report whether the devaluation of female testimony should be considered to be an invariable rule of law and, if so, under what circumstances this devaluation should apply. Islamic scholars never accepted the concept of two women testifying in the place of one man as a broad principle of law; rather, women’s testimony was traditionally barred entirely in certain matters, such as criminal proceedings.⁹²

Medieval times saw a remarkable expansion of restrictions on the admissibility of women’s testimony. For example, the famous medieval Islamic scholar Ibn Abi Zayd al-Qayrawani opined in his *ar-Risala*, “Evidence given by women is inadmissible except in respect to property.

91. ABU ABDULLAH MUHAMMAD BIN ISMAIL BIN IBRAHIM BIN AL-MUGHIRA AL-JA’FAI, SAHIH BUKHARI, vol. 1, bk. 6, no. 301 (M. Mushin Khan trans.), at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/006.sbt.html> (n.d.). The authenticity of this *hadith* was supported to some extent by another *hadith* reported in Sahih Muslim.

Jabir b. ‘Abdullah:

I observed prayer with the Messenger of Allah (may peace be upon him) on the ‘Id day . . . He then walked on till he came to the women and preached to them and admonished them, and asked them to give alms, for most of them are the fuel for Hell. A woman having a dark spot on the cheek stood up and said: [“]Why is it so, Messenger of Allah?["] He said: [“]For you grumble often and show ingratitude to your spouse.[“] And then they began to give alms out of their ornaments such as their earrings and rings which they threw on to the cloth of Bilal.

ABUL HUSAIN MUSLIM BIN AL-HAJAJ AL-NISAPURI, SAHIH MUSLIM, bk. 4, no. 1926 (Abdul Hamid Siddiqui trans.), at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/muslim/004.smt.html> (n.d.). However, Muslim’s *hadith* did not speak to the subject of evidence.

92. See discussion *infra* Part III.B.3.

The weight of evidence given by one hundred women is equal to that given by two women only, which in turn equals that of a single man.⁹³ In a similar vein, the *Hedaya*⁹⁴ states:

Evidence is of several kinds, that of four men, as has been ordained in the Quran; and the testimony of a woman in such case is not admitted; because . . . 'in the time of the Prophet and his two immediate successors it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation'; and also because the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men cannot be had; and therefore it is not admitted in any matter liable to drop from the existence of doubt.⁹⁵

This attitude has proven to be persistent in time. Even modern authors make statements that tend to give little weight to the testimony of women. N.R. Madhava Menon, in his article *Islamic Criminal Jurisprudence and Social Defence in the Modern World*, states:

[T]he concern of Islamic law for complete truthfulness of evidence and certainty of proof is abundantly clear from its rules of evidence. Avoiding conviction only on a single witness[']s testimony and reluctance to act upon the evidence of women only are indications of the fool-proof system of guilt-determination prescribed by the *Qur'an* and *Sunna[h]*.⁹⁶

In so doing, modern Islamic authors continue to rely on the ancients:

The Imam al-Shafi'i⁹⁷ has said that the evidence of one man and two women cannot be admitted, excepting in cases . . . such as hire, bail, and so forth, because the evidence of (a) woman is originally inadmissible on account of their weakness of understanding, their want of memory and incapacity of governing, whence it is that their evidence is not admitted in criminal cases.⁹⁸

93. IBN ABI ZAYD AL-QAYRAWANI, AR-RISALA § 38.02, at <http://www.cyberislam.com/literature/fiqh/risalah/book38.html> (n.d.). Further, "Women are not permitted to commend people in giving evidence nor are they permitted to discredit people in giving evidence." *Id.* § 38.04.

94. The *Hedaya* is a compilation of *ijma* used as a textbook in the Hanafi school of thought, the majority school on the Indian subcontinent. See *Jan v. Dad*, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558, 563, 566-67 (1964).

95. Quraishi, *supra* note 85, at 306 (citing THE HEDAYA OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS, bk. XXI, ch. 1, at 353-54 (Charles Hamilton trans., 1982) [hereinafter THE HEDAYA OR GUIDE]).

96. Quraishi, *supra* note 85, at 306 (citing N.R. Madhava Menon, *Islamic Criminal Jurisprudence and Social Defence in the Modern World: An Appreciation*, 1 ISLAMIC & COMP. L.Q. 232, 237 (1981)).

97. The founder of the Shafi'i school of Sunni jurisprudence. KHAN, *supra* note 89, at 94.

98. Quraishi, *supra* note 85, at 307 (citing MUHAMMED IQBAL SIDDIQI, THE PENAL LAW OF ISLAM 45 (2d ed. 1985)). Another, related, rationale for devaluing women's testimony is based upon women's "disturbed psychological conditions in various stages like menstruation,

In fact, the idea of devaluing or barring women's testimony on the basis of their "weakness of understanding" and "want of memory" persists to this day. The very same thinking exists in the modern Pakistani law of evidence.

2. The Pakistani Law of Evidence in Commercial Transactions

In the 1970s, Pakistani President General Zia ul-Haq instituted a comprehensive program of "Islamization" of the country's legal system.⁹⁹ As part of this program, the Qanun-e-Shahadat (Law of Evidence) Order of 1984 was adopted expressly to bring the Pakistani law of evidence into accordance with traditional Islamic jurisprudence.¹⁰⁰ The statute repealed the Evidence Act of 1872, which was based largely on Anglo-Saxon law principles.¹⁰¹ The statute provides generally that a court shall determine the competence of a witness in accordance with the prescriptions of the Qur'an and *Sunnah*.¹⁰² Specifically, the statute states:

- (2) Unless otherwise provided in any law relating to the enforcement of [*h*]udood¹⁰³ or any other special law,—
- (a) in matters pertaining to *financial or future obligations*, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and
- (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.¹⁰⁴

pregnancy, menopause." EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* 237 (Martinus Nijhoff Publishers 2001).

99. David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 36 (1994).

100. *Pakistan, Islamic Republic of*, Islamic Family Law, at <http://law.emory.edu/IFL/legal/pakistan.htm> (n.d.).

101. *Id.*

102. Qanun-e-Shahadat (Law of Evidence) Order, § 3 (1984) (Pak.), *reprinted in* 37 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 14, 17 (1985).

103. *See* discussion *infra* Part III.B.3.

104. Qanun-e-Shahadat (Law of Evidence) Order, § 17 (1984) (Pak.) (emphasis added), *reprinted in* 37 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 14, 20 (1985). Generally, a document required to be attested is inadmissible in evidence unless at least two attesting witnesses have been called for the purpose of proving its execution, provided that they are alive, subject to the process of the court, and capable of giving evidence, unless the document has been registered in accordance with Pakistan's Registration Act. *Id.* § 79. If the attesting witnesses have died or cannot be found, upon proof of such facts the document's execution may be proved by other evidence. *See id.* § 80. Similarly, if an attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. *Id.* § 82. Special rules govern the admissibility of banking documents. *See* The Financial Institutions (Recovery of Finances) Ordinance, § 18 (2001) (Pak.), *available at* <http://www.sbp.org.pk/publication/R-ordinance>.

This provision clearly is based on verse 2:282 of the Qur'an (the Debt Verse).¹⁰⁵ However, the scope of the devaluation of women's testimony was expanded beyond anything which could reasonably be seen as directed by the Debt Verse. The devaluation of women's testimony extends not just to a debt for a term; it extends to all "financial" obligations and to all "future" obligations. This is very broad language. The meaning of "future" obligations is not defined but, to be given independent effect, it must mean something other than "financial" obligations and could conceivably be read to extend to all contractual or commercial matters. This was apparently the position of the Federal Shariat Court when it stated that, in matters involving the "enforcement of one's right," the requisite testimony consisted of (1) two men or (2) one man and two women.¹⁰⁶

The drafting of this statute is very much in keeping with the traditional Islamic jurists' tendency to expand restrictions on women's testimony as far as possible. What is particularly interesting, however, is that this statute *on its face* ignores the advice that clearly was the very purpose of the Debt Verse, to reduce a debt agreement to writing.¹⁰⁷ The provision speaks of testimony regarding financial or future obligations *if* reduced to writing, necessarily implying that these agreements are not *required* to be in writing.¹⁰⁸ Indeed, Pakistan's Contract Act provides that "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a

htm (last visited Dec. 31, 2002). A document creating or purporting to create a mortgage, charge, pledge, or hypothecation in relation to any property, or the assumption of any obligation by a bank customer, guarantor, or mortgagor, is admissible in evidence before a Banking Court notwithstanding the fact that such document was not attested or witnessed as required by the Qanun-e-Shahadat (Law of Evidence) Order of 1984. *Id.* § 18(4).

105. See THE QUR'AN, *supra* note 56, at 45.

106. *Patel v. Pakistan*, 41 ALL PAK. LEGAL DECISIONS, FSC 95, 1989 ISLAMIC L.J. 474, 476 (1989). Please note, the vast majority of decisions reported in the All Pakistan Legal Decisions reporting service are reported in English. Oddly, *Patel* was reported in Urdu. As a result, citations are to an English translation in digest format appearing in the ISLAMIC LAW JOURNAL. See also *Yaqoob v. Hussain*, 47 ALL PAK. LEGAL DECISIONS, LAHORE 395, 399 (1995) (noting that a written lease of agricultural land created "financial liability" and hence was subject to the Qanun-e-Shahadat (Law of Evidence) Order, § 17 (1984)); *Khaliq v. Khan*, 48 ALL PAK. LEGAL DECISIONS, LAHORE 367, 370-71 (1996) (holding that a written contract for the sale of a house dealt with "future obligations" and hence was subject to the Qanun-e-Shahadat (Law of Evidence) Order, § 17 (1984) (Pak.)).

107. See THE QUR'AN, *supra* note 56, at 45.

108. Qanun-e-Shahadat (Law of Evidence) Order, § 17(2)(a) (1984) (Pak.), *reprinted in* 37 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 14, 20 (1985).

lawful object,” subject to any specific law requiring them to be in writing or in the presence of witnesses.¹⁰⁹

The Pakistani law of evidence regarding commercial transactions is a microcosm of the problem of discrimination against women in the country, and indeed to varying degrees throughout the Islamic world. It exposes, in an unmistakable way, the very root of the problem: the manipulation of Qur’anic verses to advance an agenda based on patriarchal social and political values.¹¹⁰

3. The Pakistani Law of Evidence in Criminal Proceedings

As part of President Zia-ul-Haq’s “Islamization” agenda, Pakistan enacted a set of *hudoob* ordinances prescribing punishment for offenses such as alcohol consumption, theft, adultery, and slander (false imputation of sexual immorality).¹¹¹ *Hudoob* offenses are crimes specifically mentioned in the Qur’an and for which specific penalties are prescribed.¹¹² They are to be distinguished from *qisa* offenses, crimes also specifically mentioned in the Qur’an, but for which the remedy is not direct state punishment, but rather retaliation by the victim or his or her family.¹¹³ Further still are *tazir* offenses, which are crimes specifically mentioned in the Qur’an but for which no specific penalty is prescribed.¹¹⁴ In *tazir* offenses, punishment is left to the discretion of jurists.¹¹⁵

All “Enforcement of *Hudoob*” statutes set forth both *hadd* and *tazir* punishments.¹¹⁶ For conviction at the *hadd* level of punishment, the

109. Contract Act, § 10 (1872) (Pak.), available at <http://www.pakistanlawyer.net/main.htm> (last visited Mar. 24, 2003).

110. When the Qanun-e-Shahadat (Law of Evidence) Order of 1984 was passed, Pakistani women took to the streets to protest. BENAZIR BHUTTO, DAUGHTER OF DESTINY: AN AUTOBIOGRAPHY 28-29 (photo insert) (Simon & Schuster 1989). In response, they were subjected to tear gas and beatings. *Id.*

111. President’s Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, §§ 6-11 (1979) (Pak.), reprinted in 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 35-36 (1979) (punishing alcohol consumption); Offences Against Property (Enforcement of Hudoob) Ordinance (1979) (Pak.), reprinted in 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44 (1979) (punishing theft); Offence of Zina (Enforcement of Hudoob) Ordinance (1979) (Pak.), reprinted in 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51 (1979) (punishing nonmarital sex and adultery); Offence of Qazf (Enforcement of Hadd) Ordinance (1979) (Pak.), reprinted in 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56 (1979) (punishing slander).

112. DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 171 (Anderson Publ’g Co., 3d ed. 2001).

113. *Id.* There is no equivalent to this concept in common law.

114. *Id.*

115. *Id.*

116. See, e.g., President’s Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, §§ 7-11 (1979) (Pak.), reprinted in 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 35-36

statutes require exclusively Muslim male testimony.¹¹⁷ If the evidentiary requirements for *hadd* punishments cannot be met, the *tazir* punishments are available.¹¹⁸

For *hadd* punishments, all ordinances except the *zina* ordinance require the testimony of at least two Muslim male witnesses or confession in open court for conviction.¹¹⁹ The *zina* ordinance requires the testimony of at least four Muslim male witnesses or confession in open court for conviction subject to *hadd* punishment.¹²⁰ The special requirement of four witnesses in *zina* cases is based on verse 24:4 of the Qur'an:

The penalty of those who calumniate chaste women and then bring not four witnesses, is flogging with eighty stripes. Do not admit their evidence ever after, for it is they that are the transgressors; except in the case of those who

(1979); Offences Against Property (Enforcement of Hudood) Ordinance, §§ 4-9, 13-14 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, 45-48 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, §§ 4-7, 10-11 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56, 57-59 (1979); Offence of Zina (Enforcement of Hudood) Ordinance, §§ 5-6, 10 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 52-54 (1979).

117. *See, e.g.*, President's Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, § 9(b) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 35 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, § 7(b) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, 46 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, § 6(c) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56, 58 (1979); Offence of Zina (Enforcement of Hudood) Ordinance, § 8(b) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 53 (1979).

118. *See, e.g.*, President's Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, § 11 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 36 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, § 13 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, 48 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, § 10 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56, 59 (1979); Offence of Zina (Enforcement of Hudood) Ordinance, § 10 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 53-54 (1979).

119. *See, e.g.*, President's Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, § 9 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 35 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, § 7 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, 46 (1979); Offences of Qazf (Enforcement of Hadd) Ordinance, § 6 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 58 (1979); *see also* Offence of Zina (Enforcement of Hudood) Ordinance, § 8 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 53 (1979) (requiring testimony of at least four Muslim male witnesses).

120. Offence of Zina (Enforcement of Hudood) Ordinance, § 8 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 53 (1979). The current legal status of the *zina* ordinance is somewhat questionable after the landmark decision in *Patel v. Pakistan*. *See* discussion *infra* note 150.

repent thereafter and make amends, for surely Allah is Most Forgiving, Ever Merciful.¹²¹

In *Patel v. Pakistan*,¹²² a suit instituted on Shariat petitions filed by the President of the Pakistan Women Lawyers' Association,¹²³ the Federal Shariat Court was called upon to review Pakistan's slander and fornication statutes, specifically the Offence of Qazf (Enforcement of Hadd) Ordinance of 1979¹²⁴ and the Offence of Zina (Enforcement of Hudood) Ordinance of 1979,¹²⁵ to determine their consistency with the Injunctions of Islam.¹²⁶ *Patel* is a landmark case that significantly changed the law of evidence in Pakistan. The case is important not only for its holding, but for its clear statement of the rationale underlying traditional Islamic evidence law and for the emergence of a reformist philosophy.

The *zina* ordinance covers both *zina* and *zina-bil-jabr* (*zina* by force, or rape).¹²⁷ The requirement of four male witnesses in *hudood* rape cases makes it exceptionally difficult to get a conviction.¹²⁸ This, and other abuses of the statute, enraged women's rights activists in the country and, by the time *Patel* reached the Federal Shariat Court, the ordinance was already notorious.¹²⁹

Before turning to any specific statutory provisions, the court reviewed the principles of traditional Islamic evidence law. The court observed, inter alia: Islamic law orders all Muslims, *male and female*, to

121. THE QUR'AN, *supra* note 56, at 338.

122. *Patel v. Pakistan*, 1989 ISLAMIC L.J. 474 (1989).

123. Justice Nasim Hasan Shah, *Rights of Women Before Courts of Law*, 42 ALL PAK. LEGAL DECISIONS, J. 80, 83 (1990). Any citizen of Pakistan is entitled to petition the Federal Shariat Court to examine a law for its consistency with Islam. PAK. CONST. art. 203D(1). The suit is in the nature of a declaratory judgment action. *Patel*, 1989 ISLAMIC L.J. at 474.

124. Offence of Qazf (Enforcement of Hadd) Ordinance (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56 (1979).

125. Offence of Zina (Enforcement of Hudood) Ordinance (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51 (1979).

126. *Patel*, 1989 ISLAMIC L.J. at 477, 479-84.

127. Offence of Zina (Enforcement of Hudood) Ordinance, §§ 4-10 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 51, 52-54 (1979).

128. *See id.* § 8.

129. If a woman failed to prove rape by the testimony of four male witnesses, she faced the prospect of liability for the false accusation of adultery. *See Forte, supra* note 99, at 37 n.62. If she were pregnant, she faced the prospect of liability for the offense of *zina*, the proof of *zina* consisting of her pregnancy. *See, e.g., Mina v. State*, 35 ALL PAK. LEGAL DECISIONS, FSC 183 (1983). For an interesting discussion of Pakistan's controversial rape laws, although not discussing either *Patel*, 1989 ISLAMIC L.J. 474, or *Rani v. State*, 48 ALL PAK. LEGAL DECISIONS, KARACHI 316, 325 (1996) (declaring *zina* to be a joint offense requiring identification of both a man and a woman, failing which the offense of *zina* would be incomplete), see Quraishi, *supra* note 85, and Rubya Mehdi, *The Offence of Rape in the Islamic Law of Pakistan*, 18 INT'L J. SOC. L. 19 (1990).

give true and correct evidence, even if the evidence incriminates the witness himself or his family and even if the evidence favors his enemies; all Muslims, *male and female*, should not hide evidence; Islamic law provides standards and specifications for witnesses based upon sex (male or female) and religion (Muslim or non-Muslim); and that witnesses should be of age, with dependable senses.¹³⁰ Additionally, witnesses should be of good character and free of dishonest motivations.¹³¹

With respect to the gender distinction regarding testimony in Islamic law, the court stated:

As a rule of general principle it is accepted that Islam, in the light of its specific cultural set up, requires that the women should not be burdened with the responsibility of appearing as witness[es] before the [c]ourts as far as possible, in view of their special position as a lady of house. A woman's repeated absence from house for the purpose of evidence may create difficulties for her family members, children at house and companions during journey. Moreover, a Muslim wom[a]n may feel harassment during cross-examination conducted by the lawyers of [the] opposite party and while moving among the unknown persons in the [c]ourt premises.¹³²

It is self-evident that the rationale for this rule is rapidly eroding in modern society. Women throughout the Islamic world increasingly enter the work force in a wide variety of occupations. The idea that women should remain outside public space has been discredited and abandoned in modern Islamic societies.¹³³

In discussing the *hadd* level of punishment, the *Patel* court, speaking generally, held that women's testimony was not completely prohibited in *hudood* and *qisa* cases but was rather conditionally admissible, the condition being the absence of any male testimony.¹³⁴ This thinking is very much in line with the *Hedaya's* pronouncement that women's testimony was merely a "substitute for evidence, being accepted only where the testimony of men cannot be had."¹³⁵

Even if the absence of male testimony renders female testimony admissible, women can appear only as defense witnesses.¹³⁶ The *Patel* court specifically refused to adopt the position that the prosecutorial witnesses required for *hadd* punishments could be either male or

130. *Patel*, 1989 ISLAMIC L.J. at 476.

131. *Id.*

132. *Id.* at 477-78.

133. Quraishi, *supra* note 85, at 308.

134. *Patel*, 1989 ISLAMIC L.J. at 477.

135. Quraishi, *supra* note 85, at 306 (citing THE HEDAYA OR GUIDE, *supra* note 95).

136. *See Patel*, 1989 ISLAMIC L.J. at 477.

female.¹³⁷ Noting that *hadd* punishments were very severe,¹³⁸ the court determined that they should be imposed only upon testimony of the highest quality.¹³⁹ The witnesses had to come to the standard of “*Tazkia-al-Shahood*,” meaning, they should not be forgetful, they should have no motive of personal benefit and no ill will against the accused’s religion or community, and should have no personal enmity against the accused.¹⁴⁰ The court held that this standard could not be achieved without exclusively male testimony:

Evidence of male Muslims, as specified, is necessary to bring the evidence up to the standard both in quantity and quality. [The] [s]ame has been the unanimous view of Muslim Jurists [throughout] the past centuries, and nothing contrary to it has been found in the history of Islamic jurisprudence hence, it is held that evidence of male Muslims is an essential condition in cases of [*h*]udood [i.e., *hadd*] punishments.¹⁴¹

At the *tazir* level of punishment, the court held that women’s testimony was in any event admissible.¹⁴² In discussing the requirements for *tazir* punishment for *zina-bil-jabr*, the court stated, “[A]s f[a]r as punishment of [*tazir*] is concerned evidence of any trustworthy and acceptable witness is permissible, so much so that [the] statement of [the] (female) complainant and corroborative evidence can be taken into consideration.”¹⁴³ In adopting this position, the court, in very clear terms, departed from traditional Islamic law: “Tradition quoting, ‘[e]vidence of women in cases of [h]udood and [q]isas is not permissible,’ [is] dissented from in the light of rules laid down by [the] Qur’an and in the absence of any [t]radition of [the] Prophet (p.b.u.h.) supporting the same.”¹⁴⁴

137. *See id.* at 477-82.

138. *Hadd* penalties include death by stoning (Offence of Zina (Enforcement of Hudood) Ordinance, §§ 5(2)(a), 6(3)(a) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, § 52-53 (1979)), amputation (Offences Against Property (Enforcement of Hudood) Ordinance, § 9 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 44, 47 (1979)) and whipping (President’s Order 4 of 1979, Prohibition (Enforcement of Hadd) Order, § 8 (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 33, 35 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, § 7(1) (1979) (Pak.), *reprinted in* 31 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 56, 58 (1979)).

139. *Patel*, 1989 ISLAMIC L.J. at 481-82.

140. *Id.* at 481.

141. *Id.*

142. *Id.* at 482.

143. *Id.*; *see also* Din v. State, 50 ALL PAK. LEGAL DECISIONS, LAHORE 383, 387 (1998) (holding that, in a *tazir* rape case, a female complainant’s statement supported by corroborative medical evidence was more than sufficient to establish allegations of rape).

144. *Patel*, 1989 ISLAMIC L.J. at 477. *Qisa* offenses are set forth in the Pakistan Penal Code. *See* PAK. PENAL CODE §§ 299-338H (1989), *available at* <http://www.lawandlawyers.com.pk/displaycodes.asp?subcontentID=119> (last visited Dec. 11, 2002). The Pakistan Penal Code was initially adopted as Act XLV of 1860 and has been amended numerous times over the

Regarding the offense of *qazf*, or false imputation of sexual immorality, the court held that the four witnesses required by verse 24:4 of the Qur'an to disprove an allegation of *qazf* could be either male or female, noting that the Qur'an itself supported this position and that no adverse tradition of Muhammad existed.¹⁴⁵ This holding departed from traditional Islamic law, which required exclusively male testimony.¹⁴⁶ The first preference is for male testimony, however, and presumably women's testimony would be admissible only if necessary to assemble the required four witnesses. Disproving an allegation of *qazf* is the sole case at the *hadd* level of punishment where female testimony and male testimony can coexist.¹⁴⁷

Turning to the *zina* ordinance, the court implicitly recognized the gross injustice of requiring four witnesses to effect a rape conviction and distinguished *zina-bil-jabr* from *zina*.¹⁴⁸ The court classified rape as a *haraba* crime¹⁴⁹ and reduced the number of required witnesses from four to two, setting rape on an even footing with all *hudood* and *qisa* offenses other than *zina*.¹⁵⁰

The methodology of the *Patel* court is quite revealing. The court *expressly departed* from the tradition, firmly entrenched in Islamic law

years. See, e.g., 36 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 103 (1984). For the date of this amendment, see Forte, *supra* note 99, at 27 n.4. The Penal Code does not specifically require exclusively male testimony for conviction in *qisa* cases. See PAK. PENAL CODE §§ 299-338H (1989), available at <http://www.lawandlawyers.com.pk/displaycodes.asp?subcnetntID=119> (last visited Dec. 11, 2002). For example, proof of *qatl-i-amd* (inter alia, murder) sufficient to subject the perpetrator to *qisas* is provided by confession in court or by the evidence as provided in section 17 of the Qanun-e-Shahadat (Law of Evidence) Order of 1984. *Id.* § 304. Nevertheless, female testimony traditionally has been barred in *qisa* cases. See *Patel*, 1989 ISLAMIC L.J. at 477; Shah, *supra* note 123, at 83; Naseem, *supra* note 29, at 33.

145. *Patel*, 1989 ISLAMIC L.J. at 477.

146. See, e.g., Quraishi, *supra* note 85, at 306 (citing THE HEDAYA OR GUIDE, *supra* note 95).

147. See *Patel*, 1989 ISLAMIC L.J. at 477, 479.

148. *Id.* at 478-79.

149. A *haraba* crime is akin to looting. *Id.* at 478-79.

150. *Id.* at 482-84. The Federal Shariat Court abolished *tazir* punishment for *zina* offenses as being against the spirit of the specific Qur'anic requirement of four witnesses to impugn a woman's chastity. *Id.* at 483. This was rather a technicality, however, as the court permitted lesser proof for claims of other, similar offenses (e.g., lewdness). *Id.* at 483-84. The court also set forth required changes to certain sections of the Offence of Qazf (Enforcement of Hadd) Ordinance of 1979 and the Offence of Zina (Enforcement of Hudood) Ordinance of 1979 and directed the President of Pakistan to take action to have these sections amended in conformance therewith by a specified date, failing which the sections would cease to have effect insofar as they were repugnant to the injunctions of Islam. *Id.* The President, however, has apparently not modified either ordinance to comply with the court's order. See Federal Statutes Index, available at <http://www.pakistanlawyer.com/ASP/fsi.asp?Book=zina>; <http://www.pakistanlawyer.com/ASP/fsi.asp?Book=qazf>. The *Patel* decision has been neither appealed nor modified, raising questions about this executive-judicial conflict.

for centuries, that women could not testify in *huddood* and *qisa* cases, and *abandoned* traditional thought regarding the necessity of exclusively male testimony in disproving an allegation of *qazf*. But, the court *expressly relied* upon *ijma* and tradition in holding that no *hadd* punishments could be given based on the testimony of women. The court's reliance on the unanimity of Islamic scholars to support its refusal to award *hadd* punishments based on female testimony is a tacit admission that there is nothing in the Qur'an or in the *Sunnah* which actually requires this conclusion.

It goes without saying that the rationale for the conditional admissibility of women's evidence in *huddood* and *qisa* cases and for the barring of *hadd* punishments on the basis of female testimony is demeaning to women. It serves to perpetuate degrading stereotypes regarding the intellect and capacity for truthfulness of women and relies on an increasingly antiquated view of the position of women in society. The notion that women cannot give testimony of the "highest quality" is merely a variation of the "weakness of understanding" and "want of memory" argument historically used to bar women's testimony in a broad range of factual settings. The end result of these laws is the rather bizarre fact that the very same criminal conduct can lead to entirely different punishments depending solely upon the gender of the witnesses. This result hardly inspires confidence in the integrity of the judicial system of Pakistan.

Patel was repeatedly hailed as a victory for women's rights in Pakistan. Justice Nasim Hasan Shah of the Supreme Court of Pakistan went so far as to say the *Patel* decision "remedied" women's complaints that they could not testify in *huddood* and *qisa* cases.¹⁵¹ Indeed, *Patel* did advance the cause of women's rights in the law of evidence, but this decision can hardly be called a "remedy." The fact remains that, at the *hadd* level of punishment, prosecutorial testimony of women is simply barred, and in effect, women become "silent witnesses."

4. Tangential Consequences

The immediate consequences of Pakistan's evidence laws are obvious. Women are prevented from fulfilling their duty to bear witness to the truth for the glory of Allah.¹⁵² But the manipulation of the Debt

151. Shah, *supra* note 123, at 83; *see also* Naseem, *supra* note 29, at 33 (declaring *Patel* to be a remedy "to some extent").

152. Quraishi, *supra* note 85, at 309. Ironically, being denied the right to testify is itself a *hadd* penalty under the Qur'an. *Id.* In other words, the denial of one's testimony is itself a punishment specifically provided for in the Qur'an.

Verse to devalue or bar women's testimony has implications reaching far beyond the matter of testimony before a court of law.

For example, in Pakistan and across the entire Islamic world, the question of whether a woman can be a judge is a controversial issue. Proponents of a patriarchal state rely upon verse 4:34 of the Qur'an in asserting the general superiority of men over women and, on this basis, comments like these are made:

The evidence clearly speaks against having women as judges, regardless of the fact that there are Islamic countries, which have allowed women judges[.] . . . Having a woman acting as a judge would mean giving her responsibility over men, reversing the God-given pattern, something that cannot be accepted at all.¹⁵³

Beyond verse 4:34, which, in general, contends to assert the superiority of men over women,¹⁵⁴ the Islamic law of evidence also plays a role. This is evident in the commentary of Justice Tanzil-ur-Rahman of the High Court of Sindh:

Can a [w]oman be appointed a [j]udge[?] This is a very controversial issue. Imam Malik, Shafi'i, Ahmed and the Shi'i Jafri[s] view is that a woman cannot be appointed a *Qazi* [judge]. But Imam Abu Hanifa holds that a woman can act as *Qazi* in those matters in which her evidence as witness can be under *Shari'ah* admissible. So, according to him too, a woman cannot as a [j]udge decide cases involving [*hudood*] and [*qisas*], but she can act as a *Qazi* in [the] rest of the matters . . . In my view the verdict of Imam Abu Hanifa is more acceptable and a woman can act as a *Qazi* in all those matters in which she can validly appear as [a] witness.¹⁵⁵

The use of the alleged inadmissibility of women's testimony in court as a rationale to bar women from judicial positions, in and of itself an exceptional proposition, is obviously a slippery slope. Conceivably, this same rationale could be used to bar women from many positions of

153. Fatih M. Yilmaz, *Legal Scholars, Religious Experts of Jordan Debate Islam's Position on Women Judges*, IslamiQ (quoting Ziad Thiab, a *Shari'ah* judge and religious expert, discussing traditional doctrine in the Maliki, Shafi'i and Hanbali schools of thought), at http://www.islamiqdaily.com/world/art_wld1_02102000.php4 (Oct. 2, 2000).

154. See discussion *infra* Part III.A.

155. Justice Tanzil-ur-Rahman, *Justice in Islam*, 39 ALL PAK. LEGAL DECISIONS, J. 8, 15-16 (1987). In a similar vein, Marmaduke Pickthall, a British convert to Islam, very well respected for his English translation of the Qur'an, gave a series of lectures at the University of Madras, India, in 1927. Nilofar Ahmed, *When Mortals Act as Gods*, at http://www.muslim-canada.org/mortals_dawn.html (2000). In one of these lectures he queried, "Where is that woman [j]udge, who, according to our great Imam Abu Hanifa, ought to be in every city to deal particularly with cases touching women's rights?" Marmaduke Pickthall, *The Relation of the Sexes, Address to the University of Madras, India, (1997) in Social Degradation of Women—A Crime and a Libel on Islam*, available at <http://muslim-canada.org/pickthall.htm> (n.d.).

leadership in society. Indeed, the entire subject of women's leadership in political, social, and religious life is controversial in Islamic countries.¹⁵⁶

5. Summary

In summary, the Qanun-e-Shahadat (Law of Evidence) Order of 1984 and the *hudood* ordinances of 1979 discriminate against women in the law of evidence. Two women are required to attest contractual documents in the place of a single man. In litigation involving such documents, the testimony of two women is equated in value to the testimony of a single man.

In criminal proceedings involving *hudood* and *qisa* offenses at the *hadd* level of punishment, women's testimony is only conditionally admissible, the condition being the absence of male testimony. Even where their testimony is admissible, women are confined to being defense witnesses. *Hadd* punishments cannot be imposed on the basis of prosecutorial female testimony.

These laws, supposedly based on *Shari'ah*, should be viewed as inconsistent with the Constitution of Pakistan and with Pakistan's obligations under international declarations and treaties. Specifically, the laws are clearly inconsistent with articles 2 and 7 of UDHR and article 15 of CEDAW.¹⁵⁷ Further, once the supposed Qur'anic basis for these laws is abandoned, it becomes clear that the evidence laws discriminating against women are inconsistent with Article 25 of the Constitution of Pakistan¹⁵⁸ and with the spirit of articles 1(a) and 6(a) of the Cairo Declaration.¹⁵⁹

156. See generally CAROLYN FLUEHR-LOBBAN, *ISLAMIC SOCIETY IN PRACTICE* 81-83, 146-52 (1994) (noting that although the status of women is changing in Islamic societies, women have not been allowed the full participation in society and politics that male Muslims enjoy). Moreover, traditional Islamic scholarship holds that a woman cannot be the ruler of a country. See Moulana Muhammad Karolia, *Female Leadership in Islam*, at <http://www.alinaam.org.za/library/fleadership.htm> (last modified Jan. 15, 2002). In this connection, it is worth noting that, although Benazir Bhutto became Prime Minister of Pakistan on two occasions and thus occupied Pakistan's leading legislative role, she was not Pakistan's head of state. See *Benazir Bhutto*, *supra* note 83. The President is the head of state in Pakistan. PAK. CONST. art. 41. Further, some Muslims believe that a woman cannot properly lead men in *salah* (prayer) and that she cannot even deliver lectures from the pulpit at mosques. Karolia, *supra*.

157. See UDHR, *supra* note 41, arts. 2, 7; CEDAW, *supra* note 44, art. 15(2); discussion *infra* Parts II.B.2.a-b.

158. See PAK. CONST. art. 25; discussion *supra* Part II.B.1.

159. See Cairo Declaration, *supra* note 49, arts. 1(a), 6(a); discussion *supra* Part II.B.2.c.

IV. AN IDEOLOGY AND METHODOLOGIES FOR ABANDONING THE DISCRIMINATORY PROVISIONS OF THE LAW OF EVIDENCE—*IJTIHAD* VERSUS *TAQLID*

A. *Necessity of Reform*

The first step in any reformative process is to recognize the necessity for it. Pakistan's discriminatory evidence laws, while important in their own right, are symptomatic of the larger issue of women's rights in the country generally.

Numerous human rights observers have commented on the deplorable condition of women in Pakistan. The U.S. State Department recently reported that "[s]ignificant numbers of women were subjected to violence, abuse, rape, and other forms of degradation by spouses and members of society."¹⁶⁰ The report stated that "[d]iscrimination against women was widespread, and traditional social and legal constraints kept women in a subordinate position in society."¹⁶¹ This report was echoed in Amnesty International's assessment of conditions of women in Pakistan.¹⁶² Amnesty International noted that in August 2000, a National Commission on the Status of Women was established to promote women's rights, but that this body lacked enforcement authority despite earlier government commitments to the contrary.¹⁶³

The Pakistani judiciary has repeatedly recognized the importance of improving the position of women in the country. Justice Haziqul Khairi of the High Court of Sindh endorsed the words of the *Quaid-e-Azam* (the founder of the Pakistani state), Muhammed Ali Jinnah, in the renowned Lahore Resolution of 1940:¹⁶⁴ "No nation can rise to the height of glory unless the women are side by side with the men."¹⁶⁵ In the same vein, Justice Javid Iqbal of the Supreme Court of Pakistan embraced the *Quaid-e-Azam's* words in his address to the Muslim League in 1944:

We are victims of evil customs. It is a crime against humanity that our women are shut up within the four walls of their houses like prisoners. I do

160. COUNTRY REPORTS FOR 2001, *supra* note 5.

161. *Id.*

162. Amnesty International, *Pakistan*, 2001, *supra* note 5; Amnesty International, *Pakistan Violence Against Women in the Name of Honor* (Sept. 22, 1999), available at <http://web.amnesty.org/ai.nsf/Index/asa330171999> (Sept. 22, 1999).

163. Amnesty International, *Pakistan*, 2001, *supra* note 5.

164. The Lahore Resolution called for separate autonomous states in majority Muslim areas in India. See *Jinnah: Pakistan's Founding Father*, at <http://www.cnn.com/WORLD/9708/India97/pakistan/nation.builder/> (n.d.).

165. Justice Haziqul Khairi, *Violation of Women's Rights*, Paper read at a Pakistan Women Lawyers' Association conference (Oct. 14, 1993), reprinted in 46 ALL PAK. LEGAL DECISIONS, J. 1, 5 (1994).

not mean that we should imitate the evils of Western life. But let us try to raise the status of our women according to our own Islamic ideas and standards. There is no sanction anywhere for the deplorable conditions in which our women have to live. You should take your women along with you as comrades in every sphere of life.¹⁶⁶

B. Methodologies of Reform

It is one thing to recognize a sociological deficiency in a legal theory rooted in traditional Islamic jurisprudence, but it is another thing entirely to correct it. Historically, discriminatory provisions embedded within traditional Islamic law have proven almost impervious to change. However, change is not impossible.¹⁶⁷

1. Islamic Inspiration

Of course, it is the first preference that any reformative methodology should have an Islamic inspiration consistent with the teachings of the Qur'an and in adherence to Article 2 of the Constitution of Pakistan.¹⁶⁸ Providing an Islamic methodology for reform is preferable to other reformative approaches (e.g., an approach based purely on a sociological inspiration), as it increases the likelihood that the reforms will be accepted by the majority of Muslims.¹⁶⁹

a. Express Recognition of *Ijtihad*

Ijtihad versus *taqlid* is not a case name. Rather, it is an ideological conflict, the resolution of which will determine the future of Islamic jurisprudence. The second step in the reform process should be an express acceptance of the doctrine of *ijtihad*. *Ijtihad* permits a "creative exercise of independent reasoning" in interpreting *Shari'ah* in the light of modern societal conditions.¹⁷⁰ It is a flexible tool which can be used to mold and shape traditional Islamic legal theory to fit the needs of changing times. In contrast, *taqlid* teaches that "the great putative founders of the Islamic law schools died out and the foundation of new

166. Justice Javid Iqbal, Crimes Against Women in Pakistan, Address to the Triennial Conference of APWA, Karachi (Sept. 4, 1988), reprinted in 40 ALL PAK. LEGAL DECISIONS, J. 195, 203 (1988).

167. DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 31 (Sweet & Maxwell Ltd., 3d ed. 1998).

168. See discussion *supra* Part II.A.

169. ESPOSITO, *supra* note 63, at 158.

170. *Id.* at 128, 143.

schools (*madhhabs*) concluded at the end of the tenth century,” and that *ijtihad* came to an end at that time.¹⁷¹

Ijtihad in Pakistan had modest beginnings. The Hanafi school of jurisprudence, the majority school on the Indian subcontinent,¹⁷² broadly barred “the use of *ijtihad* in favor of *taqlid* after the thirteenth century,” and rulings purportedly based on *ijtihad* were ignored.¹⁷³ Even in relatively modern times, progress has been slow. For example, “[i]n Pakistan, the direct [claim] by the Marriage and Family Laws Commission of 1955 of its [entitlement] to *ijtihad* resulted in a swift and strong reaction” from religious conservatives that contributed to a six-year delay in the passage of family law legislation.¹⁷⁴ Despite this resistance, the Pakistani judiciary remained assertive.¹⁷⁵

In recent times, the Pakistani judiciary has continued to show remarkable reformist tendencies. For example, Justice Nasim Hasan Shah of the Supreme Court of Pakistan has spoken extensively on the subject of *ijtihad*. He noted:

The commands of the Holy Qur’an that have been expressed in *nass* [clear edict] terms cover a very small field and by far the much larger area of human activity has been left unspecified wherein the Lawgiver in the State is permitted (*mubah*) to do whatever is necessary for the common good. Indeed the Almighty, in this field, has left it to us Muslims to provide for whatever may be necessary in the circumstances, through additional

171. *Id.* at 128.

172. See RENARD, *supra* note 89, at 53.

173. ESPOSITO, *supra* note 63, at 129.

174. *Id.* at 130.

175. See, e.g., Jan v. Dad, 16 ALL PAK. LEGAL DECISIONS, LAHORE 558 (1964). In *Jan*, the question before the Lahore High Court was, “can [c]ourts differ from the views of *Imams* and other juris-consults of Muslim law [i.e., the authoritative legal texts] on grounds of public policy, justice, equity and good conscience?” *Id.* at 559. Justice J. Haq Anwarul, in a concurring opinion, stated:

With great humility I venture to submit that it would not be correct to lay it down as a positive rule of law that the present-day [c]ourts in this country should have no power or authority to interpret the Qur’an in a way different from that adopted by the earlier jurists and *Imams*. The adoption of such a view is likely to endanger the dynamic and universal character of the religion and laws of Islam. At the same time, it is clear that the views of the earlier *Imams* and jurists are entitled to the utmost respect, and no [c]ourt or [c]ommentator would differ from them except for very compelling and sound reasons.

Id. at 608-09. In another case, the Lahore High Court rejected the strict rule of Hanafi law that a divorced mother forfeits her right to the custody of her minor children if she remarries. See NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 111-12 (Univ. of Chicago Press 1969) (citing *Bharai v. Wazir Muhammad*). The court reversed a lower court and allowed a mother to retain custody of her children beyond the ages at which they would usually be turned over to their father. *Id.* This decision was justified on the basis of the best interests of the children. *Id.*

legislation by the exercise of our *ijtihad* (independent reasoning) in consonance with the spirit of Islam.¹⁷⁶

Similarly, Justice Gul Mohammad Khan, Chief Justice of the Federal Shariat Court, quoted approvingly from a judgment of the Lahore High Court:¹⁷⁷

In understanding the Qur'an one can derive valuable assistance from the commentaries written by different learned people of yore, but then that is all. Those commentaries cannot be said to be the last word on the subject. Reading and understanding the Qur'an implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstances and the changing needs of the world. . . . If the interpretation of the Holy Qur'an by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop alongwith [sic] the time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed.¹⁷⁸

b. Express Recognition of *Siyasa* and *Takhayyur*

Siyasa shar'iyya, or *siyasa*, is a doctrine in Islamic scholarship which grants individual rulers flexibility in determining how strictly *Shari'ah* is to be applied.¹⁷⁹ Historically, individual rulers on the Indian subcontinent have differed in their approach to this subject, varying between a strict interpretation of traditional *Shari'ah* to a more sociological approach.¹⁸⁰ The concept of *siyasa* remains relevant today and provides additional precedent for the concept that Islamic law is subject to change.

Takhayyur is a doctrine in Islamic scholarship which embraces the notion that in legal decision making, one may choose among the views of the various traditional schools of Islamic law.¹⁸¹ It provides still further flexibility in interpreting traditional doctrine. The Constitution of Pakistan essentially embraces this doctrine. Part IX of the Constitution

176. Justice Nasim Hasan Shah, *Justice and Islam*, Paper presented at the Conference of the Islamic Philosophical Association of Pakistan (Nov. 12, 1987), *reprinted in* 40 ALL PAK. LEGAL DECISIONS, J. 1, 4 (1988).

177. *Begum v. Din*, 12 ALL PAK. LEGAL DECISIONS, LAHORE 1142 (1960).

178. Justice Gul Mohammad Khan, *Role of Judiciary in the Development of Islamic Law*, Address at a conference organized by the Southeast Asia Sharia Association and the International Islamic University, Malaysia, Kuala Lumpur (Nov. 21, 1986), *reprinted in* 39 ALL PAK. LEGAL DECISIONS, J. 1, 7 (1987).

179. PEARL & MENSKI, *supra* note 167, at 31.

180. *See id.*

181. *Id.*

instituted the Council of Islamic Ideology.¹⁸² This body was charged to develop principles for the “Islamization” of Pakistani law.¹⁸³ The membership of the council was expressly mandated to be comprised of members of different schools of law.¹⁸⁴

Further, the Enforcement of *Shari'ah* Act provides guidelines for courts to follow in interpreting Islamic law.¹⁸⁵ It provides, “[w]hile interpreting and explaining the *Shari'ah* the recognized principles of interpretation and explanation of the Holy Qur'an and *Sunnah* shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.”¹⁸⁶

This statute embraces a very expansive notion of *takhayyur*. Not only does it reference multiple schools of jurisprudence, it also indicates that the opinions of individual jurists may be considered. Further, the statute's nonobligatory language (“may be taken into consideration”) reinforces the notion of *ijtihad*.

Applying these principles to the law of evidence, a methodology for reform emerges. *Ijtihad* opens the door to rethinking traditional rules of Islamic jurisprudence in the light of modern conditions. *Siyasa* rejects rigidity in the application of Islamic law. *Takhayyur*, expanded by the Enforcement of *Shari'ah* Act, permits consideration of the opinions of individual jurists from prevalent schools of thought. While all the traditional schools of law placed restrictions on women's testimony to some extent, among individual jurists this view was not unanimous.¹⁸⁷ The famous jurists al-Tabari, Ibn Taymiyya, and Ibn Qayyim al-Jawziyya were among the dissenters.¹⁸⁸ In short, relaxation or abandonment of Pakistan's discriminatory evidence laws can be accomplished in a manner that is entirely consistent with Islamic legal principles as developed and practiced on the Indian subcontinent.

2. Sociological Inspiration

Even in the absence of an Islamic inspiration for abandoning the discriminatory provisions of Pakistan's evidence laws, a sociological

182. PAK. CONST. art. 228.

183. *Id.* arts. 229-230.

184. *Id.* art. 228(3)(a).

185. Enforcement of *Shari'ah* Act (1991) (Pak.), reprinted in 43 ALL PAK. LEGAL DECISIONS, CENTRAL STATUTES 373 (1991).

186. *Id.* § 2 (emphasis added).

187. Quraishi, *supra* note 85, at 305-06.

188. *Id.* at 306 (citing Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE E. STUD. 185, 196-99 (1997)).

inspiration is constitutionally possible so long as it is not “repugnant” to the Injunctions of Islam.¹⁸⁹ Indeed, the Constitution of Pakistan itself suggests this idea. The Islamic Ideology Council, established by the Constitution, was mandated to be comprised of members appointed on the basis of their knowledge of *either Shari’ah or* the “economic, political, legal or administrative problems of Pakistan.”¹⁹⁰

It is self-evident that the deplorable conditions of women in the country are themselves sufficient inspiration for change. The nullification or repeal of all laws that discriminate against women is essential to permit women to gain full access to economic, political, and social life in Pakistan.

C. Recent Commentary by President General Pervez Musharraf Regarding Social Changes in Pakistan

In a speech given before the National Women Convention on March 7, 2002, commemorating International Women’s Day, Pakistani President General Pervez Musharraf commented on the status of women in the country and upon efforts being made by the Pakistani government to empower women in society.¹⁹¹ He stated that his government was taking concrete actions for the participation of women in all spheres of economic, social, and political life of Pakistan, to wit, “The economic revival, poverty alleviation, good governance and political restructuring form the core of my reform agenda. And I also believe strongly and with full conviction that women have a key function to perform in each one of these areas.”¹⁹² He continued, “Women for too long have been considered the encumbrance, I urge you to look at them as the solution. To your empowerment, protection and security, I stand totally committed.”¹⁹³

He paid tribute to women for their struggle to eliminate discrimination and intimidation and for their efforts to play their full part in social, economic, and political life.¹⁹⁴ President Musharraf said he was aware that men holding the top decision making positions was one of the difficulties involved in improving the condition of women.¹⁹⁵ He

189. See PAK. CONST. art. 203D.

190. *Id.* art. 228.

191. President General Pervez Musharraf, Address presented on International Women’s Day, Islamabad (Mar. 7, 2002), *quoted in President’s Speech at International Women [sic] Day on March 7, 2002, available at* http://www.pak.gov.pk/President_Addresses/Pre-speech-women.htm (last visited Mar. 7, 2002).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

applauded the recent election of women to responsible positions in government and stated, "I will ensure that this trend takes roots [sic] and [is] strengthened in Pakistan."¹⁹⁶ He concluded that all women could play an effective role in society but noted, "this can happen only when they are empowered and my effort is precisely in this direction."¹⁹⁷

Further, President Musharraf addressed the country's *ulema* as follows:

In my view our society is divided into three classes. One is westernized modernists, ultra modern, who are in abundance in cities like Karachi and Lahore, who have adopted a wrong path. We definitely want progress in Pakistan but not in the way of the west. The second category is those of sectarian and religious extremists who nurture extreme views, who do not want to learn anything other than religious knowledge and want to enforce religious beliefs of their sect upon others. This, too, is wrong and should not happen. There should be some middle path. There should be no division amongst the citizens of Pakistan as progressive or religious. . . . Therefore, we will have to improve our internal conditions if we [want] to make progress and strengthen our country. This will entail women's development, restoration of self-respect, improvement of society, spread of education and progress of science and technology.¹⁹⁸

Finally, in an address to the entire Pakistani nation, President General Pervez Musharraf stated, "The verdict of the masses is in favour of a progressive Islamic state. This decision, based on the teaching of the Holy Prophet (Peace Be Upon Him) and in line with the teachings of *Quaid-e-Azam* and Allama Iqbal will put Pakistan on the path of progress and prosperity."¹⁹⁹

Needless to say, if the Pakistani government is to be true to its stated intention to empower women in society, then all laws discriminating against women should be dismantled. Abolition of the discriminatory laws of evidence would be an admirable beginning.

196. *Id.*

197. *Id.*

198. President General Pervez Musharraf, Address presented at Ulema and Mushaikh Conference, Islamabad (Jan. 18, 2002), *reprinted in President General Pervez Musharraf's Address to the Ulema and Mushaikh Conference*, available at http://www.pak.gov.pk/President_Addresses/President_Ulema.htm.

199. President General Pervez Musharraf, Address presented to the Nation (Jan. 12, 2002), *reprinted in President General Musharraf's Address to the Nation*, available at http://www.pak.gov.pk/President_Addresses/President_address.htm.

V. CONCLUSION

The Constitution of Pakistan simultaneously incorporates *Shari'ah* as the supreme law of the land and seeks, in theory, to protect women's rights. These pronouncements should be interpreted harmoniously to the extent possible.

Pakistan's discriminatory evidence laws should not be viewed as required by *Shari'ah*. The Qur'an's Debt Verse should be viewed as merely advisory in nature and not the basis of a rule of law. Even if the Debt Verse were to be viewed as a mandatory injunction, it should be confined to its historical context. Furthermore, it should be explicitly recognized that the verse merely reflected conditions existing at the time of its writing. These conditions have changed and the injunction should not be seen as remaining forceful.

Moreover, Pakistan's evidence laws discriminating against women are clearly inconsistent with articles 2 and 7 of UDHR and article 15 of CEDAW. Further, once the supposed Qur'anic basis for Pakistan's evidence laws is abandoned, it becomes clear that the evidence laws discriminating against women are inconsistent with Article 25 of the Constitution of Pakistan and with the spirit of articles 1(a) and 6(a) of the Cairo Declaration.

Abandonment of the discriminatory provisions of Pakistan's evidence laws can be accomplished in a manner entirely consistent with Islamic jurisprudence as developed and practiced on the Indian subcontinent. *Ijtihad*, *siyasa*, and *takhayyur* are all recognized principles of Islamic jurisprudence in this region. These doctrines offer the flexibility required for a reformist revisiting of *Shari'ah*.

In *Patel v. Pakistan*, the Federal Shariat Court, through a remarkable exercise of *ijtihad*, took the first step in dismantling Pakistan's discriminatory evidence laws.²⁰⁰ The court could and should complete the process by relying upon the many Qur'anic verses promoting equality between the sexes, and upon the many verses that are either gender neutral on the subject of evidence or that specifically equate the value of the testimony of men and women, to reach the holding that the discriminatory provisions of Pakistan's evidence laws are repugnant to the Injunctions of Islam. Failing this, the discriminatory provisions of Pakistan's evidence laws should simply be repealed.

200. *Patel v. Pakistan*, 1989 ISLAMIC L.J. 474 (1989).