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MARRIAGE AND DIVORCE LAW IN PAKISTAN AND IRAN: THE PROBLEM OF RECOGNITION

Kristen Cherry[†]

I. INTRODUCTION

As a young bride, Roshauna¹ left Iran with her husband for a new life in the United States. Soon after their arrival, their marriage began to break down due to the abuse she received from her husband. Roshauna sought and received her divorce after a long court battle. She had been given a divorce on the usual basis of irreconcilable differences. Relieved that she had been freed from her husband, she made plans to visit her parents in Iran, only to discover her American divorce would not be valid in Iran. Even worse, she learned that if she sets foot in the country, she will return to the control of her ex-husband's family, and as she had remarried in America, her ex-husband's family could accuse her of adultery and have her stoned.

Similarly, Hasan married a British woman in Pakistan. After they moved to the United States, he divorced her according to the laws of his religion. As his wife was a British citizen, the United Kingdom had never recognized their marriage. Even though she married again in England, the U.S. never recognized the validity of the divorce. Hasan is still considered a married man, though to the rest of the world he is either divorced or had never been married.

[†]J.D., University of Tulsa College of Law, Tulsa, Oklahoma, May 2002; Bachelor of Arts, History, University of Texas at Arlington, Arlington, Texas, December 1998.

1. Names have been changed to protect identity.

The question then arises: What must one do to ensure that marriages and divorces will be valid when people frequently marry spouses from other countries, or when one or both of the spouses immigrates to other countries? Often marriages and divorces, though legal in one country, will not be recognized in another for various reasons. These are often referred to as "limping marriages."² This comment focuses on the marriage and divorce laws of two Islamic law countries: one considered a fundamentalist country, Iran, and the other more westernized, Pakistan, and the problem of the recognition of these laws amongst the two countries and with the United States. Part II gives an overview of the basic Islamic law of marriage and divorce. Part III will discuss the law of Pakistan on marriages and divorces, and will offer examples of when a marriage or divorce will not be recognized in that country. Part IV analyzes marriage and divorce laws of Iran and when foreign marriages and divorces will not be recognized in that country. Part V gives an analysis on the American position of recognition. Finally, Part VI looks at possible solutions for ending the problem of limping marriages.

II. BACKGROUND ON ISLAMIC LAW

Essential to understanding the marital laws of Pakistan and Iran is to understand that while both are Islamic law countries, they each adhere to different sects of Islam; thus, explaining some key differences in their laws. Pakistan follows the larger Sunni branch of Islam,³ while Iran follows the Shiite sect.⁴ One of the biggest differences between the two sects is political. The division of Muslims between Shiite and Sunni occurred after the death of the Prophet Mohammed.⁵ As Mohammed never appointed a successor, a dispute erupted over who should take his place.⁶ The majority of people voted to elect Abu Bakr as successor, and so the majority of Muslims believe the religious leader should be elected by the people.⁷ On the other hand, the Shiites believe the religious leader, or Imam, should be a descendant of Mohammed.⁸ They believed Ali, as both the cousin and son-in-law of Mohammed, who had no sons, should have been recognized

2. Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT'L & COMP. L.J. 311, 314 (1996).

3. PAKISTAN: A COUNTRY STUDY at xxii (Peter R. Blood ed. 1995).

4. IRAN: A COUNTRY STUDY at xvi (Helen Chapin Metz ed. 1989).

5. See MALISE RUTHVEN, ISLAM IN THE WORLD 181-82 (1984).

6. See *id.*

7. See *id.*

8. See *id.*

as Mohammed's heir.⁹ As such, today the Shiites regard only the descendants of Ali as the true Imams, or religious leaders.¹⁰ There are many other differences between the Sunni and Shiite sects, especially differences in religious doctrine, but such a discussion is beyond the scope of this comment.

Although Pakistan and Iran are both Islamic countries, each have added to or changed in some cases the laws regarding marriage and divorce as set out in the Koran. It does not say in the Koran specifically that in order for a marriage to be valid it must be in writing with witnesses, but such a requirement may be induced. Marriage is an agreement that includes obligations of the spouses to each other, and since the Koran specifically says all agreements must be written and witnessed by two people, it follows that a valid marriage agreement must be written and witnessed.¹¹ According to the teachings of the Prophet, consent of both parties must be freely given.¹² It is generally held that the consent of a guardian is needed for a valid marriage.¹³ This is not found in the Koran, but from the teachings of Mohammed.¹⁴ A mahr or dower must be given to the wife upon marriage.¹⁵ This becomes her property and she is entitled to keep it upon a divorce.¹⁶ The Koran is silent on the value of the mahr.¹⁷ It apparently can be as little as a few cents or it may be extremely valuable.¹⁸ The specific marriage age is not mentioned in the Koran, but it is widely held that parents may marry off their minor children. Mohammed himself married a girl who was only nine.

The Koran lists specific categories of persons who cannot marry. These include: those prohibited by consanguinity such as mothers, step-mothers, sisters, daughters, step-daughters, daughters-in-law, aunts, and nieces; foster mothers and sisters meaning wet nurses and their daughters; any prohibited degree of one's spouse, such as the wife's mother; a man may marry his wife's sister but not while married to his wife; and of course, a woman may not have more than one husband.¹⁹ A man may not marry a

9. *See id.*

10. *See id.*

11. *See* ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 123 (1984). *See also Koran* 2:282.

12. DOI, *supra* note 11, at 123.

13. *Id.* at 140.

14. *Id.* at 140-41.

15. *Koran* 4:4.

16. DOI, *supra* note 11, at 158.

17. *Id.* at 163.

18. *Id.* at 163-64.

19. *Koran* 4:22-24.

non-Muslim woman,²⁰ unless she is a chaste woman of the book,²¹ meaning a Jew or a Christian.²² In fact, one of Mohammed's wives was a Christian.

Polygamy has been allowed by the Koran, but with limitations. Only four wives are allowed at one time.²³ Plus, they must each be treated equally.²⁴ If the man is unable to treat each equally, he must restrict himself to only one wife.²⁵ For whatever reason, this rule did not apply to Mohammed,²⁶ who took ten wives.

A temporary marriage,²⁷ though not mentioned in the Koran, was declared by Mohammed to be unlawful.²⁸ It appears though, that Mohammed had previously allowed his soldiers to contract temporary marriage while they were on Jihad, or holy war.²⁹ Today, temporary marriages are only practiced within the Shiite faith; in all other branches of Islam they are specifically forbidden.³⁰

The option of the *khiyar*³¹ is not in the Koran but comes from the teaching of Mohammed, who allowed a virgin to repudiate her marriage, as she had been given in marriage against her will.³²

“Of all things permitted by Law’ said the Prophet, ‘divorce is the most hateful in the sight of Allah.’”³³ Thus said, the Koran gives specific guidelines as to divorce. The form of divorce advised by Mohammed is the traditional *talaq*.³⁴ In this form, the husband tells his wife he is divorcing her.³⁵ If he then changes his mind, within the *idda* period (waiting period), he may revoke the divorce and take her back, but he may do this only a limited number of times.³⁶ The third time becomes final.³⁷

20. *Id.* at 89.

21. *Koran* 5:5.

22. DAVID PEARL, A TEXTBOOK ON MUSLIM LAW 49 (1979).

23. *Koran* 4:3.

24. *Id.*

25. *Id.*

26. *See* DOI, *supra* note 11, at 147.

27. *See infra* Part IV.

28. DOI, *supra* note 11, at 156.

29. *Id.* at 155-56.

30. ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 114 (1992).

31. *See infra* Part III.

32. DOI, *supra* note 11, at 123.

33. THE MEANING OF THE HOLY QUR'AN 1482 (Abdullah Yusuf Ali ed. 1989).

34. DOI, *supra* note 11, at 175.

35. *Id.*

36. *Id.* at 175-78.

37. *Id.* at 178.

One of the most common forms of divorce used by Muslim men today is the talaq al-bidah. In this form, the divorce is pronounced three times in one sitting, thus becoming irrevocable immediately.³⁸ This form of divorce was discouraged by Mohammed and even punished by the Caliph Omar.³⁹ Once the husband has divorced his wife, he may not remarry her until she has married another man, and that marriage has effectively ended.⁴⁰

The Koran also allows the khul. The wife usually instigates this form of divorce.⁴¹ In order for her to obtain this divorce, she must give up all or part of her mahr.⁴² Consent to divorce by both parties must be had.⁴³ If the husband refuses to give consent the wife may apply to a court for them to order khul.⁴⁴ These may only be done in limited circumstances such as cruelty, breach of the marriage contract, the husband's insanity or incompetence, abandonment, or any other reason left to the discretion of the judge.⁴⁵

Once divorced, a woman must observe her idda period, which is three menstrual cycles, in order to determine the father of any possible pregnancy.⁴⁶ The idda period for women who are past menopause or do not have menstrual cycles is still three months.⁴⁷ Women who are pregnant at the time of divorce must observe the idda until they deliver their child.⁴⁸ If at the time of divorce the woman is still a virgin or has not consummated the marriage, there is no need to observe an idda.⁴⁹ Widows must also observe an idda period, but theirs is longer: four months and ten days.⁵⁰ The reason for the extra time is to allow the widow to mourn undisturbed.⁵¹

Even though the basic principles of marriage and divorce are laid out in the Koran, and are explained by religious scholars, Pakistan and Iran, while both Islamic countries, have developed relatively different laws on

38. *Id.* at 179.

39. *Id.*

40. *Koran* 2:230.

41. See DOI, *supra* note 11, at 193.

42. *Id.*

43. *Id.*

44. See *id.* at 195.

45. *Id.*

46. *Koran* 2:228.

47. *Koran* 65:4.

48. *Id.*

49. *Koran* 33:49.

50. *Koran* 2:234.

51. *Id.*

the issues of marriage and divorce. For this reason the laws of the two countries will be analyzed separately.

III. PAKISTAN

Pakistan had been a part of India, which was controlled by Britain for several years, until its independence from both India and Great Britain in 1947.⁵² The division of Pakistan and India was made along religious lines resulting in modern day Pakistan and East Pakistan, which is today Bangladesh.⁵³ At the time, there was a mass exodus of Muslims leaving oppression in Hindu India for Pakistan. Likewise, Hindus living in Pakistan migrated to India.⁵⁴ This division left the problem of Kashmir over which both India and Pakistan have fought three major wars,⁵⁵ and are currently still struggling for control of region. Kashmir had been predominantly Muslim; thus, it was claimed by Pakistan, but at the time of the division between Pakistan and India, the prince of Kashmir was a Hindu and elected to align his country with India.⁵⁶

Since its independence, Pakistan has gone through several forms of government ranging from a parliamentary system to military rule,⁵⁷ yet most of the laws have remained constant. In 1958, the constitutional government was suspended, and martial law was imposed.⁵⁸ As a result, General Ayub Khan overthrew the government.⁵⁹ Instead of returning the country back to the constitutional government, he set himself up as head of the military government.⁶⁰ Dictatorship was not as disastrous for Pakistan as it may seem. Under Ayub Khan, the 1962 Constitution was enacted ending martial law.⁶¹ This document allowed for a presidential system, with Ayub Khan as president, and established a system of fundamental rights for the citizens of Pakistan.⁶²

It was also under the presidency of Ayub Khan when the Muslim Family Laws Ordinance of 1961 was passed.⁶³ Most marriage and divorce

52. PAKISTAN, *supra* note 3, at 33.

53. *See id.* at 34.

54. *Id.*

55. *See id.* at 36.

56. *Id.* at 35-36.

57. *Id.* at 200.

58. PAKISTAN, *supra* note 3, at 44.

59. *Id.* at 44.

60. *Id.*

61. *Id.* at 49.

62. *Id.* at 49-50.

63. *Id.* at 47.

law in Pakistan is found in this document and in case law interpreting it. Several months after the enactment, West Pakistan (today Pakistan as opposed to East Pakistan, which is now Bangladesh) passed the West Pakistan Rules under the Muslim Family Laws Ordinance of 1961. This was designed to be a local amendment to the Muslim Family Laws Ordinance and is the current law today. Hailed as a great achievement for the rights of women, the Muslim Family Laws Ordinance has been criticized by some as being un-Islamic.⁶⁴

Today Pakistan is again under military rule with its Constitution suspended,⁶⁵ yet most of the substantive laws, including the marital laws, remain in effect. Because it was once a colony of Great Britain, it has a common law legal system as well as an Islamic law system. As such it still adheres to some laws passed by Great Britain to its Indian colonies. From this diverse history, Pakistan has developed a family law system with influences from Islam, India, and Great Britain.

For the most part, the law governing marriage is almost solely derived from Islamic influence. A *nikah* is a valid marriage.⁶⁶ In order for a marriage to be legal, there must be an offer and an acceptance made before Muslim witnesses—either two men or one man and two women.⁶⁷ The offer and acceptance need not be made by the prospective bride and groom, but may be made on their behalf by their guardians or attorneys.⁶⁸ Usually there is a religious ceremony, but this is not a requirement.⁶⁹ There must be a *mahr*.⁷⁰ A *mahr* is a dower paid to the wife from the husband upon marriage.⁷¹ The amount of the *mahr* varies according to the income of the husband. Its basic purpose is to protect the woman in case of divorce according to the laws of the Koran.⁷² Registration of the marriage is not required for a valid marriage, but it is important to do because it is the best evidence to prove that a marriage is valid.⁷³ Although

64. Donald L. Horowitz, *The Quran and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 287 (1994).

65. U.S. Department of State, *Background Note: Pakistan* (Mar. 2000), available at <http://www.state.gov/r/pa/bgn/index.cfm?docid=3453>.

66. PEARL, *supra* note 22, at 42.

67. *Id.*

68. *Id.*

69. *Id.*

70. SHAHEEN SARDAR ALI, *GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN?* 153 (2000).

71. PEARL, *supra* note 22, at 57.

72. *See id.* at 59.

73. *Id.* at 43.

the marriage remains valid, if it is not recorded the couple could be fined or imprisoned for up to three months.⁷⁴

Ironically, child marriages, though illegal and punishable by imprisonment or fines, are nevertheless valid marriages.⁷⁵ The legal age at which a person may contract marriage is set for girls at sixteen and for boys at twenty-one.⁷⁶ Historically, women needed the consent of a guardian before they could marry. In 1997, in the controversial case of Saima Waheed, a Pakistani court upheld the rule that an adult woman does not need the consent of her guardian.⁷⁷ "A wali, or guardian, is bound by the will and consent of the woman, not the other way around."⁷⁸

There are several situations in which a marriage will be held to be null and void. These are divided into two main groups: *batil*, completely void marriages; and *fasid*, irregular marriages.⁷⁹

There are several types of *batil* marriages. First, a marriage made within a forbidden degree of consanguinity is void.⁸⁰ A person may marry his first cousin but not any person with a closer relation than that, such as a niece, sister, mother, or any ascendant or descendant of those within the forbidden degree of consanguinity.⁸¹ Second, all marriages made with a former wife's close relations, such as her niece are void.⁸² A man may marry his wife's sister if the wife is dead, but no other near relation of the deceased wife. This type of marriage may be permitted if the marriage with the former wife was never consummated.⁸³ Third, one may not marry any person, though not a biological relation, whom his mother nursed.⁸⁴ Fourth, if a person does have sexual encounters before marriage they may, and are strongly encouraged, to marry their partner, but they may not marry any close relation of their partner within the forbidden degrees of consanguinity.⁸⁵ Fifth, a man may not remarry his wife, whom he has divorced, until she has legally remarried, consummated the marriage, and

74. MUSLIM FAMILY LAWS ORDINANCE, §5(4) (1961).

75. PEARL, *supra* note 22, at 43-44.

76. *Id.* at 43.

77. *Pak Court Gives Women Victory But Threatens Rights*, at <http://www.rediff.com/new/mar/18pak.htm>. (last visited Oct. 1, 2000).

78. *Id.*

79. PEARL, *supra* note 22, at 46.

80. *Id.* at 47.

81. *Id.* at 47-48.

82. *Id.* at 48.

83. *Id.*

84. *Id.*

85. PEARL, *supra* note 22, at 48.

has been effectively divorced or widowed by the second husband.⁸⁶ Sixth, while polygamy is allowed by a man in certain situations, if a woman takes a second husband while legally married to the first, such union is void.⁸⁷ Seventh, a man may marry a non-Muslim if she is a woman of the book, meaning a monotheistic woman either Jewish, Christian, or occasionally a Zoroastrian, but a Muslim woman may not marry anyone but a Muslim man.⁸⁸ It is unclear of the status, either *batil* or *fasid*, of a man who tries to marry a polytheistic or atheistic woman.⁸⁹ The situation can be rectified if either the woman converts,⁹⁰ the couple is married secularly outside the country,⁹¹ or the spouses renounce their religions and marry under the Special Marriages Act of 1872.⁹² Finally, when one of the parties does not consent to the marriage, the marriage is void.⁹³ This does not include the marriage of minors by their guardians.

Fasid marriages are like *batil* marriages in the fact that they are void, but unlike *batil* marriages, which are completely void, *fasid* marriages are void usually because of the way they contracted, and thus, the couple may remarry correctly.⁹⁴ Any child born in a *fasid* marriage will be considered legitimate.⁹⁵ If the couple separates, the woman is entitled to her *mahr* as if she had been married correctly.⁹⁶ There are several situations in which a marriage would be considered *fasid*. The first situation occurs if the couple married without witnesses.⁹⁷ This is easily rectified by remarriage with the correct number of witnesses.⁹⁸ A second situation arises when a man marries a woman who is still observing her *idda* period.⁹⁹ If there is a marriage during the *idda*, the parties must separate and remarry.¹⁰⁰ A third situation arises when a man marries a fifth wife.¹⁰¹ Although the Koran

86. *Id.* at 49.

87. *Id.*

88. *Id.*

89. *Id.* at 49-50.

90. *Id.* at 50-51.

91. PEARL, *supra* note 22, at 51. It is unclear whether such a marriage would still be legal.

92. *Id.* This provision presents difficulties—if a Muslim renounces Islam, he can be executed.

93. ALI, *supra* note 70, at 155.

94. PEARL, *supra* note 22, at 46.

95. *Id.*

96. *Id.*

97. *Id.* at 52.

98. *Id.*

99. *Id.*

100. PEARL, *supra* note 22, at 52.

101. *Id.* at 53.

allows maximum of four wives at one time, Pakistani law now forces the husband to seek judicial permission before taking a second or subsequent wife.¹⁰² The fourth situation occurs when a man marries a close relation of his existing wife.¹⁰³ The fifth situation occurs when a marriage is made between two people who are unequal whether on social, economic, or religious standing.¹⁰⁴ A husband should be on equal standing financially, religiously, and socially as the wife's father.¹⁰⁵ Usually this type of marriage occurs when the wife marries without her family's consent. Only the guardian of the wife may apply to the court for a separation.¹⁰⁶

The Muslim Family Laws Ordinance of 1961 does allow polygamy but with certain limitations. In order to take a second wife, a man has to get written consent from the first wife,¹⁰⁷ apply to the Arbitration Council and prove such a subsequent marriage is both "necessary and just."¹⁰⁸ To determine "necessary and just," the arbitration counsel will look to the woman to see if she is, amongst other things, barren, deformed, insane, chronically ill, or unwilling or unable to perform her sexual duties.¹⁰⁹ If the husband contracts a marriage with a second wife without the permission of the Arbitration Council, he is required to pay his current wife her mahr immediately.¹¹⁰ The husband can also be fined and/or imprisoned.¹¹¹

There are several ways to be divorced in Pakistan but the most common way is by the talaq, which is a verbal pronouncement of "I divorce you," said three times. Once the talaq has been pronounced, the husband must give notice, in writing, to the Chairman of the Union Council and to the wife.¹¹² Once the notice has been given, the husband and wife or their representatives must appear before the Arbitration Council to try to form a reconciliation.¹¹³ If after ninety days from the filing of the talaq there has been no reconciliation, the Council will then declare a binding divorce.¹¹⁴

102. MUSLIM FAMILY LAWS ORDINANCE, §6(1) (1961).

103. PEARL, *supra* note 22, at 53.

104. *Id.* at 54.

105. *Id.*

106. *Id.*

107. Anita M. Weiss, *Implications of Islamization Program for Women, in ISLAMIC REASSERTION IN PAKISTAN: THE APPLICATION OF ISLAMIC LAWS IN A MODERN STATE* 97, 99 (Anita M. Weiss ed. 1986).

108. MUSLIM FAMILY LAWS ORDINANCE, § 6(3) (1961).

109. WEST PAKISTAN RULES UNDER THE MUSLIM FAMILY LAWS ORDINANCE, §14 (1961).

110. MUSLIM FAMILY LAWS ORDINANCE, § 6(5)(a) (1961).

111. *Id.* §6(5)(b).

112. *Id.* § 7(1).

113. *Id.* § 7(4).

114. *Id.* § 7(3).

Often a husband will try to divorce his wife without consulting the judicial body. This will not be recognized as valid.¹¹⁵ The requirement of judicial notice is designed to protect the wife and the sanctity of the marriage.¹¹⁶ If the husband does not give judicial notice, the talaq will be considered revoked.¹¹⁷ The West Pakistan rules give the venue for notice.¹¹⁸ It must be done in the district where the wife resides.¹¹⁹ If she does not live in Pakistan, venue is proper where the couple last lived together or in the district where the husband resides.¹²⁰ If there is no venue proper in Pakistan, the Pakistani missions or consulates in other countries have power to hear divorce cases.¹²¹ If the husband does not comply with these requirements and attempts to divorce his wife by the talaq alone, he may be fined or imprisoned for up to one year.¹²² The talaq cannot be used by a Muslim husband against his non-Muslim wife according to the Divorce Act of 1869. Any attempt to do so will render the divorce invalid.¹²³

According to one source in 1992, the Supreme Court reversed the requirement of judicial notice allowing the talaq, written or unwritten, witnessed or not, to be the final divorce.¹²⁴ This was a step back for the rights of women giving a divorced woman no proof of a divorce.¹²⁵ It is unclear whether this decision was followed for a short time or immediately rejected. Today, a man must still give judicial notice and follow all the requirement of the Muslim Family Laws Ordinance, which is still in effect.¹²⁶

Often girls are married, though illegally,¹²⁷ before the age of consent. If this occurs, the option of a khiyar divorce, which is codified in the Dissolution of Muslim Marriages Act of 1939, is available, but she must

115. PEARL, *supra* note 22, at 98.

116. *Id.*

117. *Id.*

118. *Id.* at 99.

119. *Id.*

120. *Id.*

121. PEARL, *supra* note 22, at 99.

122. Reed, *supra* note 2, at 318.

123. Farooq Leivers v. Adelaide Bridget Mary, 1958 PLD (WP) Lah 431, 447 (Pak.); see also PEARL, *supra* note 22, at 186.

124. Anita M. Weiss, *The Slow Yet Steady Path to Women's Empowerment in Pakistan, in ISLAM, GENDER, & SOCIAL CHANGE* 124, 136 (Yvonne Yazbeck Haddad & John L. Esposito eds. 1998).

125. *Id.*

126. Sakina Yusuf Khan, *Divorced From Reality: Amending the Triple Talaq Law*, The Times of India Online (Oct. 5, 2000), at <http://www.timesofindia.com/today/05edit4.htm>.

127. PEARL, *supra* note 22, at 43.

exercise this option before she reaches her eighteenth birthday; otherwise, the availability of the *khiyar* is lost.¹²⁸ If the girl freely consents to the consummation of the marriage and has not done so under duress, the option of the *khiyar* is lost.¹²⁹ Under the Act, permission of the court must be obtained for the *khiyar*, but case law has held the act of the *khiyar* is final.¹³⁰ The court's permission need not be obtained. It only recognizes the divorce.¹³¹ This is the only form of divorce available to women that can be done unilaterally and without the court's consent.¹³²

A divorce option available to all women is the *khul*.¹³³ This is a divorce by common consent, usually evoked by the wife.¹³⁴ Often the wife will give up all or part of her *mahr* in order to obtain her husband's consent to the divorce.¹³⁵ Case law in Pakistan has held in some cases that the husband's consent is unnecessary where it is impossible for the couple to live together in peace.¹³⁶ Divorce by the *khul* has even been allowed where the "wife's aversion to the husband is unreasonable."¹³⁷ If consent needed for the *khul* is obtained by duress, the divorce is void. Such duress must be of a serious nature such as threats of death, bodily harm, or captivity.¹³⁸

When all else fails, the Dissolution of Muslim Marriage Act of 1939, Section 2, allows a woman to obtain a judicial divorce on one of several grounds.¹³⁹ First, a woman may obtain a divorce if "the whereabouts of the husband have not been known for a period of four years."¹⁴⁰ The divorce will be final six months after judgment, unless the husband or an agent of the husband returns and proves he is willing to fulfill his marital duties.¹⁴¹ Second, a divorce will be granted if the husband has not provided maintenance for his wife in two years.¹⁴² Third, a divorce will be granted if "the husband has been sentenced to imprisonment for a period of seven

128. *Id.* at 44.

129. *Id.*

130. *Muni v. Habib Khan*, 1956 PLD (WP) Lah 403, 409 (Pak.).

131. PEARL, *supra* note 22, at 45.

132. *Id.*

133. *Id.* at 102.

134. *Id.*

135. *Id.*

136. *Abdul Rahim v. Mst. Shahida Khan*, 1984 PLD (S.C.) 329, 333 (Pak.).

137. Horowitz, *supra* note 64, at 280.

138. PEARL, *supra* note 22, at 102.

139. THE DISSOLUTION OF MUSLIM MARRIAGES ACT OF 1939, § 2 (1965).

140. *Id.* § 2(i).

141. *Id.* § 2(b).

142. *Id.* § 2(ii).

years or upwards.”¹⁴³ Fourth, a divorce will be granted if “the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.”¹⁴⁴ Fifth, a divorce will be given to the wife if her husband was impotent both at the beginning of the marriage and at the time of the requested divorce.¹⁴⁵ The divorce will not be final for one year.¹⁴⁶ If in that year the husband ceases to be impotent, a divorce will not be granted.¹⁴⁷ Sixth, a divorce will be granted if “the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.”¹⁴⁸ Finally, cruelty is the last ground available for divorce.¹⁴⁹ Cruelty may be defined from the severe, such as wife beating, to lesser degrees, such as taking a second wife outside both Islamic law and the provisions of the Muslim Family Law Ordinance of 1961.¹⁵⁰

After a divorce, custody of the children is not automatically given to the father. The Guardians and Wards Act, a British enactment, is the law concerning child custody.¹⁵¹ The courts will look to what is in the best interests for the welfare of the child to determine to whom custody should be awarded.¹⁵² In determining the welfare of the child, the courts look to various factors, including: the religion of the child, the age and sex of the child, fitness of the guardian, the child’s preferences, and the financial situation of the guardian, amongst other things.¹⁵³ Religion, of course, is a very important factor. A child will not be given to a parent who intends to raise the child in a religion, be it Islam or any other religion, other than the child’s own.¹⁵⁴

In determining the validity of foreign marriages, Pakistan follows the traditional international law of *lex loci contractus*, but determines the capacity of parties to marry according to their domicile.¹⁵⁵ Thus, a foreign marriage will be recognized if it was valid in the place where it was contracted and if the parties had the capacity to marry according to their

143. *Id.* § 2(iii).

144. *Id.* § 2(iv).

145. THE DISSOLUTION OF MUSLIM MARRIAGES ACT OF 1939, § 2(v) (1965).

146. *Id.* at § 2(c).

147. *Id.*

148. *Id.* § 2(vi).

149. *Id.* § 2(viii).

150. *Id.*

151. *Hosain v. Malik*, 671 A.2d 988, 991 (Md. Ct. Spec. App. 1995). This is based on the testimony of an expert on Pakistani law. *Id.*

152. THE GUARDIANS AND WARDS ACT OF 1890, § 17(1) (1992).

153. *Id.* § 17.

154. *Hosain*, 671 A.2d at 992.

155. *Gardezi v. Yusuf*, 1963 PLD (S.C.) 51, 59 (Pak.).

personal law.¹⁵⁶ Therefore, any marriage legally made in a foreign country, but which violates the provisions of *batil* or *fasid* marriages, will not be recognized. Likewise, if one marries according to his personal law, such as a polygamous marriage, in a country where such a marriage is illegal, a Pakistani court will probably not recognize such a marriage as valid. Valid foreign marriages made by Pakistani nationals will be recognized in Pakistan, but they must register their marriage in the district in which the wife was a former resident.¹⁵⁷ If the wife is not Pakistani, the marriage must be recorded in the husband's last place of residence.¹⁵⁸ Since Pakistan is a Sunni Muslim state, it will not recognize a temporary marriage, as it is repugnant to public policy.¹⁵⁹

IV. IRAN

Islamic law has ruled Iran since the Arabs conquered it shortly after the death of Mohammed in 632.¹⁶⁰ Acceptance of Islam was relatively easy for Iran because Islam offered both religious tolerance and equality.¹⁶¹ Over the next thousand-plus years, Iran was ruled by a shah, with the exception of a few centuries of rule by the Turks.¹⁶² There were several different dynasties during this period.¹⁶³

The first attempt to break out of the "medieval period" occurred in 1906, when a weak shah was forced to sign a constitution, which would weaken his own power and provide for an elected parliament.¹⁶⁴ Unfortunately, this shah died soon after. His successor forced the parliament to close.¹⁶⁵ In order to reestablish the constitution, civil war broke out ending with the shah being deposed and exiled.¹⁶⁶ The constitution and the parliament were soon reestablished with a weak shah.¹⁶⁷

156. *See id.*

157. WEST PAKISTAN RULES UNDER THE MUSLIM FAMILY LAWS ORDINANCE, § 12(1) (1961).

158. *Id.*

159. SHAHLA HAERI, *LAW OF DESIRE: TEMPORARY MARRIAGE IN SHI'I IRAN* 61-62 (1989).

160. *See IRAN, supra* note 4, at 11.

161. *Id.*

162. *See generally, id.* at 13-25.

163. *Id.*

164. *Id.* at 23.

165. *Id.*

166. *IRAN, supra* note 4, at 23.

167. *Id.*

The Pahlavi dynasty came to power in 1921, when Reza Khan overthrew the shah and took the throne for himself.¹⁶⁸ This shah was the first to begin a program of westernization.¹⁶⁹ In order to achieve this, the citizens of Iran were forced to wear European clothes, the veil was abolished, and for the first time women were allowed both an education and a career.¹⁷⁰

The first attempts at reforming marital law occurred in the early 1930s through the influence of the shah's daughter, Princess Ashraf.¹⁷¹ The marriage age was raised. All marriages, whether permanent or temporary had to be registered, and women were allowed a divorce if it was stipulated for in their marriage contract. Although polygamy was kept legal (the shah did not want to give up his three wives), men were required to inform their subsequent wives that they were already married.¹⁷² Radical changes came about with the passage of the Family Protection Act in March of 1967.¹⁷³ This law established a special court to determine matrimonial matters.¹⁷⁴ It also prevented husbands from unilaterally divorcing their wives by forcing them to get a judicial order to divorce.¹⁷⁵ Women could obtain a divorce for even minor reasons, such as incompatibility.¹⁷⁶ Custody of the children was no longer the automatic right of the husband.¹⁷⁷ Finally, polygamy was still legal but restricted even further by forcing the man to obtain the permission of his first wife in order to marry a second.¹⁷⁸ The marriage age was again raised to eighteen in 1975.¹⁷⁹

By the mid 1970s, it became clear that many Iranians were dissatisfied with the shah's government. Protests were held periodically, and became deadly in September of 1978, when the shah's troops opened fire on a demonstration in Jaleh Square killing eighty-seven people.¹⁸⁰ In January of 1979, the shah left Iran for a "vacation."¹⁸¹ He never returned.

168. *Id.* at 25.

169. *Id.*

170. *Id.* at 26.

171. HALEH ESFANDIARI, RECONSTRUCTED LIVES: WOMEN & IRAN'S ISLAMIC REVOLUTION 25 (1997).

172. *Id.*

173. *Id.* at 30.

174. *Id.*

175. *Id.*

176. *Id.*

177. ESFANDIARI, *supra* note 171, at 30.

178. *Id.*

179. *Id.* at 31.

180. IRAN, *supra* note 4, at 45.

181. *Id.* at 46.

In February of 1979, Khomeini and his supporters overthrew the shah's government and won the Iranian Revolution. A new government was formed with Khomeini as its head.¹⁸² Initially, everything remained the same after the revolution, but within a few months, the new government began its radical changes.¹⁸³ Those who had or were suspected of sympathizing with the shah were purged from their jobs and often imprisoned and executed.¹⁸⁴ Everything western was condemned. Men and women were forbidden to socialize together unless they were related.¹⁸⁵ The veil was once again imposed, and women who did not wear it properly were punished.¹⁸⁶ Women had to use separate public facilities from men,¹⁸⁷ similar to the separate but equal facilities imposed on blacks in America during the civil rights era. The revolutionary councils and the morals police enforced all of these restrictions.¹⁸⁸

One of Khomeini's first policies was to revoke the Family Protection Act, declaring it "un-Islamic."¹⁸⁹ In its place the new government passed several new family laws.¹⁹⁰ These are found in the Iranian civil code and are administered by the Special Civil Court run by religious judges.¹⁹¹ The new regime stated their primary importance was the protection of the family unit,¹⁹² but instead they passed new laws that made it easier for the family unit to be destroyed.

Ultimately, many of the policies of Khomeini have failed. After the revolution, many of the rights of women were taken away, but gradually within the past decade, some of the laws passed under the shah have been reintroduced. In 1997, Khatami won the election as President.¹⁹³ He has stated many of the so-called religious laws of Iran are not found anywhere within the Islamic law.¹⁹⁴ He has called for a reevaluation of Islamic law.¹⁹⁵

182. See IRAN, *supra* note 4, at 49.

183. See ESFANDIARI, *supra* note 171, at 39.

184. See *id.*

185. *Id.* at 39-40.

186. *Id.* at 41.

187. *Id.* at 39-41.

188. See *id.*

189. ESFANDIARI, *supra* note 171, at 43.

190. HOMA OMID, ISLAM AND THE POST-REVOLUTIONARY STATE IN IRAN 76 (1994).

191. ZIBA MIR-HOSSEINI, MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW: IRAN AND MOROCCO COMPARED 25 (1993).

192. IRAN CONST. art. 10.

193. Maryam Javaherian, *Women's Human Rights in Iran: What Can the International Human Rights System Do?*, 40 SANTA CLARA L. REV. 819, 825 (2000).

194. *Report on the Situation of Human Rights in the Islamic Republic of Iran*, U.N. ESCOR, 54th Sess., Agenda Item 10 ¶14, U.N. Doc. E/CN.4/1998/59 (1998).

Under his leadership, Iran has seen a relaxation of some of the strict rules imposed under Khomeini, but many remain, including the marital laws.¹⁹⁶

In order for a marriage to be valid in Iran, several factors must be met. First, the bride, regardless of her age, must have the consent of her father or nearest male relative.¹⁹⁷ If her father is dead or cannot be found for whatever reason, and there is no other guardian, the bride must apply to the marital court in order to obtain consent.¹⁹⁸ The marital court then will appoint a guardian to give the respective bride his consent or deny it.¹⁹⁹ Second, a mahr must be paid.²⁰⁰ In Iran, the wife has no right to the mahr while she is married, but can demand the mahr if her husband threatens divorce.²⁰¹ Usually, the sum of the mahr is extremely expensive so it acts as a deterrent against divorce.²⁰²

There are several situations in which a marriage is considered void. As in Pakistan, a man may not marry within the forbidden degree of consanguinity, which in Iran includes up to the third degree of kinship.²⁰³ He may not marry anyone his mother nursed.²⁰⁴ He may not marry within the forbidden degrees of kinship of his current wife's family²⁰⁵ or any woman's family with whom he has had a sexual relationship.²⁰⁶ Unlike Pakistan, a man is also forbidden to marry any non-Muslim, even if she is a woman of the Book, Christian, or Jewish.²⁰⁷ Further, a man may not marry a woman who had previously been found guilty of adultery.²⁰⁸ Of course, in both countries homosexuality is banned, but Khomeini discusses the implications of homosexuality on marriage.²⁰⁹ If a homosexual act occurs,

195. *Id.*

196. Javaherian, *supra* note 193, at 826.

197. ESCHEL M. RHOODIE, *DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY OF THE ECONOMIC, EDUCATIONAL, SOCIAL AND POLITICAL STATUS OF WOMEN* 376 (1989).

198. CHERRY MOSTESHAR, *UNVEILED: ONE WOMAN'S NIGHTMARE IN IRAN* 246 (1995).

199. *Id.*

200. Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U.J. GENDER SOC. POL'Y & L. 57, 67 (1996).

201. *Id.*

202. *Id.*

203. I. P. PETRUSHEVSKY, *ISLAM IN IRAN* 144 (1985).

204. *Id.*

205. *Id.*

206. Jane Khatib-Chahidi, *Sexual Prohibitions, Shared Space and 'Fictive' Marriages in Shi'ite Iran*, in *WOMEN AND SPACE: GROUND RULES AND SOCIAL MAPS* 112, 117 (Shirley Ardener ed. 1997).

207. PETRUSHEVSKY, *supra* note 203, at 144.

208. *Id.*

209. Khatib-Chahidi, *supra* note 206, at 117.

the men are prohibited from marrying the sisters, aunts, mothers, or other female relatives of their partners.²¹⁰ If the act occurs after the marriage between in-laws, such an act will not render the marriage void.²¹¹

Child marriages are still illegal.²¹² The minimum age for a girl to legally marry is fifteen;²¹³ for boys, it is eighteen.²¹⁴ If one marries a girl under the age of consent, it is punishable by imprisonment depending on the age of the girl. If the girl is thirteen or fourteen, the prison term is set between six months to two years.²¹⁵ If the girl is under thirteen, the prison term is set from two to three years.²¹⁶ Permission may be obtained from the court in order to marry a girl who is at least thirteen and avoid criminal liability.²¹⁷

Before the revolution, polygamy was allowed only with consent of the court under certain conditions: the wife gave consent, refused or was unable to perform her marital obligations, was insane, terminally ill, abandoned the husband, addicted to controlled substances or gambling, or was unable to produce children.²¹⁸ Under the new family laws, polygamy was completely legalized.²¹⁹ Men may marry not only the four allotted wives, but also an unlimited number of temporary wives.²²⁰ If a man does take more than one wife, he must provide for them each equally, both physically and emotionally.²²¹ Furthermore, they must not all be under one roof, but each must have a separate but equal home.²²²

A temporary marriage, or *muta*, which is legal in Iran, has been described as a form of a lease of a wife as opposed to a permanent marriage, which has been analogized to the sale of a wife.²²³ The wife in a temporary marriage is contracted to be married for a certain period of time, be it an

210. *Id.*

211. *Id.*

212. JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 9 (1990).

213. *Id.*

214. RHOODIE, *supra* note 197, at 376.

215. NASIR, *supra* note 212, at 9.

216. *Id.*

217. *Id.*

218. MINOU REEVES, *FEMALE WARRIORS OF ALLAH: WOMEN AND THE ISLAMIC REVOLUTION* 30-31 (1989).

219. OMID, *supra* note 190, at 76.

220. *Id.*

221. *See* PETRUSHEVSKY, *supra* note 203, at 145.

222. *Id.*

223. HAERI, *supra* note 159, at 30.

hour or be it ninety-nine years.²²⁴ Men, of course, may contract as many temporary wives as they desire, but a woman may not have more than one husband at a time.²²⁵ In order for a temporary marriage to be valid, there must be a contract, which need not be written.²²⁶ The contract must specifically state the duration of the marriage and the amount of consideration given to the temporary wife.²²⁷ As opposed to the permanent marriages contract where the husband usually makes the offer and the wife accepts, in a temporary marriage either party may make the initial offer.²²⁸ Usually, when the contract is written it is worded as to show it is the woman who makes the offer and the man accepts.²²⁹ It is unclear whether the failure to mention a specific duration in the contract would void the contract or make the marriage permanent.²³⁰ Similarly, if the amount of consideration is not specified, the temporary marriage contract is void.²³¹ Usually, if the temporary marriage is to be for a long period of time, the contract will be written and witnessed.²³² In a permanent marriage in Iran, a man may only marry a Muslim woman,²³³ but a man may contract a temporary marriage with a woman of the Book either Christian, Jewish, and in some cases Zoroastrian. Still, a woman may only contract temporary marriages with Muslim men.²³⁴ Unless the woman is divorced or a widow, the temporary bride must obtain her father's or guardian's permission before entering into a temporary marriage.²³⁵ Unlike a regular marriage, the temporary marriage need not be recorded or witnessed.²³⁶ When the contracted time period is up, the temporary marriage may be renewed with a new contract.²³⁷

224. *Id.* at 52.

225. Tamilla F. Ghodsi, Comment, *Tying the Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 670 (1994).

226. *Id.* at 681.

227. HAERI, *supra* note 159, at 51.

228. *Id.*

229. *Id.*

230. Ghodsi, *supra* note 225, at 667-68.

231. HAERI, *supra* note 159, at 53.

232. PETRUSHEVSKY, *supra* note 203, at 231.

233. *Id.* at 144.

234. HAERI, *supra* note 159, at 52.

235. Ghodsi, *supra* note 225, at 669.

236. *Id.* at 667.

237. Elaine Sciolino, *Love Finds a Way in Iran: 'Temporary Marriage,'* N.Y. TIMES, Oct. 4, 2000, at A3.

The man may end the marriage at any time before the time period is up, but the woman may not.²³⁸ At times, the man may end the temporary marriage before it is ever consummated. In this situation there has been some disagreement as to whether the man must pay his temporary wife the agreed price. Some argue he need not pay anything since he did not receive what he contracted for.²³⁹ Others, including Khomeini, argue the man should only be required to pay half of the agreed price.²⁴⁰ Finally, others argue as long as the woman has been willing and obedient, the man must pay the full amount.²⁴¹ Should the woman refuse to fulfill or continue with her duties as a temporary wife, she must return all or part of the money which she was paid.²⁴² Once the temporary marriage ends, the woman must observe the idda period as if she had been a true wife.²⁴³ The idda period is shorter in a temporary marriage.²⁴⁴ It is either two menstrual cycles for regular women or forty-five days for women who have irregular cycles.²⁴⁵

The man is under no obligation to support his temporary wife other than the price paid at the beginning of the contract.²⁴⁶ Although the temporary wife does not have the same rights as a lawful wife, any children born in a temporary marriage are legitimate and have the same rights as the children born from a permanent marriage.²⁴⁷ Children of temporary marriage are not always considered legitimate. Because the temporary marriage contract can be oral, the husband or wife can deny such a union existed.²⁴⁸ Without definite proof, the child may be considered illegitimate.²⁴⁹

The purpose of having a temporary wife is to give a man a moral way to satisfy his sexual urges while he is away from his real wives,²⁵⁰ or during the wife's menstrual period.²⁵¹ Women have been known to arrange a temporary marriage for their oversexed husbands in order for them to be

238. MIR-HOSSEINI, *supra* note 191, at 165.

239. HAERI, *supra* note 159, at 54.

240. *Id.* at 53.

241. *Id.* at 54.

242. *Id.* at 57.

243. PETRUSHEVSKY, *supra* note 203, at 231.

244. HAERI, *supra* note 159, at 57.

245. *Id.*

246. PETRUSHEVSKY, *supra* note 203, at 230.

247. *Id.* at 231.

248. HAERI, *supra* note 159, at 55.

249. *See id.*

250. *Id.* at 81.

251. MOSTESHAR, *supra* note 198, at 122.

left alone for a while.²⁵² One interesting reason some women form temporary marriage is religious. They believe they will receive some form of a religious reward if they contract a temporary marriage, especially with a descendant of Mohammed.²⁵³ They believe that in order to please God, they must actively disobey the Sunni Caliph Omar who had wrongly forbidden it.²⁵⁴

The practice of temporary marriage has been criticized as nothing more than legalized prostitution.²⁵⁵ Temporary wives are often looked down on by society. Usually they are divorced or widowed women, uneducated and poor.²⁵⁶ At times, virgins are contracted into a temporary marriage. These are usually younger daughters from large lower-class families who cannot get a husband any other way.²⁵⁷ Although the Shiite Muslims allow temporary wives, it is said that the Prophet Mohammed had forbidden it.²⁵⁸ The Caliph, Omar, in the seventh century had specifically outlawed it.²⁵⁹

A temporary marriage need not be sexual. A nonsexual temporary marriage is formed the same way a sexual one is, but the only difference is that a clause is inserted stating the union is nonsexual.²⁶⁰ This type of marriage is designed for ease in social interaction.²⁶¹ Under Iranian law, women are forbidden to be unveiled in the company of men they are not related to.²⁶² This restriction becomes problematic in several situations and often a nonsexual temporary marriage is formed to ease the restrictions.²⁶³ Often to ease the problem of a servant having to remain veiled in her employment, thus restricting her ability to perform her duties, she will contract a nonsexual temporary marriage with one of the male members of the household.²⁶⁴ Another use for a nonsexual temporary marriage is similar to dating. Usually marriages are arranged, but the future spouses still need to know a bit about each other before committing to a permanent marriage. A nonsexual temporary marriage allows for time to get to

252. HAERI, *supra* note 159, at 123.

253. *See id.* at 167.

254. *Id.*

255. MOSTESHAR, *supra* note 198, at 122.

256. HAERI, *supra* note 159, at 147.

257. Graves, *supra* note 200, at 82.

258. IBN HANBAL & IBN RAHWAYH, CHAPTERS ON MARRIAGE AND DIVORCE 13 (1993).

259. HAERI, *supra* note 159, at 50.

260. *Id.* at 89.

261. *Id.* at 90.

262. *See id.* at 83.

263. *Id.*

264. *Id.*

know each other.²⁶⁵ Finally, parents often contract for a nonsexual temporary marriage for their children who are engaged to be married. This allows the future spouses the liberty of going out in public together before their wedding.²⁶⁶ One of the oddities of this type of marriage is that it may be arranged for children and infants.²⁶⁷ This is usually done to make social interaction among the parents easier, since they are now in-laws.²⁶⁸ A second oddity is the nonsexual temporary marriage may become a sexual one at the will of the wife.²⁶⁹ All she has to do is revoke the clause in the contract forbidding intercourse.²⁷⁰ The man does not have this power.²⁷¹

Divorce in Iran is considered the exclusive right of the husband. As in Pakistan, the husband most commonly divorces his wife by the use of the talaq.²⁷² Although it is fairly easy for a man to obtain a divorce by basic Islamic law, he still must obtain a judicial decree.²⁷³ To retain the unilateral nature of the talaq, the husband is not required to give any reasons for divorcing his wife to the court.²⁷⁴ Once a petition is filed, either by the man or the woman, on grounds mentioned below, the parties go through a series of attempts at reconciliation. First, the court clerk attempts a reconciliation, if that fails, the judge tries at reconciliation. If the judge is unsuccessful, an arbitrator is assigned to try at reconciliation.²⁷⁵ If the arbitrator fails, the parties are sent back to the judge who does not have the discretion to deny the husband the divorce. The judge may, however, delay the divorce by withholding the judicial decree needed to register the divorce for a period of time, or send the parties back through the arbitration process.²⁷⁶ If both parties agree to the divorce, a judicial

265. HAERI, *supra* note 159, at 94.

266. *Id.* at 95.

267. *Id.* at 89.

268. *Id.* at 90.

269. *Id.*

270. *Id.*

271. HAERI, *supra* note 159, at 90.

272. Mahsa Aliaskari, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL'Y & L. 261 (2000).

273. S. I. Strong, *Law and Religion in Israel and Iran: How Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 168-69 (1997).

274. MIR-HOSSEINI, *supra* note 191, at 56.

275. *Id.* at 61.

276. *Id.* at 63, 71.

decree is not required—as long as the parties register the divorce with the court.²⁷⁷

A divorce in Iran is much harder for a woman to obtain than in Pakistan, but she still has the right to apply to the court for a khul, a *tatliq*, which is a divorce by judicial decree, or a *faskh*, which is an annulment.²⁷⁸ In order to get a *tatliq* divorce, the woman must prove to the court, on very specific grounds, why she is entitled to divorce.²⁷⁹ There are now twelve grounds on which she can apply.²⁸⁰ Such grounds include: the failure of the husband to provide for the wife, refusal of the husband to have intercourse,²⁸¹ the husband is incapable of fathering a child after a period of five years, the husband marries a second time without the consent of his wife or refuses to treat existing co-wives equally,²⁸² the husband is insane, the husband has an incurable disease, the husband abandons the home for a period of five years,²⁸³ the husband engages in an occupation that is repugnant to the wife or is beneath her social status, the husband has been sentenced to prison for a period of five or more years, the husband was convicted of a crime that is repugnant to the family, the husband has an addiction which is harmful to the family²⁸⁴ or the husband is cruel.²⁸⁵ Although a woman may get a *tatliq* divorce if she can prove physical or mental cruelty, it is in the judge's discretion to determine whether such cruelty is actually harmful.²⁸⁶ A case that illustrates this point is one in which a woman petitioning the court on grounds of cruelty provided medical evidence that she suffered hearing loss due to blows on the head. Further, witnesses had testified that they had seen bruises on her body. The court denied the petition because no one had actually seen the husband hit the wife.²⁸⁷

A woman may obtain a right of divorce on the aforementioned grounds, only if it is stipulated for in her marriage contract.²⁸⁸ Usually,

277. *Id.* at 57.

278. Aliaskari, *supra* note 272, at 261.

279. *Id.* at 262.

280. ESFANDIARI, *supra* note 171, at 43; MIR-HOSSEINI, *supra* note 191, at 57.

281. PETRUSHEVSKY, *supra* note 203, at 146.

282. MIR-HOSSEINI, *supra* note 191, at 57.

283. ESFANDIARI, *supra* note 171, at 43. Another source reports that the period of desertion may be as little as six months provided the court decides on the acceptability of the husband's excuse. MIR-HOSSEINI, *supra* note 191, at 57.

284. MIR-HOSSEINI, *supra* note 191, at 57.

285. PETRUSHEVSKY, *supra* note 203, at 146.

286. MIR-HOSSEINI, *supra* note 191, at 67.

287. *Id.* at 69.

288. MIR-HOSSEINI, *supra* note 191, at 57.

such a contract will list conditions that if the husband does not meet will be grounds for divorce, but such conditions will only be valid if both parties, especially the husband, sign the contract.²⁸⁹

There are several obstacles to prevent a woman from applying for a *tatliq* or *faskh* if she does not have the permission of her husband. First, since there are few courts that will hear a *tatliq* case, a woman may not be able to travel to such a court. Second, even if one were close, a woman cannot leave her home without her husband's permission, which in such case he is unlikely to give. Third, as her husband is unlikely to provide her with spending money, a woman is often unable to afford the fee required to file for divorce.²⁹⁰

There is a special kind of judicial divorce known as a *lian* or *cursing*.²⁹¹ In such a divorce proceeding, the husband accuses the wife of adultery but does not have the four witnesses required to prove it.²⁹² The husband then swears to the court the truth of his statements, and the wife swears to her innocence.²⁹³ The court rules the woman cannot be charged with adultery nor can the man be charged with perjury or slander, but the marriage is dissolved.²⁹⁴ If the wife is pregnant, the husband need not claim the child.²⁹⁵

The state may end a marriage on its own regardless of the desires of the couple. This occurs when one spouse, through committing some serious crime, has been declared civilly dead.²⁹⁶ The marriage will be automatically annulled.²⁹⁷

As in Pakistan, Iranian law requires a woman to observe the *idda* period after a divorce. This period lasts from three to twelve months.²⁹⁸ During this time the husband must continue to support her, unless the husband proves to the court the divorce was caused by the wife's

289. *Id.* at 58.

290. Aliaskari, *supra* note 272, at 262.

291. PETRUSHEVSKY, *supra* note 203, at 146.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. Edna Boyle-Lewicki, *Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights*, 13 N.Y. INT'L L. REV. 43, 67 (2000); see also ANNE ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 178 (1991).

297. Boyle-Lewicki, *supra* note 296, at 67.

298. Strong, *supra* note 273, at 169.

disobedience or failure to perform martial duties.²⁹⁹ A man, of course, may remarry immediately.³⁰⁰

A woman does retain some rights against her husband after a divorce. She has the right to retain her mahr upon divorce.³⁰¹ In 1994, a law was passed³⁰² stating that if a woman is unjustly divorced, her husband must pay her wages for her marital labor.³⁰³ Although it is unclear what the Iranian government defines as an unjust divorce, the Koran states a man should not divorce his wife unless she is openly immoral.³⁰⁴ This seems to indicate she must do some serious public offense such as adultery.

Although the woman still retains some rights after divorce, the consequences of a divorce on a woman can be devastating. First, it puts a social stigma on the woman, as well as the man. Although allowed by the Koran, Mohammed had stated it was an abomination in the sight of God.³⁰⁵ Secondly, if a woman does not have an adequate mahr, she is left without any economic help.³⁰⁶ Only recently a law was passed giving the wife the right to half of the marital property, but she is only entitled to such relief if she is not the one who seeks the divorce or was not at fault when her husband filed for divorce.³⁰⁷ Thirdly, a woman has no right to the custody of her children.³⁰⁸ The husband, the paternal grandfather, or the nearest male relative of the husband has sole custody of the children.³⁰⁹ A wife may retain custody of her son until age two or her daughter until age seven, but once these ages are reached, custody is automatically transferred to the husband or his family.³¹⁰ A woman may retain custody of her children only with the consent of her former husband.³¹¹ According to the Iranian Constitution, a woman may be given custody of her children if she is considered worthy and if it is better for the child, but there must not be a legal guardian.³¹² Usually, there is always a legal guardian making the use

299. MIR-HOSSEINI, *supra* note 191, at 59.

300. Strong, *supra* note 273, at 169.

301. *Id.*

302. ESFANDIARI, *supra* note 171, at 43.

303. Omid, *supra* note 190, at 203.

304. *Koran* 65:1.

305. THE MEANING OF THE HOLY QUR'AN 1482 (Abdullah Yusuf Ali ed. 1989).

306. Strong, *supra* note 273, at 169.

307. ESFANDIARI, *supra* note 171, at 43.

308. Strong, *supra* note 273, at 169.

309. MIR-HOSSEINI, *supra* note 191, at 154.

310. *Id.*

311. *Id.* at 156.

312. IRAN CONST. art. 21, §5.

of this provision a rarity.³¹³ In 1997, Iran passed a law giving mothers custody of their children if they can prove their ex-husband “is an addict, a child abuser or has a ‘bad reputation.’”³¹⁴

Typically, Iran will not recognize a divorce that was performed outside the country but will recognize any marriage an Iranian national male makes anywhere in the world. In fact, the bride becomes an automatic Iranian citizen whether or not she has ever been to Iran or even wants such a status.³¹⁵

As divorce is the absolute right of the husband, any divorce initiated outside of Iran by a female Iranian national will usually not be recognized. This is the case even if the foreign divorce states the same allegations set out as options that a woman could use to petition an Iranian court. Even though divorce is the exclusive right of a man, there is some evidence Iran will not recognize a foreign divorce, even if it was incited or consented to by the man. A recent United States court ordered the Iranian husband to help his ex-wife obtain an Iranian divorce in what appeared to be a no contest divorce or limited contest as to property.³¹⁶ Iran probably would not recognize this divorce as it was the wife listed as the plaintiff, and the American court was more generous to her than an Iranian court in which she would have no right to her husband’s property³¹⁷ or custody of her child.³¹⁸

V. UNITED STATES POLICY ON RECOGNITION

The general rule in the United States on the recognition of foreign marriages is that the marriage will be recognized in the U.S. if the marriage was valid in the place where it was celebrated, and void if it was void in the place celebrated.³¹⁹ There are exceptions to the general rule. First, if the marriage, though valid in the place where contracted, is “odious by the

313. Strong, *supra* note 273, at 170.

314. Kathy Evans, *Challenges to Islam: Child Who Led Small Revolution in Iran*, GUARDIAN, Dec. 9, 1997, at 14. This law was passed in response to a child who was killed by her stepbrother and possibly abused by her father after the child’s mother divorced. Although the mother got the satisfaction of seeing the step-brother sentenced to death for the crime, she must pay his family to compensate for his death. *Id.*

315. BETTY MAHMOODY & ARNOLD D. DUNCHOCK, FOR THE LOVE OF A CHILD 11 (1992).

316. Solati v. Solati, 2000 WL 38876 (Conn. Super. Ct. 2000).

317. Strong, *supra* note 273, at 169.

318. *Id.*

319. Osoinach v. Watkins, 180 So. 577, 579 (Ala. 1938); Farah v. Farah, 429 S.E.2d 626, 629 (Va. Ct. App. 1993).

common consent of nations” it is void.³²⁰ If the marriage is against public policy, the marriage will be invalid in the U.S.³²¹ Public policy has been defined as that which “refers to the morality, conscience, and public good of a state as exemplified in its state constitution, legislative statutes, and judicial opinions.”³²² To determine if a marriage is against public policy, the court looks to whether such a marriage is prohibited by its own law, such as polygamy or incest.³²³

One major problem in the United States on recognition of foreign marriages is the problem of polygamy. It seems extremely unfair to women who have validly married into polygamous marriages in a foreign country, to then immigrate to the United States, and have their marriages dissolved. England has solved this problem by allowing polygamous marriages to be valid, if they were contracted according to the law of both the party’s domiciles, and it was valid in the country where it was contracted.³²⁴ This allows any polygamous immigrants to keep their wives.

Early in our own history, certain decisions mentioned in dicta that the United States would recognize foreign polygamous marriages.³²⁵ The early case of *Ng Suey Hi v. Weeden* soon overruled the previous dicta. In this case, the daughter of the second wife of an American citizen sought citizenship on the basis that she was the daughter of an American citizen. Her father had two wives in China but had not brought them to the United States.³²⁶ The court denied her petition stating she was an illegitimate, due to the fact a polygamous marriage could not be recognized.³²⁷ The later case of *Kaur v. Boyes* took a different view. In this case, an Indian man had entered into a polygamous marriage while living in India, but left his wives behind when he immigrated to the United States. After he died intestate, his wives petitioned the California court for their inheritance jointly.³²⁸ The court allowed both wives to inherit due to that fact that it was not against public policy.³²⁹ These cases appear to contradict one

320. Ex parte Chace, 58 A. 978, 980 (R.I. 1904).

321. *Osoinach v. Watkins*, 180 So. 577, 580 (Ala. 1938) quoting 38 C.J.S. §3.

322. Peter Nash Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. FAM. L. 9, 14 n.18 (1982-83).

323. *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961).

324. P.M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW* 621 (12th ed. 1992).

325. G. W. Bartholomew, *Recognition of Polygamous Marriages in America*, 18 INT’L & COMP. L.Q. 1022, 1069 (1964).

326. *Ng Suey Hi v. Weeden*, 21 F.2d 801 (1927).

327. *Id.* at 802.

328. *Kaur v. Boyes*, 188 P.2d 499 (Cal. App. 1948).

329. *Id.* at 502.

another: one disallows recognition while the other allows it. The first can be distinguished as it was an American who entered into the polygamous marriage. Perhaps if the father had been Chinese, the daughter would not have been considered illegitimate. The second case was probably recognized, as it was entered into by an Indian, but he did not try to bring his wives to the United States. The court might have reached a different result if the wives lived in the United States. As it now stands, there has not been a case questioning the invalidation of a polygamous foreign marriage entering the United States. A recent case in dicta stated that even if a foreign court allowed polygamy, the United States will not recognize it.³³⁰

If a marriage is invalid in the United States, the parties are not always out of luck. If one or both of the spouses reasonably believed in good faith that the marriage was valid, the court will declare the parties putative spouses.³³¹ The good faith requirement is an objective standard. An honest belief is not enough.³³² As such, though not allowed to continue their relationship, they are entitled to a division of "quasi marital" property and, at times, spousal support.³³³

In order for the United States to recognize a foreign divorce, at least one of the parties must be domiciled in the country that grants the divorce.³³⁴ This requirement is essential to ensure that an American citizen will not evade the laws of the United States in order to get a divorce, which is contrary to the policy of the United States,³³⁵ or to secure a more favorable divorce settlement elsewhere. Notice is an essential element in determining the validity of a foreign divorce. If the party still living in the United States has no notice of a divorce instigated by the other in a foreign country, the divorce need not be recognized by the U.S. courts.³³⁶ A divorce received in a foreign court will not be recognized if it was procured by fraud or fraudulent evidence.³³⁷ Often, courts will recognize a foreign divorce "as a matter of comity."³³⁸ That is, if the foreign court would make the same decision as a U.S. court, the U.S. court will recognize the foreign

330. Estate of Khabbaza, 662 N.Y.S.2d 996, 997 (N.Y. 1997).

331. Neureither v. Workmen's Compensation Appeals Bd., 15 Cal. App. 3d 429, 433 (1971).

332. Vryonis v. Vryonis, 202 Cal. App. 3d 712, 721 (1988).

333. *Id.* at 717.

334. DeYoung v. DeYoung, 165 P.2d 457, 458 (Cal. 1946); Kapigan v. Minassian, 99 N.E. 264, 265 (Mass. 1912) (holding Turkish law voiding a marriage when the wife married a Muslim was valid in U.S.).

335. Atassi v. Atassi, 451 S.E.2d 371, 375 (N.C. Ct. App. 1995).

336. Corvin v. Commonwealth, 131 Va. 649, 656 (1921).

337. *Id.*

338. Loker v. Gerald, 157 Mass. 42,45 (1892).

divorce.³³⁹ If the recognition of the divorce, or marriage, is repugnant to the law of the United States, it need not be recognized under the doctrine of comity.³⁴⁰

At times, the United States will recognize a non-judicial foreign divorce; that is a divorce that was not procured by a foreign court. Such divorces are usually religious in nature. The divorce will only be recognized in the United States if at least one party is domiciled in the foreign country in which the divorce was made, and there is proof that such a divorce will be binding in that country.³⁴¹ At times, parties will seek a non-judicial divorce outside their domicile and seek to have it recognized in the United States. In this situation, the United States will look to see if the domicile country of the parties would recognize it. If that country recognizes the divorce, the United States will recognize it also. If the foreign country does not recognize the divorce, neither will the United States.³⁴² For example, if a Pakistani couple divorces by talaq pronounced in Iran, the United States will recognize the divorce if Pakistan does. Often, a foreigner living in the United States will try to obtain a non-judicial divorce, usually based on religious law, while in the United States. In this situation, the United States will recognize this divorce if two factors are met: first, the foreigner must still be a subject of the foreign country which authorizes the non-judicial divorce, and second, the divorce must be granted by the foreign government—not by a representative located in the United States.³⁴³ For example, a Pakistani national living in the U.S. tried to obtain a non-judicial divorce in the United States. According to the laws of Pakistan, before the enactment of the Muslim Family Law Ordinance of 1961, he divorced his wife by talaq in front of the National Director of the Islamic Mission in America. The papers were filed at the Pakistani Consulate in New York, and the wife was subsequently notified.³⁴⁴ The Court ruled such a divorce is a non-judicial proceeding.³⁴⁵ As such, the husband must follow the divorce law of the state of New York. Any other attempt to divorce in the New York jurisdiction would be invalid. Had the husband traveled back to Pakistan and said the talaq

339. *See id.*

340. *Britell v. Jorgensen*, 129 P.2d 217, 220 (Mont. 1942).

341. Note, *United States Recognition of Foreign, Nonjudicial Divorces*, 53 MINN. L. REV. 612, 618 (1969).

342. *Id.* at 620.

343. *Id.* at 636.

344. *Shikoh v. Murff*, 257 F.2d 306, 307 (2d Cir. 1958).

345. *Id.* at 308.

there, the court would have recognized the divorce as a matter of comity.³⁴⁶ The U.S. will recognize a foreign divorce if at the time of divorce the parties are present in the U.S., but the authority authorizing the divorce is in the foreign country.³⁴⁷ Had Shikoh applied directly to a Pakistani consulate, who would issue a divorce through the Pakistani government, instead of getting a religious divorce issued from the U.S., the court probably would have recognized the divorce.

Often parties will attempt to obtain "quickie" divorces in other countries, either to get a more favorable result or just to speed up the process. There are three types of quickie divorces. The first are mail order divorces, where neither of the parties enter the foreign jurisdiction to obtain the divorce, but get the decree by mail.³⁴⁸ This type of divorce is routinely held to be invalid in all American jurisdictions.³⁴⁹ The second type are ex parte divorces, where one party goes to the foreign jurisdiction to obtain the divorce and gives notice to the second party.³⁵⁰ This type is held as invalid as the first party was not domiciled in the foreign jurisdiction and it is often unclear whether the second party submitted to such jurisdiction.³⁵¹ The third type is a bilateral divorce, where both parties travel to and consent to the foreign jurisdiction.³⁵² Historically, U. S. courts refused to recognize bilateral divorces. *Rosensteil v. Rosensteil*³⁵³ changed that. The court held a bilateral foreign divorce would be recognized if it is consensual and does not violate United States public policy.³⁵⁴ *Rosensteil* is still a minority view.³⁵⁵ Most jurisdictions still refuse to recognize a bilateral divorce.³⁵⁶

Usually, U.S. courts will recognize any foreign divorce made on religious grounds as a matter of comity,³⁵⁷ but at times, U.S. courts will reject valid divorces made in other countries. For instance, the talaq, while a valid means of divorce in Pakistan and Iran, is not recognized in the U.S. when said by a Muslim to his non-Muslim wife. The policy reason for this

346. *Id.* at 309.

347. Reed, *supra* note 2, at 314-15.

348. Stephen C. Glassman, *The Tangled International Divorce Web: Recognition and Enforcement at Home*, 9 FAM. ADVOC. 4, 6 (Spring 1987).

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Rosensteil v. Rosensteil*, 209 N.E. 2d 709 (N.Y. 1965).

354. *Id.* at 713.

355. Glassman, *supra* note 348, at 6.

356. *Id.*

357. Reed, *supra* note 2, at 313.

is the severity of consequences to the wife is beyond moral decency.³⁵⁸ The talaq when said to a Muslim woman and confirmed by a foreign government is usually recognized. An example is *Chaudry v. Chaudry*, which is also illustrative of how a non-judicial divorce pronounced in the United States can be effective. The husband in this case was a Pakistani national whose wife lived in Pakistan. He divorced her by talaq in the United States at the Pakistani consulate. The divorce was confirmed on appeal by a Pakistani appellate court.³⁵⁹ The divorce had been contested by the wife in both Pakistani courts. Therefore, as her rights had been fully represented in the foreign courts, the United States recognized the divorce as a matter of comity.³⁶⁰ Finally, the court held the Pakistani rulings as to the matter of division of assets and child support could not be changed.³⁶¹ It also refused to allow her alimony as she is not entitled to such under Pakistani law.³⁶² The court's ruling on child support and alimony is essential. Had the court allowed a reopening of these topics previously ruled on in the foreign court and granted her a division according to American law, the floodgates would have been opened. Such a ruling would allow numerous women all over the world to petition the United States in hope of a more favorable ruling than they would be allowed in their own countries.

At times, persons living in the United States attempt to form temporary marriages. Unfortunately, there are not many court decisions that deal with the subject. One of the few available decisions is *Vryonis v. Vryonis*. The court in this case seemed consider that temporary marriages are unlawful as a given.³⁶³ The court instead focused on the wife's status as a putative spouse. The wife, Fereshteh, was an Iranian national living in the United States. She contracted a temporary marriage with a Christian man. When he decided to marry another woman, she petitioned the court for a divorce seeking a division of property and alimony.³⁶⁴ The court held the marriage was invalid as it did not conform with the laws of California.³⁶⁵ It had not been recorded, witnessed, and there was no cohabitation. A reasonable person would have realized such a union was not valid. Therefore, she could not even reach the status of a putative

358. *Seth v. Seth*, 694 S.W.2d 459, 463 (Tex. App. 1985).

359. *Chaudry v. Chaudry*, 388 A.2d 1000, 1004 (N.J. 1978).

360. *Id.* at 1005.

361. *Id.* at 1008.

362. *Id.*

363. *Vryonis v. Vryonis*, 202 Cal. App. 3d 712, 722-23 (1988).

364. *Id.* at 715-16.

365. *Id.* at 722.

spouse.³⁶⁶ Interestingly, Fereshteh, had held herself out to be an expert on Shi'i Islamic law.³⁶⁷ As such, she should have known that the temporary marriage was invalid since she could not marry anyone but a Muslim.³⁶⁸ Secondly, as an expert, she should have known it was the husband's right to end the marriage at any time.³⁶⁹ Thirdly, he was in no way obligated to support her.³⁷⁰ Had the trial court known any of these facts, they probably could have just dismissed it initially and not had to waste time with an appeal.

Often, couples who marry in Muslim countries or Muslims that marry according to Islamic law in the United States end up divorcing according to the laws of the United States. While this presents no problem as to recognition, other than that from the original Muslim countries, parties often have difficulty getting the court to enforce the marriage contract, especially the mahr requirement. One such court, while giving joint custody of the children, child support, and division of marital property, refused to grant the wife payment of the mahr. The court ruled such a contract was invalid.³⁷¹

Another reason marriage contracts are not enforced is that often they do not conform to the public policy of the United States. Often times in Islamic marriage contracts the wife does not have any assistance in the negotiation of the contract. As a result, these contracts often tend to strongly favor the man. United States courts see this as unconscionable and therefore unenforceable.³⁷²

VI. SOLUTIONS

In order to prevent the problem of limping marriages, solutions on a worldwide scale must be found. There have been numerous treaties and agreements made, that have been designed to end the problem of limping marriages.³⁷³ Unfortunately, none have ended the problem on a worldwide

366. *Id.*

367. *Id.* at 724.

368. HAERI, *supra* note 159, at 52.

369. MOSTESHAR, *supra* note 198, at 236.

370. PETRUSHEVSKY, *supra* note 203, at 230.

371. *Solati v. Solati*, 2000 WL 38876 (Conn. Super. Ct. 2000).

372. *See Chaudhary v. Ali*, 1995 WL 40079 at *2 (Va. Ct. App. 1995).

373. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L. Q. 497, 506 (1995).

scale. One of the greatest difficulties to overcome is the wide variety of religious and social ideas.³⁷⁴

One of the first efforts to regulate international marital laws occurred in 1902 at The Hague Conventions Relations to Differences in Marriage Laws, Divorce Laws, and Guardianship of Minors. This convention recommended using the party's nationality as a basis for determining which law applies.³⁷⁵ Only European nations signed the agreement. Some of these later withdrew.³⁷⁶ World War I ended its effectiveness.³⁷⁷

A more effective convention, The Hague Convention on the Recognition of Divorces and Legal Separations,³⁷⁸ proposed a model for countries to follow in recognizing foreign divorce. Simply stated, any divorce will be recognized by any means as long as the divorcing state has jurisdiction.³⁷⁹ To determine recognition, a court of the contracting states should look to the habitual residence of the respondent; the habitual residence of the petitioner conditioned that the petitioner had so resided in the jurisdiction for a least one year or the parties had resided together in the jurisdiction; the nationality of the parties; whether the petitioner was a national of the jurisdiction, provided that he habitually resided there or resided there for a period of one year in at least in the past two years prior to the divorce proceedings; or the petitioner was a national of the jurisdiction and was present in such jurisdiction at the onset of the proceedings and the parties last habitual residence was in a jurisdiction that did not allow divorce.³⁸⁰

The Convention further outlines situations in which it would be proper to refuse to recognize a divorce. These include: the recognition would be incompatible with a previous decision regarding the validity of the divorce, the divorce is grossly against public policy, and finally, the respondent was not notified or was not given an opportunity to defend his case.³⁸¹

These provisions are binding on countries which have ratified this agreement. Unfortunately, many countries including the United States, Pakistan, and Iran are not parties to this agreement and do not follow it.

374. A. E. Anton, *The Recognition of Divorces and Legal Separations*, 18 INT'L & COMP. L.Q. 620 (1969).

375. Wardle, *supra* note 373, at 507.

376. *Id.*

377. Anton, *supra* note 374, at 622.

378. Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, 978 U.N.T.S. 393.

379. *Id.*

380. *Id.*

381. *Id.*

Surprisingly, Egypt is a party to the convention. Although this convention is not binding throughout the world, it is highly persuasive.

An American case, *Atassi v. Atassi*, tested the applicability of the Hague Convention in the United States. The court did not find it persuasive stating the Hague Convention “does not have the force of law in this country.”³⁸² In that case, the spouses, both Syrian nationals, had been married in Syria and moved to the United States where the husband was a citizen.³⁸³ They returned to Syria for a visit in which, according to Syrian law, the husband pronounced a revocable divorce on the wife.³⁸⁴ Upon returning to the United States, he regretted his decision and took his wife back.³⁸⁵ Several months later their marriage again broke down and she left and sued for support.³⁸⁶ He filed for summary judgment relying on the validity of his earlier divorce.³⁸⁷ The court focused on his domicile to tell whether the divorce was enforceable.³⁸⁸ Had the court looked to the validity of the divorce itself under Islamic law, it would have realized that the couple, even under Syrian law, were still married. In most Islamic countries, the talaq is not said three times at once, but said on three separate occasions, the first two, being revocable, and the third final.³⁸⁹ If the husband pronounces only one talaq, the wife must observe her idda but if during that time the husband wishes to have her back, he may simply revoke the divorce and the marriage continues.³⁹⁰ Of course, after the third time, he may no longer take her back.³⁹¹ It appears in this case the husband had pronounced one revocable talaq effectively and had subsequently taken the wife back. Thus, he was still validly married.

A later Hague convention³⁹² tried to regulate the recognition of marriages as it had done for divorces earlier. Article two and Article nine provide that the law governing the validity of marriages is *lex loci contractus*, or the place where the marriage is celebrated.³⁹³ A contracting party may refuse to recognize a marriage only if “one of the spouses was

382. *Atassi v. Atassi*, 451 S.E.2d 371, 375 (N.C. Ct. App. 1995).

383. *Id.* at 372.

384. *Id.* at 373.

385. *Id.*

386. *Id.*

387. *Id.* at 373-74.

388. *Atassi v. Atassi*, 451 S.E.2d 371, 375 (N.C. Ct. App. 1995).

389. DOI, *supra* note 11, at 175-77.

390. *Id.*

391. *Id.*

392. Convention on Celebration and Recognition of the Validity of Marriages, Mar. 14, 1978, 16 I.L.M. 18.

393. *Id.*

already married; or the spouses were related to one another, by blood or by adoption, in direct line or as brother and sister; or one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or one of the spouses did not have the mental capacity to consent; or one of the spouses did not freely consent to the marriage.”³⁹⁴ Even fewer countries have ratified this convention, yet Egypt is one of them.

The two Hague conventions do provide a workable solution to the problem of recognition and through the example of Egypt, should be acceptable even to an Islamic state. Likewise, the United States follows several of the principles of recognition outlined in the conventions.

VII. CONCLUSION

“If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”³⁹⁵ Unfortunately, many people especially immigrants do not have this luxury. With our ever increasing global travel and immigration, there needs to be a worldwide system to grant marriages and divorces that would be effective worldwide. The Hague Convention has attempted to provide such a solution, but it is not binding on the countries that need it the most.³⁹⁶ There is a need for marriage and divorces to conform to public policy, but whose? The public policy of Islamic countries differs greatly amongst themselves, as do their laws, as seen with Pakistan and Iran.³⁹⁷ Even the public policy of a “westernized” Islamic law nation still differs greatly with the United States. Ending the problem of limping marriages must be done in stages. If the Middle East can arrive at some form of agreement along the same lines Europe did with the Hague Convention (on how to recognize the differences of marriage and divorce amongst themselves), then a more worldwide committee could reach compromises on how to recognize marriage and divorce internationally. Today, Pakistan and Iran, as well as other members of the Islamic world, are compromising their laws—especially on divorce and polygamy to look more like the laws of the West.³⁹⁸ England and Europe have compromised by allowing Islamic-style

394. *Id.*

395. *Estin v. Estin* 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

396. Adair Dyer, *The Tangled International Divorce Web: Recognition and Enforcement Abroad*, 9 FAM. ADVOC. 5, 12 (Spring 1987).

397. *See generally supra* Part III, IV.

398. *See generally supra* Part III, IV.

divorces to be recognized, and for polygamy, as long as the divorce and polygamous marriage occurred in the country allowing it, according to the personal law of the parties.³⁹⁹ Only the United States has held out, but it has made improvements in recognizing Islamic divorces if the parties effectuated the divorce in the foreign country, and were still domiciled there.⁴⁰⁰ The way to get to a worldwide bargaining table will only occur when countries are willing to accept the fact that their own laws do not solve the problem of limping marriages, and realize they cannot enforce their public policy on the rest of the world. Until then, the problem of limping marriages will continue.

399. NORTH & FAWCETT, *supra* note 324; Dyer, *supra* note 396, at 11.

400. DeYoung v. DeYoung, 165 P.2d 457, 458 (Cal. 1946); Kapigan v. Minassian, 99 N.E. 264, 265 (Mass. 1912) (holding Turkish law voiding a marriage when the wife married a Muslim was valid in U.S.); Reed, *supra* note 2, at 314-15.