Broadening the Escape Clause: How the UCCJEA Can Protect Female Survivors of Domestic Violence

Emma Walters*

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), U.S. courts must enforce a custody order from an international court unless the custody laws of that country constitute a "fundamental violation of human rights." Historically, U.S. courts have rarely invoked this "escape clause." However, this Note argues that this narrow construction of the escape clause is incorrect. Focusing on the case study of mothers in Pakistan, this Note articulates two legal realities that should be considered a violation of human rights under the UCCJEA. First, a gendered requirement of male custody violates a mother's human right to parent with dignity. Second, a legal system that actively allows abusive husbands to use the law as a sword against their wives violates a mother's human right to live without violence. Unless U.S. courts engage in a critical analysis of gender and its intersection with international law, custody law, and domestic violence, they will not use the UCCJEA to its full potential to provide legal protection for survivors of domestic violence who flee to the United States with their children.

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* J.D. 2021, University of California, Berkeley School of Law.
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INTRODUCTION

International child custody disputes carry with them a host of conflicting issues for both individual parties and the forum in which they chose to proceed. Importantly, a U.S. court has to initially decide if it has jurisdiction to hear the case. If a foreign country has already issued a custody order, a U.S. court might want to honor that decision under the doctrine of comity to preserve international judicial respect and efficiency. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was created to help resolve these jurisdictional issues.[1] In the international context, the UCCJEA requires a U.S. court to uphold a custody order of a foreign country unless the custody laws of that country constitute a violation of a fundamental principle of human rights.[2] This so-called escape clause has rarely been successful in modifying or ignoring a foreign order because U.S. courts have maintained a narrow definition of a violation of human rights.[3] However, this Note argues that the enforcing legal bodies must expand

1. *See* Unif. Child-Custody Jurisdiction & Enf't Act § 105 (Nat'l Conf. of Comm'rs on Unif. State L. 1997).
2. *Id.*
3. *See* discussion *infra* Part II.

their interpretation of the escape clause to help protect women who flee domestic violence with their children.[4]

The escape clause provides a useful tool to promote child welfare and maternal rights in cases that involve domestic violence. In this Note, I argue that two situations should trigger the escape clause under the UCCJEA because they constitute violations of fundamental human rights. First, a statutory structure that grants custody to one parent over another based solely on gender is a violation of human rights. Second, a failure of a national family law system to protect a partner from domestic violence is a violation of human rights. Historically, U.S. courts have not considered gendered custody decision-making and domestic violence to be severe substantive abuses of human rights. Despite the prevalence of domestic violence across international borders and its far-reaching negative effects on its victims, most courts in this country have refused to invoke the escape clause of the UCCJEA because they do not consider these abuses to be sufficiently egregious.[5] This means that courts ignore a mother's and a child's human rights when the courts believe they do not have the authority to intervene. However, a more nuanced understanding of how an international legal system treats gender provides an opening that should enable U.S. courts to allow survivors of domestic violence to use the escape clause when they flee their abusive co-parents. This case study of Pakistan[6] demonstrates how U.S. courts have erred by not fully understanding how custody laws work in other countries, especially those under Sharia law.

It is important to note that neither the UCCJEA nor this Note's call for expansion of the escape clause is meant to be a judgment or condemnation of international law, Islamic or otherwise. Islam and its interpretation vary greatly between communities and countries, in part because "there is not a pure, neatly defined, monolithic and homogeneous Islamic law."[7] Rather, I focus on the

4. All people can be impacted by domestic violence, and all parents can be subject to the mandate of the UCCJEA. *See Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/statistics [https://perma.cc/DG4R-89LL]. While people of all genders can be co-parents and partners, this Note focuses on heterosexual co-parenting relationships because of the high rates at which male partners perpetuate domestic violence against women. *See Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), https://www.who.int/news-room/fact-sheets/detail/violence-against-women [https://perma.cc/MV2S-EJFG]. Further, this Note chooses to focus on women because women are disproportionately the targets of domestic violence worldwide. *See id.*

5. *See infra* notes 50–79 and accompanying text.

6. While U.S. courts have applied the UCCJEA to international custody decisions from a wide variety of countries, this Note focuses on Pakistan for several reasons. First, Pakistan's confluence of constitutional and religious law provides a broader legal landscape for courts to critically examine. *See infra* Part III.B. Second, recent U.S. state court decisions have focused on custody disputes that originated in Pakistan and thus provide useful precedent. *See infra* Part II.A. Third, English, along with Urdu, is a national language of Pakistan, which makes primary research more accessible. *See* Oishimaya Sen Nag, *What Languages Are Spoken in Pakistan?*, WORLD ATLAS (July 30, 2019), https://www.worldatlas.com/articles/what-languages-are-spoken-in-pakistan.html [https://perma.cc/ZE3F-RYFK].

7. Ihsan Yilmaz, *Pakistan Federal Shariat Court's Collective* Ijtihād *on Gender Equality, Women's Rights and the Right to Family Life*, 25 ISLAM & CHRISTIAN-MUSLIM RELS. 181, 188 (2014).

specific laws of Pakistan because they provide uniquely strong evidence that the UCCJEA does indeed provide recourse for certain survivor-mothers to gain custody of their children and flee violence.

I.
UCCJEA BACKGROUND

For many survivors of domestic violence, custody of shared children is a key aspect of separation. Over the years, the United States has developed a "series of laws designed to deter interstate parental kidnapping and promote uniform jurisdiction and enforcement provisions in interstate child-custody and visitation cases."[8] In 1997, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the UCCJEA.[9] Forty-nine states and the District of Columbia have adopted the UCCJEA, and most states have adopted it nearly verbatim.[10] For example, California has adopted the UCCJEA in full, and its escape clause is mirrored in California Family Code § 3405(a)–(c).[11]

Critically, the UCCJEA does not govern *how* a custody case is decided. Rather, it "specifies which court has the power to decide a custody case."[12] As such, the UCCJEA is a jurisdictional act. Jurisdiction determinations are both complicated to navigate and essential for survivors of domestic violence who want to gain custody of their children and protect them from the abusive spouse or co-parent. According to a UCCJEA court guide, "[i]nterstate custody cases involving domestic violence arrive at the courthouse in a variety of ways," including situations where survivors escape their abusive partners or when survivors attempt to remove children from an abuser.[13] Even if a survivor-parent is able bring a custody case to a U.S. court, the court may not have the jurisdiction to hear it because of procedural hurdles like the UCCJEA.

As the New Hampshire Supreme Court eloquently stated, "[t]hat a foreign jurisdiction's law is different from ours is not an indication that it violates fundamental principles of human rights, and, therefore, that is not the test under the UCCJEA." *In re* Yaman, 105 A.3d 600, 611 (N.H. 2014).

8. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, JUV. JUST. BULL., Dec. 2001, at 1, 1.

9. *Id.*

10. Kevin Wessel, Note, *Home Is Where the Court Is: Determining Residence for Child Custody Matters Under the UCCJEA*, 79 U. CHI. L. REV. 1141, 1148–49 (2012). The only state to not adopt the UCCJEA is Massachusetts. Wendy O Hickey, *Family Law in the United States: Massachusetts* § 2, GLOB. GUIDE TO FAM. L., Westlaw (database updated Dec. 1, 2020). Massachusetts did adopt the previous UCCJA. *See id.*; *see also* MASS. GEN. LAWS ch. 209B (2021).

11. Cal. Fam. Code § 3405(a)–(c) (West 2021).

12. Legal Res. Ctr. on Violence Against Women, Nat'l Council of Juv. & Fam. Ct. Judges & Nat'l Ctr. for State Cts., *Uniform Child Custody Jurisdiction and Enforcement Act: Guide for Court Personnel and Judges* 2 (2018), https://www.ncjfcj.org/wp-content/uploads/2018/07/UCCJEA_Guide_Court_Personnel_Judges_Final_508.pdf [https://perma.cc/4BUQ-3ZB6] [hereinafter UCCJEA Guide].

13. *Id.* at 1.

The UCCJEA emerged against the "muddled statutory background" of attempts to unify jurisdictional standards in custody cases.[14] The UCCJEA was seen as an update to the 1968 Uniform Child Custody Jurisdiction Act (UCCJA).[15] Under the UCCJA, a child's affiliation with a particular state or locality determined proper jurisdiction for a custody case.[16] In essence, the UCCJA established jurisdiction in one state and protected that state's order unless the original state lost jurisdiction.[17] This solution was thought to protect against forum shopping by parents who wanted to manipulate the system by finding the most favorable court for their case.[18] However, because the UCCJA provided four grounds for jurisdiction, including home state, significant connection, emergency, and vacuum,[19] multiple states often ended up with enforceable jurisdiction.[20] The Parental Kidnapping Prevention Act of 1980 (PKPA) tries to clarify this issue by giving priority to the home state and granting it exclusive jurisdiction until all the parties left that state.[21] Though the PKPA aims to deter interstate child abduction,[22] the PKPA only applies to domestic custody disputes and does not expressly govern international jurisdiction issues.[23]

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) remains an important part of the legal landscape for international child custody disputes. In 1988, the United States signed onto the Hague Convention in order to provide court access to a "left-behind" parent in situations involving the wrongful removal of a child to another country.[24] The Hague Convention contains a defense within Article 20 that allows a court to refuse to return a child based on a foreign custody order if "[t]he return of the child . . . would not be permitted by the fundamental principles of the requested

14. Wessel, *supra* note 10, at 1144.

15. *Id.* at 1146.

16. Hoff, *supra* note 8, at 2. This Note uses "state" as a shorthand because the UCCJEA uses the word "state" to refer to both state and non-state jurisdictions within the United States. UCCJEA § 102(15) ("'State' means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.").

17. Wessel, *supra* note 10, at 1145.

18. *Id.*

19. Home state jurisdiction under the UCCJA refers to where the child has lived for over six months. Hoff, *supra* note 8, at 2. Significant connection jurisdiction refers to substantial evidence that connects the child to the state. *Id.* Emergency jurisdiction refers to situations that require protective action based on abuse, abandonment, or other grave situations. *Id.* Vacuum jurisdiction refers to situations where no other rationale exists. *Id.*

20. *Id.*

21. Wessel, *supra* note 10, at 1145.

22. Marian C. Abram, Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RSRV. L. REV. 89, 114 (1982).

23. *See* Patricia M. Hoff, Adrienne E. Volenik & Linda K. Girdner, *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, 48 JUV. & FAM. CT. J., no. 2, Spring 1997, at 1-1, 10-3 to -4.

24. D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 549 (2004).

State relating to the protection of human rights and fundamental freedoms."[25] The Hague Convention, however, "does not even address issues of jurisdiction in transnational custody matters, and its enforcement remedies are incomplete" because the remedies are primarily limited to required notice and procedural delays.[26] As such, U.S. courts often rely on domestic law to determine jurisdiction in international custody disputes.[27] In short, the Hague Convention controls when a party seeks the return of a child to another country after possible unlawful removal, and the UCCJEA controls in cases regarding enforcement of a foreign custody order.[28]

The UCCJEA replaced the UCCJA in 1997 and clarified jurisdictional standards by providing more "thorough rules."[29] As such, the UCCJEA "gives a state exclusive, continuing jurisdiction once it makes an initial child custody determination."[30] Like the PKPA, the UCCJEA gives priority to home state jurisdiction,[31] followed by the significant connection test. The UCCJEA also contains fallback provisions that include emergency jurisdiction, more convenient forum, and vacuum jurisdiction.[32] The rationales underlying the UCCJEA include eliminating excessive litigation, encouraging conformity between states, prioritizing the well-being of the child, and decreasing legal manipulation by abusive parents.[33] Importantly, the UCCJEA requires that domestic courts treat foreign countries as states for custody proceedings.[34] Under the UCCJEA, U.S. courts must recognize and enforce a custody determination of a foreign country that conforms to the factual circumstances of the present case and complies with procedural rules.[35]

Like the Hague Convention, the UCCJEA contains an escape clause under Section 105(c) that states: "A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights."[36] Thus, if a foreign country's laws violate a fundamental principle of human rights, the U.S. courts do not need to follow that country's custody decision. However, the courts have often construed the escape clause narrowly.[37]

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25. Hague Convention on the Civil Aspects of International Child Abduction art. 20, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

26. Blair, *supra* note 24, at 553.

27. *Id.* at 554.

28. *See* Hoff et al., *supra* note 23, at 10-1.

29. Wessel, *supra* note 10, at 1146.

30. *Id.* at 1147.

31. *See* UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 201 cmt. 1 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997). ("This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.").

32. UCCJEA GUIDE, *supra* note 12, at 5–6; UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT §§ 201–204 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

33. UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 101 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

34. *Id.* § 105.

35. *Id.* § 105(a)–(b).

36. *Id.* § 105(c).

37. *See infra* Part III.

Notably, drafters explicitly modeled Section 105(c) of the UCCJEA after the Article 20 defense in the Hague Convention.[38] In its comment to the Hague Convention, the U.S. Department of State stated that U.S. courts should only invoke their power to ignore a foreign custody order "on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[39] Taking a similar deferential stance in its own comment to Section 105, the NCCUSL articulates that the UCCJEA "takes no position" on what laws violate human rights; rather, the clause should be "invoked only in the most egregious cases."[40]

Under the plain meaning of this language, Professor D. Marianne Blair cautions that the UCCJEA "Comment's linkage between the [fundamental human rights] exception and Article 20 could easily be construed as a death knell" for the invocation of the escape clause, especially as U.S. courts are rare to invoke Article 20 of the Hague Convention.[41] While the comment shows that the NCCUSL was concerned about the possibility of "magnifying every difference between the U.S. legal system and that of a foreign nation," the inclusion of an escape clause in the first place "indicate[d] their awareness that international cases would arise in which UCCJEA application would be inappropriate."[42] However, "a viable Section 105(c) is necessary" to the intended interplay between the UCCJEA and the Hague Convention.[43] For survivor-parents seeking to modify a custody order from a foreign jurisdiction, the UCCJEA's escape clause can be construed as a lifeline in the form of a procedural determination.

II.
U.S. COURTS HAVE NARROWLY INTERPRETED THE UCCJEA ESCAPE CLAUSE

Courts frequently turn to the UCCJEA to determine custody jurisdiction, as it is the model law in forty-nine states.[44] However, few courts have been able to consistently set the boundaries of the scope of Section 105(c).[45] In general, courts have refused to invoke the escape clause for one or more of three reasons. First, custody laws that include parental preference for men as one of the factors

38. *See* UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 105 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997); *See also* Hoff, *supra* note 8, at 5. The Hague Convention also includes an exception where there is a "grave risk" that the child will be subjected to dangerous conditions if sent back to the home country. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 25, at art. 13; *see also infra* Part IV (discussing a U.S. court case that invoked the exception under the Hague Convention).

39. Hague International Child Abduction Convention, *Text and Legal Analysis*, 51 Fed. Reg. 10,494-01, 10,510 (U.S. Dep't of State Mar. 26, 1986).

40. UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 105 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

41. Blair, *supra* note 24, at 564.

42. *Id.* at 565.

43. *Id*. at 578.

44. Wessel, *supra* note 10, at 1142.

45. Blair, *supra* note 24, at 565.

in determining custody are not sufficient to constitute a violation of human rights, mainly because of the United States' former similar tender years doctrine.[46] Second, as noted below, U.S courts have overwhelmingly held that foreign custody laws that maintain superficial conformity to the best interests of the child standard are sufficient to uphold a foreign custody order, even when that country's laws do not allow for joint custody.[47] Finally, because most countries do not have written laws that actively permit domestic violence, U.S. courts rarely take family violence into account.[48] Despite courts' historical reluctance to invoke the escape clause, a recent District of Columbia Superior Court decision opened the door to a more expansive use of the UCCJEA's protective Section 105.[49]

As a general matter, U.S. courts have been averse to using the UCCJEA's escape clause. The case of *Coulibaly v. Stevance* exemplifies this unwillingness: in *Coulibaly*, the Court of Appeals of Indiana denied a mother's request to modify a Mali custody order that granted custody to the father.[50] Coulibaly, a mother who claimed she was a survivor of domestic violence, sought to modify the custody order by arguing that the laws of Mali violated her human rights under the UCCJEA.[51] The court rejected that argument for three reasons. First, the custody laws of Mali merely "favor[ed]" fathers over mothers, and the court held that mere favoritism did not rise to the level of a human rights violation.[52] Under the Malian system of fault-divorce, the mother argued, custody is more often awarded to the party not at fault, which usually is the male partner given the propensity for Malian courts to decide that the woman is at fault for the dissolution of the marriage.[53] The court, however, found this argument unconvincing.[54] Second, because the Malian custody laws focused on the best interest of the child, the preference for male custody did not constitute a violation of human rights because "parental preference . . . is not conclusive."[55] Finally, the court refused to consider whether Mali's female genital mutilation laws violated human rights for purposes of the UCCJEA because "consideration of every law likely to affect children would throw the doors wide open."[56]

However, the *Coulibaly* court left open important possibilities of statutory interpretation. First, it differentiated between custody laws that have a gender

46. *See* discussion *infra* Part II.

47. *See infra* Part III.

48. *See infra* Part IV.

49. *See* Shaikh v. Lakhani, No. 2016 DRB 002734, slip op. at 13 (D.C. Super. Ct. July 28, 2017) (order granting in part and denying in part defendant's motion to dismiss).

50. Coulibaly v. Stevance, 85 N.E.3d 911, 921 (Ind. Ct. App. 2017).

51. *Id.* at 914.

52. *Id.* at 921.

53. *Id.* at 918–19.

54. *Id.* at 921.

55. *Id.* at 920–21.

56. *Id.* at 921. Even though the court acknowledged that female genital mutilation is a human rights violation, it did not allow it to come in as a violation of human rights under the custody laws of Mali. *Id.* One child in question was female. *Id.* at 914.

preference versus laws that use gender as a sole rationale.[57] In doing so, the court held that "[w]e see nothing in the comments to the UCCJEA that would require a court to turn a blind eye to the realities of the custody order before it in such a situation."[58] Second, the *Coulibaly* court did not foreclose the examination of other laws that affect custody. While the court found that Mali's failure to outlaw female genital mutilation was too indirectly related to the custody laws under consideration,[59] it is arguable that domestic violence, especially violence that affects the children of the abuser, is within the sphere of custody laws and open to examination by the court.

In a similar but older case interpreting the UCCJA, the Court of Special Appeals of Maryland in *Malik v. Malik* refused to affirm the trial court's decision that a Pakistani custody order was not entitled to comity.[60] The court, considering a second appeal of this case in *Hosain v. Malik*,[61] held that the custody laws of Pakistan neither (1) failed to apply the best interest of the child standard when it gave custody to the Pakistani father nor (2) "arrived at its decision by applying a law (whether substantive, evidentiary, or procedural) so contrary to Maryland public policy as to undermine confidence in the outcome of the trial."[62] Therefore, the court concluded that the custody order must be granted comity in Maryland state court under the UCCJA.[63] In this case, the mother left the marital home in Pakistan with the couple's daughter.[64] When the father found out, he sued for custody. The mother escaped Pakistan with their daughter. [65] Upon fleeing, the mother moved in with another man, with whom she conceived a son in 1991. Afraid for her wellbeing if she returned to Pakistan due to strict adultery laws, she did not appear at the Pakistani custody hearing and the court granted custody to the father.[66] A trial judge in a Maryland circuit court refused to grant comity to the father's Pakistani court order.[67] The father appealed,[68] and on remand, the Maryland circuit court upheld the Pakistani

57. *Id.* at 919.
58. *Id.*
59. *Id.* at 921.
60. Malik v. Malik, 638 A.2d 1184, 1186 (Md. Ct. Spec. App. 1994), *aff'd sub nom*. Housain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).
61. The mother changed her name after the initial litigation. The parties remained the same. *See Hosain*, 671 A.2d at 989.
62. *Hosain*, 671 A.2d at 991 (citing *Malik*, 638 A.2d at 1184). Though this case was examined under the prior UCCJA, the court performed a similar analysis to the UCCJEA. *See* Eugene Volokh, Opinion, *U.S. Courts and Child Custody Judgments from Foreign Countries that Have Sex-Discriminatory Custody Rules,* WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/27/u-s-courts-and-child-custody-judgments-from-foreign-countries-that-have-sex-discriminatory-custody-rules/ [https://perma.cc/V5WS-CA2V] (explaining that although the *Malik* court examined the case under the prior UCCJA and thus did not examine the UCCJEA's escape clause, it performed a similar analysis).
63. *Hosain*, 671 A.2d at 989.
64. *Id.* at 990.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

custody order.[69] The mother then appealed to the Court of Special Appeals of Maryland, which affirmed a decision in favor of the father.[70]

The Court of Special Appeals held that a paternal preference under the Pakistan Guardian and Wards Act did not preclude the application of the required best interests of the child standard.[71] Because the doctrine of maternal *Hizanat*, discussed below, was "but one of the factors to be considered in the welfare of the child test" and was "no[t] more objectionable than any other type of preference," the law was not one "repugnant to Maryland public policy."[72] In her dissent, Judge Hollander argued that the Pakistani court did not apply the best interests of the child standard.[73] Further, she wrote that because the court "failed to investigate, consider, or resolve the mother's serious allegation of [the father's] substance and domestic abuse," the court only "paid lip service to something that sounds like a best interests of the child standard."[74]

In *In re Yaman*, the Supreme Court of New Hampshire similarly disregarded gendered parental rights and found that a custody law that does not provide for joint custody did not violate a fundamental principle of human rights.[75] In that case, the mother and father, both Turkish citizens, separated after the mother believed that the father was sexually abusing one of their two children.[76] The Turkish Family Court granted sole legal custody to the father and granted the mother "substantial visitation rights."[77] The mother then fled Turkey with the children and settled in New Hampshire, where she brought suit.[78] The court held that the substantive law of Turkey that does not allow for joint custody was not an "'egregious' or 'utterly shocking' violation that the UCCJEA contemplates as a reason to refuse to enforce a custody order."[79]

These three cases show that U.S. courts have been reticent to invoke the escape clause and instead have relied on superficial, textual interpretations of international law. However, a recent District of Columbia decision provides a new application of the escape clause that serves as a model for more nuanced analysis. In *Shaikh v. Lakhani*, the Superior Court for the District of Columbia proposed a test that stated:

> A violation of fundamental human rights would occur if Pakistani custody law discriminated on the basis of sex, and therefore did not offer one parent an equal opportunity to practice their fundamental right to

69. *Id.* at 989.
70. *Id.*
71. *Id.* at 1004.
72. *Id.* at 1004–05. *Hizanat* refers to a female-oriented sense of physical custody that is separate from male-oriented legal guardianship. *See infra* Part IV.B.
73. *Id.* at 1011–12 (Hollander, J., dissenting).
74. *Id.* at 1018, 1020.
75. *In re* Yaman, 105 A.3d 600, 611–12 (N.H. 2014).
76. *Id.* at 604.
77. *Id.* at 611–12.
78. *Id.* at 604–05.
79. *Id.* at 612.

parent or to advocate for a child's best interests.[80]

In this case, the relationship between Shaikh, the mother, and Lakhani, the father, was abusive.[81] The father attempted to isolate the mother from her family and "hit her on the wrist and collar bone with a hammer" as he tried to take her phone.[82] Further, he physically abused her several times in front of the children, and she once ended up in the hospital.[83] After one such incident where the father threatened to "cut her to pieces" and kill her, the mother left the home with the children.[84] After the father threatened that he was "on his way to the house with a gun to kill [the mother]," the mother, a U.S. citizen, returned to the District of Columbia at the recommendation of her father.[85] Shortly thereafter, the father filed for custody in Karachi, Pakistan under the Guardian and Wards Act.[86]

When she settled in the District of Columbia, the mother received a temporary protective order against the father.[87] She later filed for custody of the children, who were also American citizens.[88] The father filed a motion to dismiss.[89] In its determination, the D.C. Superior Court held that because the Guardian and Wards Act requires male guardianship, Pakistani laws embody a fundamental violation of human rights under the UCCJEA.[90] The court concluded that "the Pakistan justice system does not base its decision on the best interest of minor children, but on sex-preferences that severely discriminate against women."[91] As such, the court concluded that it was free to set aside the Pakistani custody order.[92] The superior court decision in *Shaikh* is a groundbreaking development for survivor-mothers trying to gain custody of their children under the UCCJEA.

III.
A GENDERED REQUIREMENT FOR LEGAL CUSTODY IS A VIOLATION OF HUMAN RIGHTS BECAUSE IT DENIES WOMEN THE RIGHT TO PARENT THEIR CHILDREN

As part of the right to safely parent with dignity, parents must be able to use the courts as a judicial arbitrator in custody decisions. As noted above, many U.S. courts have not considered a presumption of custody based on gender to be a violation of human rights, sufficient to justify vacating a foreign order. However, this Section argues that in the specific instance of Pakistani custody

80. Shaikh v. Lakhani, No. 2016 DRB 002734, slip op. at 13 (D.C. Super. Ct. July 28, 2017) (order granting in part and denying in part defendant's motion to dismiss).
81. *Id.* at 4–6.
82. *Id.* at 4.
83. *Id.*
84. *Id.* at 5.
85. *Id.* at 5–7.
86. *Id.* at 2, 8.
87. *Id.* at 3.
88. *Id.*
89. *Id.*
90. *Id.* at 20.
91. *Id.*
92. *Id.*

orders, U.S. courts are incorrect for three reasons. First, the primary custody law of Pakistan contains more than a rebuttable presumption of male custody. Rather, the Guardians and Wards Act creates a *requirement* of male guardianship.[93] Second, U.S. courts have incorrectly analyzed Islamic custody law. Unlike the U.S. system that combines physical and legal custody, the doctrine of *Hizanat* differentiates between the two along gender lines: while Pakistani fathers can be awarded both physical and legal custody of children, mothers can never gain legal custody under the law.[94] Third, legal custody is the more important marker of custody, and a presumptive denial of such violates a woman's equal opportunity to parent her child because without legal custody, a mother may not be able to properly care for her child.

A. U.S. Courts Require a Best Interests of the Child Standard in Custody Determinations, But Do Not Apply a Rigorous Analysis of the Standard to International Custody Law Cases Arising under the UCCJEA

All U.S. states maintain a "best interest" of the child standard.[95] This standard is not new but rather has deep roots in gendered ideas of the family. The best interests standard can be traced back to eighteenth century jurisprudence, though it was not fully adopted in the United States until the twentieth century.[96] The standard was initially created as a method to incorporate a mother's bond with a child against a paternalistic socio-legal backdrop, and "courts have remained wary of completely open-ended applications of a best interest standard."[97] This standard has come to replace the "tender years" doctrine, which assumed that the mother was the more nurturing parent for a younger child.[98] However, the tender years doctrine lost popularity in the twentieth century,[99] and "[m]any courts consider[ed] the maternal preference doctrine to be gender discriminatory."[100] Although the "precise contours of the best interest standard have been left to the states,"[101] the U.S. Supreme Court has hinted that the best interest determination is the preferred statutory standard, if not the set legal or

93. *See infra* note 148 and accompanying text.

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

95. Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 335 (1982).

96. June Carbone, *Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS S111, S112–13 (2014).

97. *Id.* at S113.

98. C. Gail Vasterling, Note, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-of-War?*, 67 WASH. U. L.Q. 923, 925 & n.15 (1989).

99. LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459, 469 (1989).

100. Vasterling, *supra* note 98, at 925 n.19.

101. Carbone, *supra* note 96, at S113.

constitutional standard.[102] Further, the Court has held that the state has a significant interest in "preserving and promoting the welfare of the child."[103] In a typical jurisdiction, best interests of the child will include a consideration of the relationship status of both parents, history of abuse, history of contact, and substance use.[104]

Under the old UCCJA, which the UCCJEA replaced in 1997, many courts interpreted a "public policy"[105] exception in which they could deny comity or enforcement of a foreign custody order "if the foreign court did not consider or apply the 'best interests of the child' standard."[106] However, some argue that this "creative" exception does not stand up to statutory construction.[107] In fact, the UCCJEA eliminated this public policy exception.[108] Nevertheless, the UCCJEA escape clause pointed to the need for U.S. courts to be able to deny comity when human rights were at stake.[109]

In theory, the NCCUSL included the escape clause to allow for a rigorous analysis in determining the best interests of the child in cases involving foreign custody orders. However, U.S. courts have not taken this opportunity; rather, they rely on oft-empty signposting regulatory language. For example, the court in *Coulibaly* rejected the argument that Malian fault-based divorce laws favored male custody. Instead, the court relied on the statutory text of Malian custody law that mentioned the phrase "best interests of the child" as a sort of backup provision.[110] Even though the mother alleged severe physical abuse by her husband, the Indiana court blindly upheld the Malian court's holding that "only the best interests of the children controlled this decision."[111] Given the factual context, the Indiana court should have critically examined whether the original custody order was in fact in the best interest of the child. Even if the court found that the facts of the case supported the Malian order, the court had the responsibility to do its due diligence. Similarly, the court in *Hosain* held that the Pakistani court followed the best interest standard even though the mother was

102. *See* Reno v. Flores, 507 U.S. 292, 303–04 (1993) (stating that the best interest standard, though "not traditionally the sole criterion—much less the sole *constitutional criterion*," nevertheless "is a proper and feasible criterion").

103. Santosky v. Kramer, 455 U.S. 745, 766 (1982).

104. *See, e.g.*, CAL. FAM. CODE § 3011 (West 2021) ("In making a determination of the best interests of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant and consistent with Section 3020, consider all of the following: (1) The health, safety, and welfare of the child. (2)(A) A history of abuse by one parent or any other person seeking custody against any of the following: (i) A child to whom the parent or person seeking custody is related by blood or affinity or with whom the parent or person seeking custody has had a caretaking relationship, no matter how temporary. (ii) The other parent . . . .").

105. Blair, *supra* note 24, at 560.

106. *Id.* at 557.

107. *Id.* at 560.

108. *See id.* at 560–62.

109. *See id.* at 562.

110. *See* Coulibaly v. Stevance, 85 N.E.3d 911, 918 (Ind. Ct. App. 2017).

111. *Id.* (emphasis omitted).

unable to present her claims in the original Pakistani custody hearing. [112] In that case, the mother was not able to attend the hearing because of discriminatory criminal law regarding adultery by women. Because she feared for her own safety, she was not able to present evidence that pointed towards a history of domestic violence essential for a robust custody determination.

To apply a rigorous best interests of the child standard, U.S. courts must take the time and effort to understand the factual and legal context on the ground without bias. However, courts have not risen to that challenge, and have thus not invoked the true power of the escape clause.

B. Pakistani Custody Laws and Islamic Religious Laws Require a Legal Guardian to Be Male

The Guardian and Wards Act of 1890 is the controlling custody legislation of Pakistan. [113] The relevant section of Section 17 of the Act states:

> In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, *appears in the circumstances to be for the welfare of the minor*.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, *the character and capacity of the proposed guardian and his nearness of kin to the minor*, the wishes, if any, of a deceased parent, and any existing or previous relations of the *proposed guardian with the minor or his property*. [114]

Many U.S. courts have started and finished their analysis with Section 17. [115] However, Section 19 of the Act articulates that a woman can *never* be granted custody:

> 19. Guardian not to be appointed by the Court in certain cases.
>
> Nothing in this Chapter shall authori[z]e the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person –
>
> (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or
>
> (b) of a minor whose father is living and is not, in the opinion of the

112. *See* Hosain v. Malik, 671 A.2d 988, 999–1000 (Md. Ct. Spec. App. 1996).

113. The Guardians and Wards Act, No. 8 of 1890, § 1(2), PAK. CODE, *amended by* The Central Laws (Statute Reform) Ordinance, No. 21 of 1960, http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cJc%3D-sg-jjjjjjjjjjj [https://perma.cc/NMT7-KTJX]. ("[This Act] extends to the whole of Pakistan.").

114. *Id.* § 17 (emphasis added).

115. *See* Shaikh v. Lakhani, No. 2016 DRB 002734, slip op. at 13–14 (D.C. Super. Ct. July 28, 2017) (order granting in part and denying in part defendant's motion to dismiss).

> Court, unfit to be guardian of the person of the minor . . . .[116]

As the court in *Shaikh* clarified, "Section 19 of the act states that as long as the father of the minor child is alive and not found to be unfit, the Court is compelled to give guardianship to the father."[117]

The custody law of Pakistan becomes more complicated in its interaction with Sharia law because "[c]onstitutional provisions, secular civil and criminal law, customary practices and international human rights laws operate in Pakistan alongside the laws derived from Islamic sources."[118] Given the supremacy of Sharia law over all jurisprudence in Pakistan to determine "whether or not a law conforms to the injunctions of Islam,"[119] Muslim Personal Law, or classic Islamic Law that runs concurrently with constitutional law, must be analyzed in concurrence with the Guardian and Wards Act. Most importantly, Muslim Personal Law divides custody into *Hizanat* and *Wilayah,* concepts that refer to specific roles and responsibilities between parents based on gender.[120]

Hizanat,[121] etymologically derived from "lap of mother," corresponds to the "right to physical custody of the child."[122] While *Hizanat* is usually granted to mothers when the child is young, the right is "vested" with fathers when the child ages, typically at seven years of age for boys and at puberty for girls.[123] *Wilayah*, on the other hand, corresponds to "guardianship of the person and property of the child."[124] This guardianship gives the person the right to "establish contracts and other legal conducts, execute them and bear the consequences thereof."[125] Whereas *Hizanat* is related to the emotional requirements of child-rearing, and thus considered "female-oriented," "[a]ccording to Islamic Law, *wilayah*, generally speaking, is a male-oriented function."[126] As the presumed "natural guardian of a child," the father "has the right and duty to determine major decisions, such as education, religious upbringing, career prospects and consent to marriage, and to provide adequate maintenance for this purpose."[127] Whereas *Hizanat* aligns with "a set of

116. The Guardians and Wards Act § 19.

117. *Shaikh*, slip op. at 14.

118. Yilmaz, *supra* note 7, at 182.

119. *Id.* at 183.

120. Mahdi Zahraa & Normi A. Malek, *The Concept of Custody in Islamic Law*, 13 ARAB L.Q. 155, 155–57 (1998).

121. *Hizanat*, *Hazanit*, and *hadanah* are different terms that refer to the same concept. *See* Sarmad Ali, *Inter-Country Child Abduction—Pakistan's Legal Response*, *in* PRIVATE INTERNATIONAL LAW: SOUTH ASIAN STATES' PRACTICE 221, 229 (Sai Ramani Garimella & Stellina Jolly eds., 2017); *see also* Hosain v. Malik, 671 A.2d 988, 1001 n.7 (Md. Ct. Spec. App. 1996) ("[T]here seems to be some discrepancy regarding the proper spelling of the term. The Pakistani orders state 'Hizanat,' but the parties state 'Hazanit.'"). For the sake of consistency, I use the term *Hizanat* throughout this Note.

122. Ali, *supra* note 121, at 229.

123. *Id.* at 230. This is similar to the tender years doctrine historically followed in the United States until the adoption of the best interest of the child standard. *See infra* Part IV.A.

124. Ali, *supra* note 121, at 229.

125. Zahraa & Malek, *supra* note 120, at 156.

126. *Id.* at 157.

127. *Id.* at 177.

responsibilities and duties" for the care of the child,[128] *Wilayah* corresponds with guardianship of the child—and its legal implications.[129]

Although many U.S. states similarly separate physical and legal custody, both measures of U.S. custody are governed by the best interests of the child standard.[130] Even though the Supreme Court has never held the Constitution to disallow gender[131] as a consideration under the best interest standard, many state divorce and custody laws have prohibited courts from considering gender as a factor.[132] Partly as a reaction to perceived unconscious gender bias in child custody cases, many states have participated in the movement to encourage joint custody between both parents.[133] For example, California Family Code Section 3080 states that "[t]here is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child."[134] As such, while both U.S. and Pakistani custody laws differentiate between types of custody, the doctrines of *Hizanat* and *Wilayah* codify gender requirements for custody, which constitutes a violation of fundamental human rights.

While the Federal Shariat Court (FSC)[135] of Pakistan has "aimed at making existing Islamic laws more gender-sensitive by reducing their negative impact on the position of women,"[136] the dominance of the man within family life has remained a constant.[137] For example, in a case before the FSC, "[t]he Court concluded that man is the supporter, caretaker, provider and protector of the family."[138] Though the FSC noted that this "fact" did not indicate the inferiority

128. *Id.* at 158.

129. *Id.* at 156.

130. *See* DETERMINING THE BEST INTERESTS OF THE CHILD, CHILD WELFARE INFO. GATEWAY 1 (2016), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/ [http://perma.cc/645Y-UG64].

131. *Cf.* Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that race cannot be a determinative factor under the best interests of the child standard).

132. *See, e.g.*, CAL. FAM. CODE § 3040(c) (West 2021); IND. CODE § 31-17-2-8 (West 2017).

133. Michael Alison Chandler, *More than 20 States in 2017 Considered Laws to Promote Shared Custody of Children After Divorce*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512_story.html [http://perma.cc/DQE5-HV57]. However, many have disputed the alleged gender bias against male fathers in custody proceedings. Some have argued that while the courts often grant legal and physical custody to mothers, their decisions are a product of gendered parenting, not judicial bias. *See* Cathy Meyer, *Dispelling the Myth of Gender Bias in the Family Court System*, HUFFINGTON POST (Sept. 8, 2012), https://www.huffpost.com/entry/dispelling-the-myth-of-ge_b_1617115 [https://perma.cc/3GBA-HX9L].

134. CAL. FAM. CODE § 3080 (West 2021).

135. The Federal Shariat Court is a constitutional court of Pakistan possessing the power to determine if the laws of Pakistan comply with Sharia law. *See infra* Part IV.B.

136. Yilmaz, *supra* note 7, at 185. For examples of progressive gender-friendly law, see *Muhammad Imtiaz v. State*, 1981 PLD (FSC) 308 (Pak.) (recognizing an adult woman's consent to marriage despite her father's objection) and *Allah Rakha v. Pakistan*, 2000 PLD (FSC) 1 (Pak.) (explaining that a husband cannot give notice of divorce with the ill-intention of torturing his wife by keeping her bound).

137. *See* Yilmaz, *supra* note 7, at 186.

138. *Id.*

of women to men, the reference to patriarchal family structures is clear.[139] Similarly, in a case regarding conjugal and family maintenance visits for prisoners, the FSC concluded that "the Qur'an had placed extraordinary emphasis on the maintenance and protection of family life and '[p]rolonged absence of the bread winner and lack of contact with members of *his* family can give rise to varied forms of social evils.'"[140]

While the custody laws of Pakistan reflect, on first glance, a best interest of the child standard, a closer reading shows otherwise. The Guardian and Wards Act automatically grants custody to a father or, if he is found unfit, to his male relatives.[141] This is more than a criterion for gender preference. Further, Islamic Law gives legal custody to the father through *Wilayah*. This is the more important marker of child custody because it gives fathers complete legal control over their children, while mothers may only receive physical custody or visitation. Putting together the specific language of the Guardian and Wards Act, the strict division of rights under Islamic Law, and the supremacy of the FSC to review constitutional rulings, the custody laws of Pakistan clearly mandate gender-based custody.

C. Custody Laws that Give Legal Guardianship to Men Without Exception are a Violation of Human Rights

A requirement of male guardianship is a violation of human rights that should trigger the escape clause of the UCCJEA. Custody laws like those of Pakistan do not provide discretion for judges to give legal guardianship to the mother. Thus, judges cannot fully take child welfare circumstances, such as domestic violence, into account to promote the best interest of the child. First, a requirement of male custody is in direct contradiction to most U.S. state statutes that require gender neutrality. Second, gender as a sole requirement of custody determination goes against the fundamental right to parent under the U.S. Constitution.

Most states prohibit gender discrimination in custody awards. For example, the California Family Code states that the court "shall not consider the sex . . . of a parent, legal guardian, or relative in determining the best interest of the child."[142] Similarly, other states have gender-neutral laws outlawing gender-based preferences in family law determinations.[143] Pakistan's custody laws as

139. *See id.*

140. *Id.* at 187 (emphasis added).

141. *See* Shaikh v. Lakhani, No. 2016 DRB 002734, slip op. at 18–19 (D.C. Super. Ct. July 28, 2017) (order granting in part and denying in part defendant's motion to dismiss). In that case, the mother's expert witness Dr. Fouzia Saeed concluded that Pakistani custody laws violated a fundamental principle of human rights for many reasons, including the fact that "if a father becomes unavailable to parent, the law looks to the next male relative to assume guardianship of the children, bypassing the mother." *Id.* at 19–20.

142. CAL. FAM. CODE § 3040(c) (West 2021).

143. *See, e.g.*, TEX. FAM. CODE ANN. § 153.003 (West 2019) (prohibiting discrimination on the basis of gender and marital status in conservatorship cases); VT. STAT. ANN. tit. 15, § 665(c) (2017)

written, however, go one step further than a preference. The Guardian and Wards Act and Islamic Law do not merely *favor* a parent on the basis of gender but rather *require* gender as the *sole* criterion for legal guardianship.[144] According to the court in *Shaikh,* "these sex-preferences [affect] custody determinations by expanding a father's rights to acquire physical custody from the mother, while restricting the mother's access to custody and almost completely denying her the opportunity to exercise guardianship."[145] Under Islamic Law, a woman's right to parent is even more compromised in situations of domestic violence. This is because a woman's right to physical custody through *Hizanat* depends on marriage status, location, and financial status[146]—all of which can be impacted by domestic violence.

As noted above, many U.S. family courts have held that the gender-preference statutes of other countries do not violate a fundamental human right under the UCCJEA.[147] These courts, however, did not properly understand the complexities of foreign custody law and based their decisions on a strict textualist interpretation of a small part of the legislative landscape. The court in *Shaikh* was one of the first U.S. jurisdictions to complete its due diligence with respect to understanding Pakistani law. The *Shaikh* court correctly noted that the Pakistani courts hold fast to the gender requirement of the country's custody laws, and "if [the father] is found fit, then the father will be awarded guardianship and custody."[148] Though Pakistan may be moving towards a more gender-neutral interpretation of its custody laws, the UCCJEA makes its determination based on the laws as they are written.[149] If courts exercised their due diligence and read Pakistani law in its entirety, it is clear the current Guardians and Ward Act and the Islamic Law of *Wilayah* statutorily protect—and mandate—sex-based custody.[150]

Pakistan's mandated sex-based custody requirement violates fundamental rights outlined in the Due Process and Equal Protection Clauses of the U.S. Constitution. The Due Process and Equal Protection Clauses of the U.S. Constitution protects against discrimination on the basis of gender.[151] The U.S. Supreme Court in *Washington v. Glucksberg* noted that "[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the

(prohibiting a preference based on gender in custody proceedings); COLO. REV. STAT. § 14-10-124(3) (2020) (prohibiting gendered presumptions in parenting time and responsibilities cases).

144. *See* The Guardians and Wards Act §§ 17, 19; *see also Shaikh*, slip op. at 14–16 (recognizing that Islamic Law codifies an inherent bias in favor of the father).

145. *Shaikh*, slip op. at 16.

146. *See* Zahraa & Malek, *supra* note 120, at 168.

147. *See supra* Part II.

148. *Shaikh*, slip op. at 18.

149. *See* UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 105(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

150. *See Shaikh*, slip op. at 15–17.

151. *See* U.S. CONST. amends. V, XIV § 1.

rights . . . to direct the education and upbringing of one's children."[152] The Supreme Court in *Troxel v. Granville* held that "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[153]

Further, a presumption of custody based on gender violates the Equal Protection Clause of the U.S. Constitution. While the out-of-style U.S. tender years doctrine does not go as far as Pakistani law in terms of gender preference, it still provides for a factually rebuttable presumption.[154] Many courts have argued that this presumption violates the equal right to parent. For example, in 1973, the Family Court of New York held that the "application of the 'tender years presumption' would deprive respondent of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution."[155] Similarly, the Supreme Court of Alabama held that the tender years presumption "imposes legal burdens upon individuals according to the 'immutable characteristic' of sex."[156] Finding that the doctrine necessarily implied a "presumption of fitness and suitability" toward a parent without an actual evaluation of capability, the court determined that the tender years doctrine "represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex."[157] These decisions illustrate that the Constitution requires that parents must have equal opportunity to exercise the fundamental right to parent.

A foreign custody law that requires custody to be awarded based on gender violates both the Equal Protection and Due Process Clauses. While these U.S. constitutional rights do not extend to all foreign jurisdictions, a violation of these rights, which culminates in the fundamental right to parent, can constitute a violation of human rights sufficient to invoke the escape clause of the UCCJEA. Custody laws that give legal guardianship to men without exception are a violation of human rights. Not only are they inconsistent with the best interest of the child standard, they also violate a mother's equal opportunity to the fundamental right to parent. Although U.S. courts have traditionally leaned towards enforcement of foreign custody orders based on gender-preference laws, another country's wholesale granting of legal custody to fathers based exclusively on gender is a violation of the mother's human rights. As such, U.S. courts should be able to use the escape clause of the UCCJEA to refuse to enforce a foreign custody order if the laws of that country require male custody of children.

152. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
153. Troxel v. Granville, 530 U.S. 57, 66 (2000).
154. Klaff, *supra* note 95, at 344.
155. State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973).
156. *Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981).
157. *Id.* at 695–96.

IV.
A LEGAL SYSTEM THAT FORCES MARRIED SURVIVORS OF DOMESTIC VIOLENCE TO RETURN TO THEIR AGGRESSORS IS A VIOLATION OF HUMAN RIGHTS

The United Nations has held that "violence against women is one of the most pervasive human rights violations."[158] For many women seeking to vacate a foreign custody order, domestic violence is part of the picture.[159] Whereas the Hague Convention has a mechanism to take a parent's domestic violence victimization into account, the UCCJEA does not have such an explicit statement. Under Article 13 of the Hague Convention, "the requested State is not bound to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[160] While the exception is a narrow one, various U.S. courts have applied the exception to halt the removal of a child from the United States based on a foreign country's custody order.

For example, the First Circuit Court of Appeals in *Walsh v. Walsh* held that a history of serious domestic violence towards a mother and her children constituted a "grave risk" of danger if the court enforced the foreign custody order.[161] As such, the court invoked the exception under the Hague Convention.[162] In another case also before the First Circuit, the court reversed and remanded a district court decision and refused to return children to their potentially-abusive father in Sweden.[163] Because there was significant evidence that the Swedish government was not able to adequately address the domestic violence investigation, the court held that the Hague Convention allowed the children to stay in the United States with their victim-mother while the district court decided whether abuse had occurred.[164]

As previously explained, the UCCJEA was modeled on the Hague Convention and meant to apply to questions of enforcement regarding foreign custody orders. A narrow reading of the escape clause that forces courts to dismiss factual considerations of domestic violence and the legal response to it goes against the intentions of the UCCJEA. This Section will argue that in the specific case of Pakistan, three elements of Pakistani law can trigger the escape clause of the UCCJEA. First, the supremacy of the Shariat Court in Pakistani law does not adequately protect survivors of domestic violence and their children. Second, divorce laws of Pakistan make it significantly more difficult for victims

158. *Violence Against Women*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Jan. 29, 2010), https://www.ohchr.org/EN/NewsEvents/Pages/ViolenceAgainstWomen.aspx [https://perma.cc/NVG7-AGTD].

159. *See* UCCJEA GUIDE, *supra* note 12, at 1.

160. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 25, at art. 13.

161. Walsh v. Walsh, 221 F.3d 204, 218–20 (1st Cir. 2000).

162. *Id.* at 222.

163. Danaipour v. McLarey, 286 F.3d 1, 26 (1st Cir. 2002).

164. *Id.* at 25.

to separate from their aggressor-husbands. Third, the restoration of the conjugal rights provision of the Pakistan Constitution gives aggressors the legal tools to further abuse their victims. All three legal realities can force Pakistani women to flee for safety with their children. Courts should reconceptualize the UCCJEA escape clause as a tool to protect Pakistani survivors and their children, as well as survivors from other countries with similar laws, from domestic violence.

A. Domestic Violence Fact Patterns are Prevalent in International Custody Cases Arising Under the UCCJEA

Many cases that arise under the UCCJEA involve a mother fleeing from domestic violence. A "desire to escape domestic abuse or to ensure a safe environment for their children is a significant factor in the decision of many parents who bring their children to the United States."[165] Many legal systems consider violence against women to be a violation of human rights.[166] However, the current narrow interpretation of the UCCJEA does not allow U.S. courts to factor in situations of domestic violence. As Professor D. Marianne Blair correctly noted, "Section 105(c) can and should be utilized to protect a parent who has been the victim of severe domestic abuse."[167]

This gap in protection for domestic violence victims arises because Section 105(c) requires that the *custody* laws of the foreign jurisdiction violate a fundamental principle of human rights.[168] A strict reading of custody laws may not include legal remedies related to family violence. However, this distinction between custody law and anti-violence law is a false separation. To make well-informed custody determinations, judges must take into account a parent's history of domestic violence. Therefore, criminal laws are necessarily a part of custody laws. For example, before long-sought feminist reforms in 2006, the sentence for extramarital sex, including rape, under the Pakistani *Hudood* Ordinances included severe punishments, such as stoning and whipping.[169] If a survivor-mother could not return to Pakistan for a custody hearing for fear of criminal sentencing, the custody hearing would "produce an order entered without [the] benefit of one parent's evidence," which often points to a father's domestic violence.[170] A narrow reading of custody law, as separate from other domestic relation and criminal law, does not accurately reflect the family law context under which a custody order was entered. A second issue arises because courts have interpreted the escape clause to mean that a violative *application* of

165. Blair, *supra* note 24, at 566.

166. *See, e.g.*, G.A. Res. 48/104, pmbl., (Dec. 20, 1993), https://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf [https://perma.cc/22L6-7VXA].

167. Blair, *supra* note 24, at 573.

168. UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 105(c) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

169. Blair, *supra* note 24, at 576; Hosain v. Malik, 671 A.2d 988, 1006 (Md. Ct. Spec. App. 1996); *see also* discussion *infra* Part IV.A.

170. Blair, *supra* note 24, at 577.

said laws does not suffice. Rather, the written laws themselves must constitute a violation of human rights.[171] At this point, very few countries have an explicit promotion of domestic violence on the books.[172] Although a foreign country's legal system as a whole and the principles influencing its custody laws may violate fundamental human rights, Section 105(c) is inapplicable if the written laws do not convey these violations.[173] Therefore, U.S. courts may not use a country's prevalence of domestic violence alone to invoke the escape clause. Doing so cuts against the ethos of the UCCJEA that does not seek to magnify differences between countries. Further, the United States has one of the highest domestic violence rates in the world,[174] so such a determination would be hypocritical.

When deciding whether to invoke the escape clause, courts must take into account the country-specific context of domestic violence in which custody laws operate. In the case study of Pakistan, studies estimate that between 70 and 90 percent of Pakistani women experience some form of domestic violence.[175] In response to the high rates of domestic violence incidents, the majority of which are not prosecuted,[176] Pakistan has enacted several anti-violence laws. In 2006, Pakistan passed the Protection of Women Act, which takes rape out of the *Hudood* Sharia Law and puts rape cases in the criminal courts.[177] Whereas Pakistan used to prosecute extramarital sex (*zina*) and rape (*zine-bil-jabr*) under the same *Hudood* Ordinance, thereby often convicting the victim, the 2006 Act separates the two.[178] In 2009, the National Assembly passed the Domestic Violence Protection Bill, but the Senate killed the Bill with intentional delays.[179] The Bill would have increased survivor services, pushed for increased

171. *See* UNIF. CHILD-CUSTODY JURISDICTION & ENF'T ACT § 105(c) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997).

172. *See, e.g.*, PAKISTAN CONSTITUTION, May 31, 2018, art. 9 ("No person shall be deprived of life or liberty save in accordance with law.").

173. *See* Zadora M. Hightower, Note, *Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases*, 22 MICH. ST. INT'L L. REV. 637, 651–52 (2013).

174. *See generally* CLAUDIA GARCIA-MORENO, CHRISTINA PALLITTO, KAREN DEVRIES, HEIDI STÖCKL, CHARLOTTE WATTS & NAEEMAH ABRAHAMS, WOLRD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 17 (Penny Howes ed., 2013), https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=0CE63195E06BB3A87823B85BF7DB6952?sequence=1 [https://perma.cc/VS8U-EJ6S] (finding the WHO Region of the Americas to have a 29.8 percent prevalence of intimate partner violence).

175. Immigr. & Refugee Bd. of Can., *Pakistan: Domestic Violence, Including Effectiveness of the Protection of Women (Criminal Laws Amendment) Act, 2006; State Protection and Services Available to Victims* § 1.1, REFWORLD (Jan. 14, 2013), https://www.refworld.org/docid/51222ba42.html [https://perma.cc/Q4JQ-Z5C2] [hereinafter *Canada IRB Report*].

176. *Id.* § 2.1.

177. *Id.*

178. *Id.*

179. *See id.* § 2.2.

prosecution of aggressors, and set deadlines for a fair hearing.[180] The Senate passed a version of the Bill in 2012, but the individual states retain the authority to determine its adoption.[181] The Ministry of Human Rights introduced the Domestic Violence (Protection and Prevention) Bill 202 in July 2020, which would protect victims and survivors at the federal level, including in the federal territory of Islamabad.[182] However, as of the publication of this Note, the Assembly has not yet passed the Bill.[183]

Implementation of anti-violence laws in Pakistan such as the Protection of Women Act and the Domestic Violence Protection Bill has been met with fierce opposition, mostly from religious groups.[184] Despite the idea that "Islam assigns a great position of honor and dignity to the woman as a mother, wife, sister, daughter, and aunt for their protection and care from any kind of violence,"[185] these religious groups have challenged the bills several times arguing that they go against Islamic Law.[186] The Council of Islamic Ideology have mostly led these challenges.[187] While this group is situated as only an advisory body that makes recommendations on the law's conformity with Islam, "it holds considerable influence with legislators."[188] Despite these challenges, the Pakistani Supreme Court has upheld the Protection of Women Act, and it remains valid law.[189]

Because of the opposition to many federal anti-violence laws, the majority of protection for survivors happens at the provincial level. When the legislature ratified the 18th Amendment to the Pakistani Constitution in 2010, the four individual provinces became responsible for passing legislation for the

180. *Pakistan: Expedite Domestic Violence Legislation*, HUM. RTS. WATCH (Jan. 11, 2010), https://www.hrw.org/news/2010/01/11/pakistan-expedite-domestic-violence-legislation [https://perma.cc/K5XC-5J6L].

181. *See Canada IRB Report*, *supra* note 175, § 2.2.

182. Myra Imran, *Domestic Violence Bill Presented in NA,* NEWS INT'L (July 9, 2020), https://www.thenews.com.pk/print/684026-domestic-violence-bill-presented-in-na [https://perma.cc/LMJ5-ZVPU].

183. Waseem Ahmad Shah, *View from the Courtroom: KP Domestic Violence Bill Is a Diluted Version of Previous Drafts,* DAWN (Jan. 11, 2021), https://www.dawn.com/news/1600820 [https://perma.cc/X9PK-Q7R7].

184. M Ilyas Khan, *Why Is a Pakistani Bill to Protect Women Unpopular*?, BBC NEWS, (Mar. 17, 2016), https://www.bbc.com/news/world-asia-35811180 [https://perma.cc/A2KS-DD95].

185. Muhammad Tahir, Domestic Violence Against Women in Pakistan and Its Solution from an Islamic Perspective: A Critical and Analytical Study 12 (July 1, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2986723 [https://perma.cc/3M2M-MAML].

186. Mehreen Zahra-Malik, *Top Pakistani Religious Body Rules Women's Protection Law 'Un-Islamic,'* REUTERS (Mar. 3, 2016), https://www.reuters.com/article/us-pakistan-women-idUSKCN0W51O9 [https://perma.cc/L46P-982U].

187. *Id.*; *see also* COUNCIL OF ISLAMIC IDEOLOGY, http://www.cii.gov.pk/ [https://perma.cc/BV3H-SDTX] ("The Council of Islamic Ideology is a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam . . . .").

188. Menaal Munshey, *The Punjab Women's Protection Act: An Ideological Battle*, LSE: S. ASIA @ LSE (May 6, 2016), https://blogs.lse.ac.uk/southasia/2016/05/06/the-punjab-womens-protection-act-an-ideological-battle/ [https://perma.cc/3FXD-CSGS].

189. *See* Protection of Women (Criminal Laws Amendment) Act, No. 6 of 2006, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Dec. 2, 2006.

protection of women.[190] By 2021, all four provinces have a domestic violence bill; however, such change has been both piecemeal and met with extreme resistance. In 2013 and 2014, the Sindh and Balochistan provinces passed their respective versions of a domestic violence bill.[191] However, at least in the Sindh Province, implementation has been slow.[192] In 2016, the provincial assembly passed the Punjab Protection of Women Against Violence Act.[193] The remaining territory finally followed suit in 2021, with the passage of the Khyber Pakhtunkhwa Domestic Violence Against Women (Prevention and Protection) Bill in the Assembly in January.[194] That bill had been held up in the Assembly for over eight years due to religious opposition. Despite the delay, many advocates worry that the Khyber Pakhtunkhwa bill is not sufficiently expansive to cover all those affected by violence.[195]

The lack of consistent federal legal protections for domestic violence survivors in Pakistan can lead to discriminatory application of family laws, forcing a woman to choose between returning to the location of abuse and relinquishing her children in order to participate in a trial in the home country. One scholar has proposed that this constitutes a violation of human rights.[196] The scholar characterized the void as the "untenable choice of returning to a highly dangerous environment or forfeiting custody and contact with [the survivor's] children."[197] She wrote that "[s]uch a choice deprives a parent of the fundamental rights to life, security of person, and freedom from torture protected in numerous human rights conventions and declarations."[198] However, the U.S. courts have historically not agreed with this proposition; as long as the law guarantees a

190. Naziha Syed Ali, *Tackling Domestic Violence*, DAWN (Feb. 11, 2014), https://www.dawn.com/news/1086246 [https://perma.cc/DJ28-Q2CA]; *Canada IRB Report*, *supra* note 175, § 2.2.

191. The Domestic Violence (Prevention and Protection) Act, No. 20 of 2013, THE SINDH GOVERNMENT GAZETTE EXTRAORDINARY, Mar. 19, 2013, http://sindhlaws.gov.pk/setup/publications/PUB-18-000115.pdf [https://perma.cc/DG6F-WHP7]; The Balochistan Domestic Violence (Prevention and Protection) Act, No. 7 of 2014, THE BALOCHISTAN GAZETTE EXTRAORDINARY, Feb. 12, 2014, http://pabalochistan.gov.pk/pab/pab/tables/alldocuments/actdocx/2018-10-23%2014:37:37act072014.pdf [https://perma.cc/797P-NKVB].

192. *#ViolenceAgainstWomen: Sindh Assembly Unanimously Demands Implementation of Law,* THE EXPRESS TRIB. (Nov. 25, 2016), https://tribune.com.pk/story/1244443/violenceagainstwomen-sindh-assembly-unanimously-demands-implementation-law [https://perma.cc/S2FF-FEDQ].

193. In 2016, the Punjab Territory passed the Protection of Women Against Violence Bill. Asad Hashim, *Pakistan Province Passes Landmark Law Protecting Women Against Violence*, REUTERS (Feb. 25, 2016), https://www.reuters.com/article/us-pakistan-rights-women/pakistan-province-passes-landmark-law-protecting-women-against-violence-xidUSKCN0VY1QE [https://perma.cc/J5W9-SJTZ]; Intikhab Hanif, *PA Approves Bill for Protection of Women Against Violence*, DAWN (Feb. 25, 2016), https://www.dawn.com/news/1241751 [https://perma.cc/W5FB-524P].

194. *KP Finally Legislates to Criminalise Domestic Violence*, DAWN (Jan. 16, 2021), https://www.dawn.com/news/1601824 [https://perma.cc/73CW-6L5M].

195. *See id.*; Waseem Ahmah Shah, *supra* note 183.

196. Blair, *supra* note 24, at 574.

197. *Id.*

198. *Id.*

woman the right of due process in a custody hearing—that is, notice and a chance to present her case in some way, including through a lawyer—that choice is hers alone and is not discriminatory in its codified law.[199] By subscribing to this hollow notion of due process, the U.S. courts do not acknowledge the impact of trauma on victims of domestic violence as they navigate an already patriarchal judicial system.

Apart from the Pakistani vacuum of codified protective measures, several Pakistani family laws actively punish survivors of domestic violence.[200] I argue that these laws are a violation of human rights because they do not allow a mother to gain both custody of her children and remain free from violence. Rather, she has to sacrifice one to get the other. In Pakistan, these laws focus on the supremacy of a FSC, gendered requirements for divorce, and a restitution system that further endangers survivors of domestic violence.

B. Pakistani Federal Religious Courts Have Neglected to Take a Substantive Role in Anti-Violence Jurisprudence, and the U.S. Courts Must Consider that Fact in Pakistani Domestic Violence Cases Arising Under the UCCJEA

In 1980, the President of Pakistan established the Federal Shariat Court.[201] The Pakistani Constitution gave the court the power to "examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam."[202] Over ten years later, in 1991, the Enforcement of Shari'ah Act held that Shari'ah law, the law of Islam as described in the Quran and Sunnah, would be "the supreme law of Pakistan."[203] Under the Act, all Pakistani laws are subject to religious law, which has supremacy over all court decisions.[204] The Pakistani FSC hears the petitions, and its decisions are binding on all High Courts of Pakistan.[205] The Shariat courts have the power to declare any law unconstitutional if it repudiates the principles of Islam.[206]

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199. *Id.* at 561–62; *see, e.g.*, Malik v. Malik, 638 A.2d 1184, 1190–91 (Md. Ct. Spec. App. 1994), *aff'd sub nom*. Housain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

200. *See infra* Part IV.C–D.

201. Yilmaz, *supra* note 7, at 183.

202. PAKISTAN CONSTITUTION, May 31, 2018, art. 203(D).

203. Enforcement of Shari'ah Act § 3, No. 10 of 1991, THE GAZETTE OF PAKISTAN EXTRAORDINARY, June 18, 1991.

204. The Enforcement of Shari'ah Act contains a clause that states, "Notwithstanding anything contained in this Act, the rights of women as guaranteed by the Constitution shall not be affected." *Id.* § 20. In terms of violence against women, the Constitution of Pakistan guarantees no discrimination on the basis of sex (art. 25); that "[n]o person shall be deprived of life or liberty save in accordance with the law" (art. 9); freedom of movement (art. 15), association (art. 17), assembly (art. 16), and speech (art. 19); ensures full participation of women in national life (art. 34); and guarantees that "[t]he State shall protect the marriage, the family, the mother[,] and the child" (art. 35). PAKISTAN CONSTITUTION, May 31, 2018, arts. 9, 15–17, 19, 25, 34–35.

205. Yilmaz, *supra* note 7, at 183–84.

206. Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law*, 60 AM. J. COMPAR. L. 875, 891 (2012).

The FSC has played a complicated role in Pakistani jurisprudence on the subject of gender equality. In some respects, the FSC has formalized the requirements of due process and expanded employment opportunities for women in the law.[207] On the other hand, the FSC has often played a detrimental role in protecting women from violence, both in its direct action and in its inaction.[208] Given the supreme power of the FSC coupled with the various interpretations of Islam that promote anti-violence rhetoric, the FSC's refusal to substantively address questions of violence against women points to a violation of human rights under the UCCJEA.

Before the Protection of Women Act of 2006 amended the *Hudood* Laws, the "Shariat Courts were considered the guardians of the Hudood laws and their role was seen as instrumental in perpetuating the wrongs resulting from the enforcement of these laws."[209] While this characterization does not fully address the nuances of the FSC response to the *Hudood* Ordinances, the Shariat courts refused to rule on proposed challenges to *Hudood.*[210] Though the Shariat courts often overturned the trial court convictions of victims of rape and attempted to mitigate the harms that the sexist ordinances inflicted, "[t]he Shariat courts could have pushed for such amendments [to the *Hudood* Ordinances] long before the 2006 Act was passed."[211]

Often, the FSC has used Islamic Law under the Enforcement Act to "reinforce misogynous and patriarchal social practices and cultural norms."[212] Though many of these cases occurred in the past, the FSC has issued a few recent decisions that point to a precedent that allows for violence against women. In 2010, the FSC struck down several sections of the Protection of Women Act because they were in conflict with Section 203DD of the Pakistani Constitution that gives the Shariat courts the power to review laws relating to *Hudood* enforcement.[213] In another case, the Court held that while men are not superior to women, "[a] man is the supporter, caretaker, provider, and protector of the family."[214] Further, the Punjab Protection of Women Against Violence Act of 2016 was challenged in the FSC on religious grounds.[215] Though the FSC often plays a conflicting role in the protection of women's rights in Pakistan, the supremacy of religious law over judicial decisions often creates significant obstacles for women who seek safety from their abusive partners. U.S. courts

207. *See id.* at 905–06.
208. *See id.* at 904–05.
209. *Id.* at 885.
210. *Id.* at 890.
211. *Id.* at 892.
212. *Id.* at 904.
213. Shariat Petition No. 1/I of 2010, § 117(v) (Pak.), http://www.pakistani.org/pakistan/judgments/2010/fsc_wpb.pdf [https://perma.cc/LK85-FDP7].
214. Yilmaz, *supra* note 7, at 186.
215. Humaira Sajid, *Woman Opposes the Protection Against Violence Law*, DUNYA NEWS (Mar. 29, 2016), http://dunyanews.tv/en/SpecialReport/326021-Woman-opposes-the-Protection-against-Violence-Law [https://perma.cc/Y8XB-C6RB].

must engage in a critical analysis of specific international judicial structures when deciding when to uphold or modify foreign custody orders.

C. Divorce Laws in Pakistan Make it Difficult for A Survivor to Leave

As one Pakistani woman recently noted, "[p]eople say getting married is difficult, but in [Pakistan], getting divorced with dignity is much tougher."[216] Two aspects of the divorce laws of Pakistan, which are not subject to review by the FSC, do not actively protect survivors of domestic violence. Instead, they place survivors in danger of continued and intensified abuse by the father of their children. First, the Muslim Family Law Ordinance (MFLO) requires petitioners to participate in mandatory family arbitration.[217] Second, the Dissolution of Muslim Marriages Act provides only a very narrow definition of domestic violence that allows a woman to divorce her husband.[218]

Under Section 7 of the MFLO, the husband who wants a divorce (*talaq*) must supply a written notice of his request to his wife and a Chairman.[219] Within thirty days of the notice, "the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation."[220] This arbitration is mandatory, and women have reported that the main aim of the council is to "dissuade" the divorce.[221] In fact, the statutory language states that the goal is "reconciliation."[222] This is incredibly harmful and dangerous for survivors of domestic violence. In addition, "[t]he Arbitration Council may not be objective either; in a society in which the public sphere is almost exclusively occupied by males, alliances between men may form unwittingly."[223] If a survivor attempts to get a divorce but is unable to do so because of fear that forced arbitration can lead to separation assault, the survivor may consider fleeing with her children.[224] For these reasons, the UCCJEA must

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216. Maham Javaid, *Why Women in Pakistan Struggle to Get 'Divorced with Dignity,'* AL JAZEERA (Mar. 7, 2019), https://www.aljazeera.com/indepth/features/women-pakistan-struggle-divorced-dignity-190306231602365.html [https://perma.cc/L48Z-W9LQ].

217. The Muslim Family Laws Ordinance, No. 8 of 1961, § 7(4), PAK. CODE, http://pakistancode.gov.pk/pdffiles/administratordf5df7bd70945d88e28f6a85c1a9ef6b.pdf [https://perma.cc/F57J-3GFB].

218. *See* The Dissolution of Muslim Marriages Act, No. 8 of 1939, § 2(viii), PAK. CODE, http://pakistancode.gov.pk/pdffiles/administratorfb32d6015ae887e6d6b85018961842ea.pdf [https://perma.cc/VKT4-2FTE].

219. The Muslim Family Laws Ordinance, § 7(1) (Pak.).

220. *Id.* § 7(4).

221. *See* Javaid, *supra* note 216.

222. The Muslim Family Laws Ordinance, § 7(4) (Pak.).

223. Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287, 315 (2000).

224. NAIMA QAMAR, MALIHA ZIA & TARA KHAN, LEGAL AID SOC'Y, DE-CONSTRUCTING CONJUGAL RIGHTS IN PAKISTANI LAW 5–6 (2019). *But see Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/WY9U-VUH3]. Separation assault refers to the manner in which a former partner will "use violence after a separation to reassert control over their former partners." Ruth E. Fleury, Cris M. Sullivan & Deborah

recognize that the forced arbitration requirement is a violation of the human right to be free from violence or coercion.

The Dissolution of Muslim Marriages Act governs when the woman attempts to initiate a divorce. It was enacted in 1939 to "clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law."[225] Section 2 lists the grounds for a decree of dissolution, including but not limited to when the husband has been missing, when the husband takes an additional wife, when the husband is impotent, or other valid grounds under Muslim law.[226] Under Subsection viii, a wife may also file a decree for dissolution when "the husband treats her with cruelty."[227] This includes when the husband (a) "habitually assaults her or makes her life miserable by cruelty," (b) is unfaithful, (c) forces the wife to "lead an immoral life," (d) disposes her of her property rights, (e) engages in religious obstruction, or (f) in cases of polygamy, does not treat "her equitably in accordance with the injunctions of the Quran."[228] Most problematically, the Section requires *habitual* cruelty.[229] This articulation of the ground for divorce for domestic violence circumstances is not broad enough to sufficiently encompass the realities of domestic violence, since even one act of cruelty should be sufficient to obtain a divorce. In addition, it leaves the designation of "habitual" up to the court's estimation. Pakistani courts have recently held that "*khula* [no-fault divorce] is not contingent upon the consent of the husband, but rather on the court reaching the conclusion that spouses could no longer live within the limits prescribed by Allah."[230] However, unlike husbands who may divorce their wives without the court through the unilateral *talaq*, women must pass through the court's scrutiny under the Dissolution of Muslim Marriages Act.[231] This unequal treatment is a violation of human rights because if mother-survivors cannot get a fair divorce, they will be forced to flee with their children. Women may use the UCCJEA's escape clause when they have no choice but to escape.

I. Bybee, *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1365 (2000). Sadly, separation assault is common and can consist of stalking, sexual assault, control over children, and homicide. *Id.*

225. The Dissolution of Muslim Marriages Act, No. 8 of 1939, § 1, PAK. CODE, http://pakistancode.gov.pk/pdffiles/administratorfb32d6015ae887e6d6b85018961842ea.pdf [https://perma.cc/VKT4-2FTE].

226. *Id.* § 2(i)–(vii).

227. *Id.* § 2(viii).

228. *Id.*

229. *Id.* § 2(viii)(a).

230. Muhammad Zubair Abbasi, From *Faskh* to *Khula*: Transformation of Muslim Women's Right to Divorce in Pakistan (1947-2017) 13 (Dec. 29, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307766 [https://perma.cc/4M93-QT5F].

231. *See* ALI SHAIKH, LAW OF DIVORCE & KHULA IN PAKISTAN 1 (n.d.), https://www.ma-law.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20(Article).pdf [https://perma.cc/J97G-WNRS].

D. Abusers Use the Restitution of Conjugal Rights Provision to Further Commit Violence Against their Wives when They Try to Leave

As codified in Section VII of the Pakistan Divorce Act of 1869, a spouse may apply in civil court for the restitution of conjugal rights (RCR).[232] Unless the court finds a legal ground for dismissal, it will order the decree.[233] Under the RCR, an aggrieved spouse can request a reinstatement of conjugal rights when the other spouse has "withdrawn from the society of the other."[234] While technically either husband or wife may apply for an RCR, it has been most commonly manipulated by husbands against their wives.[235] As one scholar noted, it "is a ready-made legal instrument in the hands of unscrupulous husbands to be employed as a sword and shield against the rights of their wives."[236] The RCR presents a serious threat to survivors of domestic violence because it gives abusers a legal tool to coerce their victims back to the house, withhold financial support, delay litigation, and avoid trial.[237] The RCR, or a threat of an RCR, makes it more likely that survivors will flee with their children.[238] Human Rights Watch has identified the RCR as a tool of violence and discrimination against women.[239] In sum, the legal viability of such a coercive tool against survivors constitutes a violation of human rights under the UCCJEA.

The RCR in Pakistan is a hold-over of British colonization, where marriage was considered both an eternal bond under Christianity and a civil contract under common law.[240] After independence, Pakistan, along with other former British colonies,[241] retained the RCR.[242] Though the RCR does not have an equivalent under Islamic Law, in part due to more reciprocal conceptions of marriage under

232. The Divorce Act, No. 4 of 1869, § 32, PAK. CODE, http://pakistancode.gov.pk/pdffiles/administrator5e93fac2df76e6993f8c8e739c827420.pdf [https://perma.cc/NU2H-AG2A].

233. *Id.*

234. Jawaria A Kashif, *An Overview of Conjugal Rights and Obligations in Islam,* COURTING THE L. (Oct. 21, 2017), http://courtingthelaw.com/2017/10/21/commentary/an-overview-of-conjugal-rights-and-obligations-in-islam/ [https://perma.cc/822N-KGRU].

235. Shahbaz Ahmad Cheema, *Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for Its Abolition*, 5 LUMS L.J. 1, 10–11 (2018).

236. *Id.* at 1.

237. *See id.*

238. *See, e.g.*, ARUNA KASHYAP, HUM. RTS. WATCH, "WILL I GET MY DUES . . . BEFORE I DIE?" 78 (Janet Walsh, Liesl Gerntholtz & Danielle Haas eds., 2012), https://www.hrw.org/sites/default/files/reports/bangladesh0912ForUpload.pdf [https://perma.cc/GYM2-HBGC] (explaining a similar situation in Bangladesh, where Hindu women cannot obtain a divorce).

239. *Id.*

240. Cheema, *supra* note 235, at 1, 3.

241. Pakistan is not alone in upholding the RCR as a legal tool. *See, e.g.*, Saroj Rani v. Sudarshan Kumar Chadha, (1985) 1 SCR 303 (India) (upholding the RCR as "inherent in the very institution of marriage itself"); The Divorce Act, No. 4 of 1869, § 32, BANGLADESH CODE, http://bdlaws.minlaw.gov.bd/act-details-20.html [https://perma.cc/5NPH-QJLU].

242. Cheema, *supra* note 235, at 5.

the Quran, the FSC has implicitly validated the practice.[243] Though new developments in *khula* divorce law, which allow women to get a no-fault divorce, tempered the utility of the RCR, a recent FSC decision "g[a]ve an impression that the RCR cannot be objected to from the perspective of Islamic injunctions."[244]

Various Pakistani courts have upheld the use of RCRs.[245] For example, the FSC in *Nadeem Siddiqui v. Pakistan* refused to hear an RCR case because the wife could not refer to a specific verse from the Quran or Hadith that disclaimed the use of RCR.[246] Further, the court stressed the importance of the lower court's role in spousal compromise.[247] RCRs can be used to subvert a wife's attempt to seek a divorce,[248] harass wives through judicial abuse,[249] and undermine a wife's property interests.[250] As such, the RCR "in an overwhelming majority of cases . . . is peddled for ulterior motives and sinister intentions to deprive the wives of their rights—financial or otherwise."[251] The RCR is a dangerous tool that aggressors use against victims attempting to flee the marital home with their children. As one lawyer noted, "[t]he moment women file for divorce, maintenance, or a dissolution of marriage, men's first response is to file an RCR."[252] Its pervasive use by men to intimidate their wives has led some human rights activists to call for governments to declare the RCR as "unconstitutional because it is against a person's dignity and privacy, and is discriminatory toward women."[253]

A stringent reading of the UCCJEA may not consider any one of these factors—a lack of national domestic laws addressing violence, disparate divorce laws based on gender, the supremacy of the FSC or other religious court, and the restitution of conjugal rights provision—to be a violation sufficiently egregious to trigger the escape clause on their own. However, the combination of these

243. *Id.* at 4, 17.

244. *Id.* at 7.

245. *See, e.g.*, Nobahar Shah v. Salma Bibi, 2016 CLC 1668 (Pak.) (upholding the RCR on the condition of the husband's payment of the outstanding dower despite a finding of the husband's cruelty towards the wife).

246. Siddiqui v. Pakistan, 2016 PLD (FSC) 1 (Pak.).

247. *Id.*

248. *See, e.g.*, Rahim Jan v. Muhammad, 1995 PLD (Lahore) 122 (Pak.) (holding that a husband's non-payment of maintenance was insufficient grounds for denial of an RCR and that "the decree for conjugal rights is an insuperable obstacle in the plaintiff's way" for her divorce petition).

249. *See, e.g.*, Moondan v. Judge, Family Court, 1989 MLD (Lahore) 339 (Pak.) (granting a wife relief from her abusive husband after litigation that lasted seven years, i.e., litigation abuse); Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), http://theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/ [https://perma.cc/4GGH-NKBS] (describing how abusers misuse the court system to maintain control over their partner).

250. Cheema, *supra* note 235, at 11–12; *see, e.g.*, Ghulam Sakina v. Umar Bakhsh, 1964 PLD (SC) 456 (Pak.) (holding that there was no mutual assent to the divorce based on the issuance of an RCR, thus denying the wife's appeal to her share of the shared property).

251. Cheema, *supra* note 235, at 17.

252. Javaid, *supra* note 216.

253. *Id.*

factors surely is. Examining the legal landscape of Pakistan and other similarly situated jurisdictions reveals a legal system working to the detriment of survivors of domestic violence. These laws constitute a violation of human rights sufficient to trigger the escape clause under the UCCJEA. For courts applying the UCCJEA, the recognition of contextual foreign family laws gives judges the discretion to "ensure that the UCCJEA does not otherwise operate to impair [litigants'] fundamental rights to safety and protection."[254]

CONCLUSION

The UCCJEA is a powerful tool to help prevent child kidnapping by clarifying the jurisdictional rules surrounding custody proceedings. However, U.S. courts are not using it to its full potential as a protective law. The escape clause of the UCCJEA offers a unique way to protect mothers and children who flee to the United States to escape domestic violence in their home countries. However, U.S. courts have rarely employed the full power of the escape clause. This narrow interpretation is not based in textual readings of the UCCJEA, but rather in a statutory interpretation choice informed by a lack of knowledge of international law and a stifled conception of gender-based violence. Despite this, the recent *Shaikh* decision provides an example of a different method of interpretation.[255] A fuller understanding of the specificities of international custody laws coupled with a broader acknowledgement of domestic violence offer a rationale by which courts may invoke the escape clause.

First, custody laws that require male legal custody violate a fundamental principle of human rights. While a gender preference may not suffice to trigger this violation, a deeper reading of Pakistani custody law indicates that the law engages in more than a rebuttable presumption. The inability of a woman to gain legal custody *and* physical guardianship effectively forecloses the right to parent with dignity. This itself is a violation sufficient to trigger the escape clause and to refuse to enforce a foreign custody order. Second, U.S. courts should consider laws that actively hurt domestic violence survivors a violation of human rights under the UCCJEA. Laws surrounding domestic violence, divorce, and marriage are within the realm of custody laws because domestic violence implicates the rights of both a parent and child to be free from violence. In Pakistan, the absence of a national domestic violence law, gendered requirements for divorce, and codified legal tools of abuse constitute a human rights violation sufficient to trigger the escape clause of the UCCJEA.

The U.S. courts must be a site of legal protection for survivors of domestic violence and their children. When deciding whether to enforce a foreign custody order, judges must carefully examine the technicalities of foreign custody law to see if a gender requirement for custody lies behind a veneer of a best interest of the child standard. Further, judges must understand that the state can compound

254. Blair, *supra* note 24, at 581.
255. *See supra* Part II.

violence perpetuated by aggressor-husbands through their decisions in court. Cases arising under the UCCJEA often intersect with histories of violence, and U.S. courts have a responsibility to protect human rights. The escape clause under the UCCJEA gives the courts that power.