

**Women's Rights
in Muslim Family Law in Pakistan:
45 Years of Recommendations
vs. the FSC Judgement (January 2000)**

Special Bulletin
February 2000

© Shirkat Gah 2000

The use of any material from this publication is to be acknowledged.

Printed by Arqam Printers, Lahore

Shirkat Gah
Women's Resource Centre
PO Box 5192,
Lahore, Pakistan

Contents

Introduction	5
Comparative Chart of Recommendations regarding Family Laws:	11
Marriage	12
Child Marriage	16
Polygamy	20
Divorce	29
Inheritance & Wills	33
Extracts from the 1998 National Plan of Action (Pakistan)	36
Extracts from CEDAW	45
Presentations made to the Federal Shariat Court	
A Brief Survey of Muslim Laws in Other Countries (Human Rights Commission of Pakistan)	46
The Requirement of Registration of Marriage & Divorce and Provision of Punishment for Contravention (Shirkat Gah)	51
Statements regarding FSC judgement	
Joint Action Committee for People's Rights (JAC)	63
HRCP Dismayed at Challenging of Family Laws	64

Glossary

Ayat/ayaat

Verse/verses of the Qur'an

Hadith

A saying attributed to the Prophet

Iddah/iddat

Compulsory waiting period following divorce or widowhood, during which a woman cannot remarry

Ijtehad/ijtihad

The exercise of reason in jurisprudence

Nikah

Marriage

Nikah khwan

Person who performs the marriage ceremony

Nikahnama

Marriage contract

Talaq

Divorce initiated by the husband

Talaq-e-tafweez

The right of divorce delegated to the wife by the husband

Tehsil/tehsildar

District/district revenue officer

Tuhur

Period between menstruations

Ulema

Plural of alim, learned person, denoting religious scholar

Zina

Extra-marital sexual relations, offence attracting severe criminal penalties

Introduction

Holding certain of its provisions to be repugnant to Islam, on 5 January 2000 the Federal Shariat Court directed the President of Pakistan to take steps to amend the Muslim Family Laws Ordinance 1961 (MFLO) “so as to bring the provisions into conformity with the injunctions of Islam”. The Ordinance has long been regarded by activists as one of the few pieces of legislation protecting women’s rights within the family. Following the judgement, however, certain provisions shall cease to have effect from 31 March 2000.

This *Special Bulletin* is an attempt to provide activists and all those concerned about women’s rights within the family a tool for lobbying and advocacy around the issue. It shows how, over four decades, there has been a consistent demand for the protection and strengthening of legal provisions favouring Muslim women’s rights within the family¹. This demand has been strongly supported by all four major government commissions on women’s status, from the 1956 Commission (headed by a former Chief Justice) to the 1997 Commission (headed by a sitting judge of the Supreme Court). This Bulletin therefore includes extracts relating to marriage, child marriage, polygamy, divorce and inheritance from the:

- 1956 Report of the Commission on Marriage and Family Laws (Rashid Commission);
- 1976 Report of the Pakistan Women’s Rights Committee;
- 1985 Report of the Status of Women Commission (Zari Sarfraz Commission);
- 1997 Report of the Commission of Inquiry for Women.

The *Bulletin* also points out that Pakistan’s national and international commitments oblige the state to protect and strengthen positive provisions in personal status laws and therefore includes relevant extracts from:

- the National Plan of Action (the officially adopted blueprint for implementing the Beijing Platform for Action).
- the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);

The *Bulletin* brings together two written submissions presented to the FSC by women’s and human rights organisations during the Lahore hearings in the case. Activists regularly attended the hearings on the petitions at the Karachi, Lahore, Peshawar and Islamabad benches, and the court acknowledged their presence by hearing their arguments and accepting written presentations. Finally, the *Special Bulletin* contains two statements from human rights organisations in the immediate aftermath of the January 5 judgement.

¹ Matters of marriage, divorce and inheritance are governed by the personal laws of the followers of different religions, most of which were codified during the colonial period. Although the 1997 Report of the Commission of Inquiry for Women recommended a major review of minority personal law, this subject is beyond the scope of the present *Bulletin*.

The Muslim Family Laws Ordinance 1961 and the FSC Petitions

Hearings on some 37 petitions that challenged various substantive sections of the MFLO as violative of the Injunctions of Islam had been continuing in the FSC since 1993. The sections challenged were

Section 4: inheritance of grandchildren of predeceased parents:

In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

Section 5: registration of marriage:

- (1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provision of this Ordinance.
- (2) For the purpose of registration of marriages under this Ordinance, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one person be licensed for any one Ward.
- (3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.
- (4) Whoever contravenes the provision of sub-section (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.
- (5) The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriages shall be registered and copies of nikahnama shall be supplied to the parties, and the fees to be charged thereof, shall be such as may be prescribed.
- (6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record prescribed under Sub-section (5), or obtain a copy of any entry therein.

Section 6: polygamy:

- (1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.
- (2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.
- (3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

- (4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan to the Collector and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any Court.
- (5) Any man who contracts another marriage without the permission of the Arbitration Council shall,
 - (a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and
 - (b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

Section 7: procedure for talaq:

- (1) Any man who wishes to divorce his wife shall as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
- (2) Whoever contravenes the provision of Sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.
- (3) Save as provided in Sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under Sub-section (1) is delivered to the Chairman.
- (4) Within thirty days of the receipt of notice under Sub-section (1), 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.
- (5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in Sub-section (3) or the pregnancy, whichever later, ends.
- (6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this Section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

The FSC judgement upheld Section 5 as “in no manner violative of any Injunction of Islam. Indeed, it directed the enhancement of the existing punishment of fine and/or 3 three months imprisonment for contravening Section 5 on registration of marriage:

“registration of marriage as provided for by Section 5 in a Government record will be a positive check on the litigation where due to non registration, the marriage and/or paternity of children is denied in order to just deprive the wife or the children from her inheritance. The measure intended to be preventive for avoiding litigation thus in no manner be termed as un-Islamic or opposed to the Injunctions of Islam.

“We may also observe that for having effectual compliance of the provision it would be desirable that the punishment prescribed by sub-section (4) of Section 5 be suitably enhanced as that prescribed presently is not adequate to attract strict compliance of the provision.”

Section 6 was held to be “reformatory only” and “not violative of the Injunctions of Islam,” although this was subject to certain “observations and recommendations” contained in the judgement. The court stated that regarding polygamy, “suitable measures” should be adopted “to put an end to or at least minimise the instances of injustice being found abundantly in society”. It further recommended that in the event that the husband intends to contract another marriage:

“the Arbitration Council should figure in when a complaint is made by the existing wife or her parents/guardians. The intention is to protect the rights of the existing wife/wives and interest of her/their children.”

However, the FSC held Section 4 to be repugnant to Islam using the argument that Islam does not provide for the direct inheritance by orphans from their grandparents.² The court said it would:

“leave it to the legislative domain of the country to deliberate on it and bring about the law which would safeguard the interest of the orphan grandchildren and exclude all possible complications of litigation that may crop up as a result of loose or unthoughtfor provision of law. We are preferring the creation of a will in favour of the orphan grandchildren by the grandparent over other solutions which may be available for the socio economic problem inter-alia for the following reasons:

[...]

c) that a provision can be made that in case a propositous dies without creating a will, the will - to the extent of 1/3rd in favour of the grandchildren out of the estate with a ceiling that it does not go beyond the share of their predecessor - shall be deemed to have been created by the grandparents in their favour.”

Finally, while the FSC held that “no valid objection can be raised to the spirit of Section 7”, it also criticised the “over exuberance of legislation in a new field” and held that Section 7(3) and 7(5) resulted in an “implied violation of the Injunctions of Quran” and therefore “cannot be maintained.” The implication is that divorce should take immediate effect upon pronouncement, while iddat could be observed subsequently, its length depending upon each individual situation.

Women’s and human rights groups issued a number of statements in response to the judgement, above all objecting to the FSC’s application of jurisdiction over the Muslim Family Laws Ordinance. The FSC was created during Gen. Zia-ul-Haq’s so-called ‘Islamisation’ in 1980 with the jurisdiction to examine whether laws are in conformity with the injunctions of Islam. However, under Article 203 (B)(c) of the Constitution, personal laws are exempted from the FSC’s scrutiny, and there have been numerous judgements since 1980 upholding this view. Nevertheless, the FSC relied upon a 1994 judgement of the Supreme Court (PLD 1994 SC 607) which held that the “mere fact that a codified law or statute law applied to only the Muslim population of the country, in our view, could not place it in the category of ‘Muslim Personal Law’ envisaged by Article 203(B)(c) of the Constitution.” In other words, the MFLO did not fall under the definition of ‘personal law’ and was therefore not immune from scrutiny by the FSC.

² It should be noted that unlike provisions in many Muslim communities, the MFLO’s Section 4 does not distinguish between male and female grandchildren and male and female grandparents.

The orthodox attack against the MFLO

The current attack, although the most concerted challenge in the MFLO's nearly 40-year history, is in fact a continuation of an attack, both inside the legislature and outside, by orthodox elements that began even before the Ordinance was promulgated. Maulana Ehtishamul Haq Thanvi wrote a blistering dissenting note to the report of the 1956 Rashid Commission, whose recommendations laid the foundation for the MFLO. Subsequent attacks on the MFLO from the religious Right have mirrored the original dissenting note.

During cycles of state-sponsored 'Islamisation' under successive governments in the 1980s and 1990s, various sections of the MFLO came under challenge in the FSC. The MFLO - notably Section 7 - became the victim of a highly charged debate over whether the statute law or the injunctions of Islam are to be supreme, and whether the superior courts had the power to declare a law repugnant to Islam. In line with the fluctuating political environment, the superior courts issued contradictory judgements on these issues, the FSC decision merely being the latest.

Certainly, it is not just the MFLO that has suffered over the years: the real victims have been the millions of women whose rights have been undermined by this sustained attack on the MFLO. It is now time to look back at all the recommendations made over the years for strengthening Muslim family law in Pakistan and to move forward to a situation where women's rights within the family are fully legislated and implemented.

**A Comparative Chart of
Recommendations
Regarding Marriage and Family Laws
from the:**

- **1956 Report of the Commission on
Marriage and Family Laws
(Rashid Commission)**
- **1976 Report of the Pakistan Women's
Rights Committee**
- **1985 Report of the Status of Women
Commission
(Zari Sarfaraz Commission)**
- **1997 Report of the Commission
of Inquiry for Women**

MARRIAGE

1956 Report of the Commission on Marriage and Family Laws

Should there be compulsory registration of marriages, and if so, what machinery should be provided therefore? What should be the penalty, if any, and who is to be penalized for non-registration?

Should a standard Nikahnama be prescribed and its registration made compulsory at the time of the solemnization of the Nikah?

The registration of marriages must be made compulsory as complex questions relating to the validity and existence of nikah between certain parties arise very frequently in civil and criminal courts. It often happens that of two men each claims to be the husband of the same woman, in order to escape being convicted under section 498 of the Pakistan Penal Code³ for abduction. Difficulties also arise in cases relating to inheritance. Very often one of the claimants to a large amount of property dubs the defendants as illegitimate sons; and the case is difficult to decide for lack of all documentary evidence. In suits relating to maintenance, a great deal of oral evidence is produced to prove that the woman claiming maintenance is not a legally married wife but a mistress or a keep. Registration would be facilitated if a standard nikahnama is prescribed. We suggest that the Government should print a nikahnama in triplicate and it should be offered for sale at every post office at

a nominal price of 8 annas. At the time of nikah entries should be filled in and one copy handed over to the bridegroom, the second to the bride or her guardian, and the third should be despatched by registered letter (A.D.) to the Tehsildar of the Tehsil where the parties reside. The Tehsildar should keep a register wherein all these nikahnama or certificates of marriage are copied out. It shall be the duty of the Nikah Khwan to remit the nikahnama by registered post to the Tehsildar. If he fails to do so he should be made liable to criminal prosecution and punishable with a fine not exceeding Rs.500. Such provision already exists in the Parsi Marriage Act.

This step is not without precedent in Muslim history and some Muslim countries introduced this reform about 40 years ago. In Algeria the deed of marriage is required by law to be registered although it appears that the nikah can be performed by any one. Khalifa Haroonur Rashid insisted on all Muslims and Zimmis [non-Muslim citizens of a Muslim state] registering their marriages (Amir Ali's Muhammadan Law, Vol. II, page 307).

³ With the enforcement of the Zina (Enforcement of Hudood) Ordinance in 1979, Pakistan Penal Code provisions covering crimes related to marriage were repealed. These are now covered under the Zina Ordinance and their penalties have been greatly enhanced. The repealed Section 498 provided for a two-year maximum punishment with fine for enticing or taking away or detaining with criminal intent a married woman.

1976 Report of the Pakistan Women's Rights Committee

After item 12 [in the nikahnama form], the following new item may be inserted:-

“Name of the guarantor of the dower, if any, his father's name and residence.....”

1985 Report of the Status of Women Commission

[no specific recommendation regarding marriage]

1997 Report of the Commission of Inquiry for Women

Marriage

Although the law requires registration of marriages, this provision is frequently violated. This is partly due to the fact that in a country like Pakistan, where illiteracy is the rule and not the exception, widespread awareness of the law does not exist. This ignorance has been compounded by the confusion caused by the misinformation campaign which asserts that registration is not required for Muslims. The registration of marriages exists in a large number of Muslim countries.⁴

In Pakistan, the Union Council grants license to Nikah (marriage) Registrar who register nikahnamas. The law prescribes no criteria and no minimum qualifications for selecting people for this important job. It only specifies that the person be fit and proper. The Nikah Registrar's appointment is permanent and can only be revoked if he or she violates any of the conditions laid down under the law. In this case, the Nikah Registrar is punishable by a simple imprisonment of one month, or with a fine which may extend to Rs.200, or with both.⁵ In practice, the Nikah Registrar usually performs the duties of the Nikah Khwan as well. Thus, it is the Nikah Registrar who is virtually always responsible for registration of marriages. Yet, it has been noticed time and again that no proper record of registration has been maintained and thus a large number of people face criminal liability because of this inefficiency of the Nikah Registrar. Moreover, the superior courts have time and again pointed out the lack of

unquestionable probity of the Nikah Registrars.⁶ Nevertheless, the licenses of Nikah Registrars are hardly ever revoked and prosecution against them is virtually non-existent.

In one instance, as reported in the press, in 1996, 250 nikahnamas were produced before Lahore's civil courts more than half of which were fake. The forms were privately produced, the witnesses listed did not exist, and the nikahs existed only on those fictitious forms, not in the official record books.

Such fake marriages have a purpose: they serve the ends of men out for temporary sex, or who have designs to deceive the gullible 'bride' out of her property, the dowry and/or other valuables she has brought with the marriage she believes was genuine, or to perpetrate some vendetta on her family. Alternatively, these marriages serve to keep young people tied to the wishes of their parents, sometimes to the extent where young girls are bartered, sold, or exchanged in marriages by their own kith and kin for money or for the lust of an old male member of the family who wishes to marry a younger girl. In one racket uncovered in Lahore last year it was alleged that a number of lawyers, touts and Nikah Registrars were reported to have been acting in collusion to deceive young girls into phoney marriages. Some of the 20,000 registered Nikah Registrars in Lahore were believed to have made profitable side-business of their notary powers.⁷ No wonder the superior courts have commented on the prevalence of the malpractice. On occasions more than one person has produced nikahnamas before them to prove marriage with the same woman.⁸

⁴ Algeria, Bangladesh, Indonesia, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Syria, Tunisia, Turkey, Yemen; the laws of these countries have been examined by the Commission.

⁵ Section 7, West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

⁶ See, for example, PLD 1995 Lah 364 Farman Ali and 1991 SCMR 354 Muhammad Akhtar, Daily Jang, Lahore, June 28, 1997.

⁷ Daily Pakistan August 4, 1996.

⁸ 1977 PCr.LJ 499 Muhammad Usman, 1995 MLD 1507 (Lahore) Zulfikar Ali.

Fortunately, the current law does not contain a time bar on when nikahs should be registered. Consequently, it would be relatively straightforward for the government to require that all unregistered nikahs in force be registered immediately. This would serve both to protect the women who are parties to unregistered marriages and to enable the government to compile a meaningful database of legal marriages in the country.

Recommendations

1. The task of registration should be taken very seriously and the machinery revamped.
2. The Nikah Registrar should be an educated person (at least with an intermediate certificate) so that he/she understands the importance and can acquire the skill of maintaining a crucial record that determines the legal status of people.
3. The penalty for the Nikah Registrar for violating the law, or misusing his/her powers, should be rigorous imprisonment which may extend to three years and a fine of up to Rs.50,000.
4. As no legal provision prescribing a time bar on registration exists, the government should pass a law requiring all subsisting marriages solemnised after the promulgation of the 1961 Ordinance which are unregistered to be registered within the next three years; further, a time limit should be prescribed so that all future marriages are registered within thirty days of solemnisation of the marriage. The government must publicise the enactment of this law through the mass media and encourage personnel of the Union councils to facilitate the marriage registration process.
5. Since the Nikah Registrar deals with questions of family law where there is a substantial involvement of women, it is recommended that an adequate number of women be appointed Nikah Registrars.

CHILD MARRIAGE

1956 Report of the Commission on Marriage and Family Laws

Would you prevent child marriages by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage?

It is the opinion of all the members of the Commission, with the exception of Maulana Ehtishamul Haq Sahib, that child marriages should be prevented by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage. The Commission is of the opinion that such legislation will be in perfect conformity with the injunctions of the Holy Qur'an and Sunnah. The Holy Qur'an makes not only puberty but a definite stage in the development of intelligence as a condition precedent for entrusting property to the orphans. The question of marriage may be decided on the same footing because the entrusting of the life of marrying-parties to each other is an affair of greater importance than mere entrusting of property.

1976 Report of the Pakistan Women's Rights Committee

[no specific recommendation on child marriage]

1985 Report of the Status of Women Commission

[no specific recommendation on child marriage]

1997 Report of the Commission of Inquiry for Women

Child Marriage Restraint Act, 1929

Child marriage, mostly a legacy of an orthodox society, is justified by a section of people on religious and social grounds. It is argued by some that Islam has placed no restriction on age for the marriage of girls. The dissenting note in one of the previous commission's reports has forcefully argued that no restriction should be placed on child marriage since doing so would contravene Islamic custom. This argument appears to be based on a fallacy. Moreover most Muslim countries have prescribed restrictions on child marriage. In Algeria, the prescribed age for legal capacity for marriage is twenty-one years for a man and eighteen years for a woman. However, the court can grant an exemption on the grounds of necessity or benefit to the minor. Bangladeshi law prescribes a minimum of twenty-one and eighteen years of age for boys and girls respectively for a marriage to be legal; in Jordan, the minimum ages are 16 and 15 respectively for boys and girls; in Iraq, the requisite age is 18 for both sexes; in Yemen it is 15 years for boys and girls; in Turkey, 17 years and 15 years; and, under Indonesian law, 19 and 16. In Lebanon, Libya, Morocco, Syria and Tunisia, a minimum age is prescribed and the courts have been given powers to permit child marriage if it is in the interest of the minor and the parents consent to it.

Another argument is based on the assumption that daughters are, because of their sex, a burden on parents and the sooner they can be married off the better. If they are a burden, and to the extent they are that, it is only because society does not afford them the necessary protection. It does not allow them the normal opportunities for their mental and social growth. It does not enable them to become skilled, strong and self-confident individuals in their own right. Those who do not favour women being educated and

participating equally with men in social, economic and nation-building activities, who see their role mainly as that of bearing and raising children within the confines of four walls, are usually the ones who regard a daughter as a liability that is best put to her vocation of producing children with the first suitable proposal that comes along, and regardless of her own age. The child is thus punished first because of the failure of society to give her the rights and protection that are her due, and second because of an obsolescent view of her role and her capacities.

Regardless of the opposition, sheer force of circumstances is bound to make child marriage passe. It is necessary to anticipate the wisdom of it and prevent the practice now. If it survives it is partly because the law has been weak and the will behind it even weaker.

Child marriage, by all accounts, is a practice which adversely affects any child. The Bill to prohibit it was introduced in 1927 in the Indian Legislative Assembly. There was strong opposition to this Bill. Members of the Assembly made representations to the government. Religious scholars and ulema opposed it. But the legislation received strong support from Quaid-e-Azam Muhammad Ali Jinnah. The father of the Nation said:

I am not convinced that this Bill in any way militates against the rule of civil laws applicable to marriages amongst Mussalmans, I agree with my Honorable friend over there. I congratulate him upon his maiden speech. I cannot believe that there can be a divine sanction for such evil practices as are prevailing, and that we should not, for a single minute, give our sanction to the continuance of these evil practices any longer. How can there be such a divine sanction to this cruel, horrible,

disgraceful, inhuman practice that is prevailing in India?

The Quaid went on to say that if:

My constituency is so backward as to disapprove of a measure like this then I say, the clearest duty on my part would be to say to my constituency, 'You had better ask somebody else to represent you.' Because, after all, you must remember that public opinion is not so fully developed in this country, and if we are going to allow ourselves to be influenced by the public opinion that can be created in the name of religion when we know that religion has nothing whatever to do with the matter, I think we must have the courage to say, 'No, we are not going to be frightened by that.'⁹

Recommendations

1. The prescribed minimum of 16 years of age for the marriage of girls should be strictly enforced. The offence against this should be non-cognisable and anyone should have the right of complaint. The parents/guardians, the groom if adult and the person solemnising the marriage should be liable to punishment. If the girl's age at marriage is less than 12 the punishment should be a maximum of five years of imprisonment and a fine up to Rs.25,000; if above 12, the maximum sentence should be three years and Rs.20,000; if above 12, the maximum sentence should be three years and Rs.20,000 fine. Sections 4, 5 and 6 of the Child Marriage Restraint Act, 1929, should be accordingly amended, but the proviso in section 6, prohibiting imprisonment for any woman, should stay.

⁹ Quaid-e-Azam M.A. Jinnah, *Speeches in the Legislative Assembly of India, 1924-1930*; edited by M. Rafique Afzal

2. Later, the age of the girl too should be raised to 18 with the proviso that a minor between 16-18 years may in exceptional circumstances be married with permission of the family court and after ascertaining that the marriage has the girl's voluntary consent.
3. A child marriage should be liable to be dissolved or annulled if contracted in violation of the law and if the child complains. This right may be exercised by the child till she/he attains the age of twenty-one.
4. Forced marriages of minors should be made a punishable offence under the Pakistan Penal Code, 1860. They violate both the fundamental rights and the tenets of Islam.

POLYGAMY

1956 Report of the Commission on Marriage and Family Laws

1. **The Quranic verse dealing with polygamy occurs only in connection with the protection of the rights of orphans. (Verse III. Surat An-Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective?**
2. **Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that effect from a court of law?**

There is only one verse in the Holy Qur'an which deals with the question of polygamy. This verse was revealed to solve certain difficulties which had arisen in the matter of orphan-girls and widows. The permission to marry more than one wife originated for the establishment of social justice. According to this verse there was a fear of orphan-girls and widows being exploited or unjustly dealt with. For that the Holy Qur'an, as a matter of emergency, permitted Muslims to marry more than one woman. But a proviso was attached to this permission that if this way of solving the problem leads to injustice in family relations then the Muslims are advised to practice monogamy only. Experience has confirmed that many Muslim indulge in polygamy, disregarding the original reason of the permission, and waiving aside the condition of doing equal justice between the two wives. The abuse of this conditional permission makes it necessary for the State to see that polygamy is not practiced except in cases where it could rationally be justified, as justice is a condition precedent for this permission. It is incumbent on the State to prescribe a procedure which would prevent

people from taking advantage of this permission without any restrictions being placed on them. It is a universally accepted maxim that prevention is better than cure. It would be absolutely in the interest of justice and in conformity with the spirit of the Holy Qur'an that a man contemplating to have a second wife should present himself before a court to explain the circumstances which, according to him, justify his taking this step. There may be some cases in which there may be rational justification and in such rare cases, the court could permit a man to take a second wife only on the condition that in the matter of maintenance and other treatment no injustice is done to the first wife and her children. The Commission is of the opinion that this step will greatly curb the unrestricted and uncontrolled practice of polygamy which causes so much distress in family life.

Apart from monetary considerations a person applying to the Matrimonial and Family Laws court for marrying a second wife in the life time of the first should satisfy the Court that the first wife is insane, or is suffering from some incurable disease or that there are other exceptional circumstances which make his second marriage an inescapable necessity and, that he is not taking a second wife merely because he wishes to marry a prettier or a younger woman than his first wife.

In such matters the court shall also see whether a man desiring to have a second wife and a second family is capable financially of supporting two families, satisfying their basic needs of life and guaranteeing the standard of living to which his first wife and her children have been accustomed. The court shall ascertain the wishes of the first wife also, and if she insists on living separately from her husband and the second wife, the court shall not pass any order permitting the second marriage unless adequate

arrangements are made by her husband for suitable separate accommodation and other amenities for the first wife. It would be open to the court to make provision that an adequate part of the salary of such an individual is paid directly to the first wife and her children. Those who do not enjoy any fixed salary should provide some guarantee to the court for the prompt payment of suitable maintenance to the first wife and her children. In special cases, for reasons to be recorded by the court, it would be open to the Matrimonial and Family Laws Courts to vary the allowance payable to the first wife.

1976 Report of the Pakistan Women's Rights Committee

Recommendations

- 1) Muslim Family Laws Ordinance, 1961, should be implemented in a uniform manner in all Provinces and the functions of Chairman of the Union Council under the Ordinance be entrusted to Family Courts. The Ordinance be amended to read as "Family Court" in place of Chairman/Union Council.
- 2) In order to restrict polygamy and to safeguard the interest of the existing wife, it is recommended:
 - (i) Section 6 of the Muslim Family Laws Ordinance, 1961 should be amended so as to provide – in an application for permission the applicant while stating that the consent of the existing wife or wives has been obtained to the proposed marriage shall also be required to state--
 - (a) that he is willing to pay unpaid dower which may be due to the existing wife or wives;
 - (b) that he is willing to delegate his right of divorce to his existing wife or wives;
 - (ii) The Arbitration Council in order to satisfy itself as to whether the existing wife or wives have in fact given permission to the proposed marriage shall record the statement of the existing wife or wives if they appear in person before it or cause it to be recorded through local commissioner, if the existing wife or wives are Parida Nashin [observe purdah] or are from sickness or infirmity unable to appear in person.
 - (iii) The Arbitration Council shall grant permission to the applicant to contract the

proposed marriage only if the applicant has paid to the ex-wife or wives her or their unpaid dowers and has also delegated to the existing wife or wives the right of divorce.

4) The incorporation of certain additional items in the Nikahnama Form (Form II) appears to be appropriate and necessary. It is, therefore, recommended:-

- (i) After item 3, the following items may be inserted:-
- whether the bridegroom is a single, married or divorced;
 - Number of previous marriages of bridegroom, if any

1985 Report of the Status of Women Commission

The Commission is convinced that it is on a misinterpretation on the basic thrust of the Quranic teachings that a man can take as many as four wives and that there is no harm if he keeps changing them also during his life time. The verse 3 of Surah Al-Nisa which is the foundation of such a belief has been misinterpreted.

It may be noted that the verse gives the men the right to “marry of the women, who seem good to you, two or three, or four”, but takes away the right in that very verse by advising “and if ye fear that ye cannot do justice (to so many) then one (only)...”

Keeping in view the emotional side of human nature and the inherent characteristic of jealousy, envy, possessiveness and others that may arise out of a situation where one man has to be shared by two, three or four women, the verse closes with a warning “Thus it is more likely that ye will not do justice”.

The Commission would like to mention the prevalent practice of polygamy still popular in certain parts of Pakistan, especially in the tribal areas, and in the interior of Baluchistan and Sindh. The most common reason given by men with four or more wives when interviewed by the Commission was the desire to have more sons, as additional helping hands in work and in confronting tribal enemies, as well as, to serve the guests and the *baradari* [caste]. Complaints of unequal treatment of wives and demands of maintenance by wives of a polygamous husband leading to divorces were also repeatedly cited.

Regarding all laws about sex and family life, the Holy Qur’an makes one basic provision and that is, that the liberty that has been given is not for sexual adventure but for protection of virtue. Every woman according to the Quran’s teaching

is entitled to a house and a family of her own because in a large majority of cases marriage for a woman is the foundation for achieving life's fulfillment.

The above referred verse of the Quran speaks specifically of women who are 'Ayama' i.e., single and without a protector. It is to provide families for such women also that men have been placed under an obligation that if they are able to assure women their rights with justice and equality then and only then, they may take them in marriage. Marrying the Ayama is a Divine obligation on the whole community. Quran has pointed out that for a man taking of a wife is a serious responsibility and it should not be undertaken unless he be physically, financially, and emotionally fit to do justice in providing for all women who come into his protection. What was provided as an obligation under certain circumstances has been abused as an unrestricted right by men. In a large majority of cases second, third or fourth wife is taken only as a matter of sexual adventure.

Many examples can be cited from early Islamic history where companions/warriors used to lay their lives during battles and immediately steps were taken to restore family status to the widows by giving them option to choose from amongst the men who were considered fit for marriage or who could undertake the additional obligations. In this regard verse 126 of Surah-al-Nisa makes it clear as to what are the responsibilities of men with regard to free women. This verse makes it clear that the responsibilities are no different than those in respect of the orphans.

Recommendations

Impress upon families and particularly the fathers that before the marriage of their daughters they should carefully study the Nikahnama and get the following conditions accepted from the bride groom's family and incorporated:

- a) Husband will not practice polygamy;
- b) The husband delegates his right to divorce to his wife and cannot withdraw *talaq-e-tafweez* [delegated right of divorce]. She in turn will not use this right arbitrarily.

1997 Report of the Commission of Inquiry for Women

The exact extent of polygamous marriages in the country is not known. Not only has there been no national survey, the scanty documentation that exists is misleading: many such marriages are not even registered nor is permission for such marriages necessarily sought or recorded.

No one doubts however that the practice exists on a wide enough scale. The Report of the Pakistan Women's Right Committee that came 15 years after the Muslim Family Laws Ordinance, 1961 noted that the law had done nothing to discourage the polygamy in the those years. A decade later, the 1985 Report of the Pakistan Commission on the Status of Women reported that the practice was particularly widespread in the interiors of Sindh and Balochistan and in the tribal areas. Again, in 1995 the National Report for the Beijing World Conference on Women acknowledged the prevalence of the practice and the inadequacy of the laws relating to it.

The orthodox sections have meanwhile continued to assert that religion had given clear sanction for a man's taking more than one wife. The pledge resistance to any move to restrain it.

What exactly is that sanction? What is its intent and context? And is there any room for state intervention?

There is just one verse in the Holy Quran that specifically deals with the issue:

And if ye fear that ye may not deal fairly with the orphans, marry women who seem good to you, two or three or four; but if ye fear that ye may not be able to do justice (to them), then only one, or (a captive) that your right hand possesses. That will be more

suitable to prevent you from doing injustice.

Surah IV, Verse 3
(Translation by Maulana Yusuf Ali)

The commentary offered on this by Maulana Yusuf Ali is worth noting. He says (footnotes 508/509):

Notice the conditional clause about orphans, introducing the rules about marriage. This reminds us of the immediate occasion of the promulgation of this verse. It was after [the battle of] Uhud, when the Muslim community was left with many orphans and widows, and some captives of war. Their treatment was to be governed by principles of the greatest humanity and equity. The occasion is past, but the principles remain. Marry the orphans if you are quite sure that you will in that way protect their interests and their property with perfect justice to them and to your own dependants, if you have any. If not, make other arrangements for the orphans.

The unrestricted number of wives of the Times of Ignorance was no strictly limited to a maximum of four, provided you could treat them with perfect equality in material things as well as in affection and non material things. As this condition is most difficult to fulfil, I understand the recommendation to be towards monogamy.

Another translation of this verse is as follows:

And if you fear that you will not be able to do justice to the orphan girls marry such women who are agreeable to you, two or three or four; but if you fear that you cannot do justice (to so many) then marry only one or have the captives which your right hand owns. That will be more suitable to prevent you from injustice.

Surah IV, Verse 3

(Translation by Abdul Majeed A. Auolakh)

The commentary provided by Maulana Auolakh (footnote 6(B)) on this verse reinforces the position taken by Maulana Yusuf Ali:

Four wives have been allowed to save sex starved people from sex corruption, adultery, rape, forced sex etc. Very hard and fast rules of maintaining social justice between two or more wives have been laid down. Since human weakness leads the polygamic male to commit injustices in family life, therefore, Divine prohibition has been imposed to have only one wife. Up to this period the Arabs and other Jewish/Christian chiefs had scores of wives which were reduced to the minimum. Second wife is permissible only in particular circumstances and not at all as a rule. Islam prefers perfect adjustment with one wife for profound family life and community solidarity.

Marmaduke Pickthall's translation of the same verse is as follows:

And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice.

Surah IV, Verse 3

The Holy Quran itself makes the point more emphatic later in Surah Nisa (Verse 129): 'Ye are never able to be fair and just as between women even if it is your ardent desire...'

Mr. Justice (Retd.) Aftab Hussain, former Chief Justice of the Federal Shariat Court of Pakistan, argues in his book *Status of Women in Islam* that the injunction of the Holy Quran was intended to wean Arabs from the practice of unrestricted polygamy prevalent during the ayyam-I-jahila. He quotes other Islamic scholars on this issue. Thus, Maulana Zafeeruddin Nadvi in his book *Modesty and Chastity in Islam* says that the Quranic verse 'is a clear pointer to the fact that monogamy is the rule in the Islamic law and only as an exception it was considered necessary to keep the door open for more than one in case of genuine need.'¹⁰ Maulana Omar Ahmad Osmani¹¹ and Pir Muhammad Karam Shah Alazhari¹² also endorse the view that the Quranic permission was specifically in the context of war emergency when widows and orphans in the Muslim ranks tended to multiply.

Justice Aftab Hussain states that Syed Rashid Raza and Dr. Tanzil-ur-Rahman (in his book

¹⁰ p. 488, *Status of Women in Islam*, Justice Aftab Hussain.

¹¹ p. 497, Hussain.

¹² p. 489, Hussain.

Majmua-I-Qawanin-I-Islami) have held that where circumstances demand, legislation can be brought in to prohibit polygamy.¹³

The report of the Council of Islamic Ideology (CII) on Muslim family laws has recommended that section 6 of the Muslim Family Laws Ordinance, 1961 be amended to further restrict permission for polygamy. They suggest that the permission be granted by a civil judge and that too after inquiring and investigating the financial position of the applicant and his ability to afford an additional marriage. The CII recommended that the applicant must satisfy the court that he would be able to treat his wives with justice and equity and that he has not concealed any previous marriage from his proposed wife.

Some Muslim countries have gone even further than the recommendations of the CII in Pakistan. Turkey and Tunisia have made polygamy a punishable offence: Tunisia's jurisprudential interpretation has held that since the condition of equality of treatment of wives was practically impossible, the Quranic verse was in effect an injunction against polygamy. Tunisian law also provides punishment for a woman who 'deliberately' contracts a marriage with a person who she knows is already married. In most Muslim countries, restrictions have been placed on polygamy making it almost impossible for the husband to take an additional wife. In Iraq, the husband has to take permission from the court and must be able to show that the marriage is performed for some 'lawful benefit' and that the husband has the ability to support an additional wife. Unless he does so, the law does not permit polygamy. In Algeria, similar grounds are prescribed and if permission is not sought legal action is permissible against the husband. In Indonesia, Lebanon, Syria, and Yemen, permission can only be granted by the court where the husband is able to show that he can treat the wives equally and equitably.

¹³ p. 506, Hussain.

Libyan law only permits polygamy where the husband can establish that he possesses the financial and 'physical ability' to support multiple wives. The law in Morocco specifically says that permission for polygamy shall not be granted if the husband is unable to treat his wives in an equitable manner. Moreover, Moroccan law expressly stipulates that 'marriage may not be contracted with a second wife unless she has been informed that the man who wishes to marry her is already married to another wife.'

In Pakistan, however, polygamy escaped decisive censure of the Muslim Family Laws Ordinance, 1961. The Ordinance neither banned polygamy nor did it effectively restrict the practice. Even though the law requires the husband to secure permission from the Arbitration Council prior to entering into a second marriage, the valid grounds for such a permission are wide enough to give the Arbitration Council total discretion. Otherwise too, the grounds as laid down under Rule 14 of the Rules under the Ordinance are arbitrary, irrational and discriminatory.

The law states:

In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage, the Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances, as the following among others:-

Sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife.

It is not clear why the rules bothered to list any grounds at all when it took such abundant care to emphasise the Council's unlimited discretion ('without prejudice to its general powers.... Such circumstances as the following among others...'). The object seemed more to provide for a council as a fig leaf and then to facilitate rather than restrict the practice of polygamy. Even the grounds provided, 'among others', for justifying a new marriage were all one-sided and discriminatory. Besides, some of these grounds, like sterility, are not even meaningful unless it is absolutely proven that the husband has played no contributory role in their existence.

Even this requirement to seek permission is a virtual formality. Its violation does not invalidate the subsequent marriage. Moreover, the penalty for contracting an additional marriage without permission is merely imprisonment which may extend to one year, or a fine up to five thousand rupees, or both.

There is no evidence of any reported incident that in the 36 years since the promulgation of the Ordinance, there was a husband who in the rare instance that he sought permission for a new marriage failed to get it. Mostly few bothered. The complaints for contracting polygamous marriages without permission can technically be made but few find it worthwhile. In the absence of the due permission, the existing wives also become entitled to immediate payment of dower and it provides a ground for dissolution of marriage. In practice nothing comes automatically. The wives have still to go through lengthy court processes to get dower or dissolution, if they want it. Thus, the provision of the Ordinance on polygamy was little more than a charade to placate the women's rights activists of the 1950s.

The Commission is fully aware of the fact that the practice of polygamy is widely instrumental in destroying family harmony, leads to the abandonment and destitution of women and

children, and is a constant source of insecurity for married women. Consequently, the Commission recognises its obligation, when choosing from amongst several possible interpretations of the Holy Quran, to select the one that is most in accord with the Islamic spirit of justice and the principle of gender equality. Thus, in order to begin to move in the direction of compliance with Quranic injunctions, this Commission feels that Pakistan must, at a minimum, greatly restrict polygamy in the short term, and phase it out completely in the medium to long term.

Recommendations

1. The nikahnama should include a column for the statement of the current marital status of the spouses, their existing partners' addresses, and the number of children, if any, from the earlier marriages.
2. A new marriage should strictly be subject to permission, and the authority for permission should be the family court.
3. Permission should only be granted on the following conditions:
 - a. The existing wife/wives have voluntarily and specifically consented to the additional marriage. There statements should be recorded by the concerned family court.
 - b. The husband should be required to file details of his assets and income.
 - c. The family court should grant the existing wife/wives adequate provisions for maintaining her/their own residence/residences and ensure that her/their financial status is not affected by the additional marriage of her/their husband.

- d. An application made by the husband for an additional marriage should include a provision whereby he must delegate his right of divorce to his existing wife/wives.
- e. The husband be liable to pay a dower amount to the existing wife/wives which shall be fixed by the court keeping in view the financial status of the parties.
- f. The grounds for granting permission for an additional marriage should be exclusively where:
 - i. The insanity of the wife is established
 - ii. The wife is declared physically unfit to have conjugal relations
 - iii. The parties are issueless and the wife has been medically declared unable to bear children and where in the opinion of two component medical practitioners she has no chances of recovery.
4. A complaint against violation of the law can be made by an aggrieved person or any of her blood relatives.
5. Penalty for violation of the law should be imprisonment of five years and a fine of Rs.20,000 to be paid to the aggrieved wife.
6. A provision be made imposing a penalty for misstating any facts in the nikahnama.
7. Where the husband misstates his pre-existing marital status, the aggrieved wife should have the same rights as those applicable to the existing wife; for example, the court should grant her the delegated right of divorce, adequate provisions for maintaining her residence and financial status, and a dower which is equitable in light of the financial status of the parties.

DIVORCE

1956 Report of the Commission on Marriage and Family Laws

Divorce by the Husband

If a husband pronounces talaq three times at a single-sitting, should it be recognized as a valid and final divorce or should three pronouncements during three Tuhrs as enjoined by the Holy Qur'an, be made obligatory?

In respect of this question Maulana Ehtishamul Haq stated that all the four Imams had laid down that three pronouncements of talaq at a single sitting constitute an irrevocable talaq and that it is not open to this Commission to make any recommendation which is not in accordance with the views of the Imams. It was however, pointed out in the discussion that during the period of the Holy Prophet, the first Caliph Abu Bakr, and for some years in the reign of Hazrat Umar, three pronouncements of talaq at one sitting were regarded as only one pronouncement. It is further recorded that Hazrat Umar made three pronouncements at one sitting an irrevocable talaq as a punitive measure to punish those who had made a vain sport of the injunctions of the Holy Qur'an and Sunnah. Hazrat Umar, in spite of accepting such a talaq as final used to punish the persons who resorted to it. It is also recorded that Hazrat Umar repented later on as the change introduced by him was not strictly in accordance with the Holy Qur'an and Sunnah, and it made divorce easy for those who wanted to indulge in it.

Islam inculcates happiness and security in family life which require that easy divorces should be prevented. It is stated in the Hadith that out of all the things permitted by God

divorce is the most disagreeable in the sight of God.

The original injunction of the Holy Qur'an about divorce prescribed a very rational procedure to prevent it, if possible. First of all an effort should be made for conciliation with the help of well-wishers of both the sides and thereafter a considerable period, amounting to three months, is to be allowed for changes of reconciliation so that family life may not be disrupted.

The pronouncement of three talaqs at a single sitting has always been called Talaq-i-Bidat by all the jurists. Talaq-i-Bidat means undesirable innovation. The very name condemns it as un-Islamic. A leader of a religio-political party in Pakistan has stated in his answer that "although all jurists have accepted it as final, and a valid divorce and irrevocable, it is really un-Quranic. It is a sin and a punishable crime". Many other theologians from the beginning of Islam down to the modern time have been of the opinion that the pronouncement or divorce three times at one sitting amounts to the pronouncement of divorce only once, and such a divorce does not in any way effect dissolution of marriage. It is essential that this divorce should be followed by two further pronouncements in two subsequent Tuhrs. This opinion should be given legislative effect. This is an important reform, and if enacted will bring into force the law as laid down by the Holy Qur'an and the Sunnah and followed by the first Caliph.

1976 Report of the Pakistan Women's Rights Committee

Recommendations

1. Muslim Family Laws Ordinance, 1961, should be implemented in a uniform manner in all Provinces and the functions of Chairman of the Union Council under the Ordinance be entrusted to Family Courts. The Ordinance be amended to read as "Family Court" in place of Chairman/Union Council.
2. On talaq becoming effective, if the husband does not pay the dower and/or does not return her dowry within one month, he should be liable to be punished with simple imprisonment for a term not exceeding three months or fine or both.
3. [recommendation No. 5 in original] Section 7 of the Muslim Family Laws Ordinance should be amended so as to require the husband to give notice of his intention to divorce his wife to the Chairman and that talaq in the case of wife who is not pregnant should become effective after expiration of three tuhrs or ninety days whichever is earlier.

1985 Report of the Status of Women Commission

Divorce according to the Holy Quran is an act of separation which should take place in a spirit of courtesy, consideration and generosity. Allah has reminded the believers that while taking decisions concerning divorce due consideration be given to the closeness of relationship that existed between the parties. The Holy Quran has also pointed out that the mere fact that a man finds another woman more attractive by itself is not good enough reason for such a divorce. For says Allah:

"Per chance you may like a thing and in that there might be evil for you and per chance you might dislike a thing in which there might be good for you". (Q:2:216).

The Quran insists that whenever a man divorces his spouse he should do so with grace and generosity and should not take back what he has given except when the woman is guilty of blatant immorality. The Holy Quran has provided that divorce may be pronounced and the period be duly counted and if during this period reconciliation takes place it is better for the parties. It has also provided that during this period the wife is entitled to live in the same quarters in which she lived before the divorce, apparently to leave the door open for reconciliation.

The Holy Quran has also provided that for the period of waiting between the 3 times pronouncement of Talaq a woman is entitled to maintenance from her husband in accordance with the status and income of the husband.

The Holy Quran has also provided that the divorced women are entitled to a comely maintenance even after the divorce has taken place. This command of the Quran has been almost completely disregarded in our country. Denial of the right of maintenance was one of

the most common complaints of both the rural and urban women brought to the notice of the Commission. It is only recently that in a neighbouring country legislation on the basis of the above verse of Quran has been sought. It is not uncommon that a husband divorces his wife when she reaches mature years and loses the glamour of youth and sometime the capacity to produce children also. At such an age and stage of life divorce can leave her absolutely without financial support or emotional satisfaction leaving her without any meaning in life. In such circumstances she is plainly entitled to support from one to whom she gave her youthful years of life. Maintenance in such case becomes all the more necessary because the Muslim community in Pakistan by and large does not appreciate the mandatory nature of the Ayat:

“And marry the widows and divorcees from amongst you”.

The above verse has also been interpreted to apply to all single persons, but the primary category which I subject matter of the above command are the widows and the divorcees. If we were to take care of this command of Allah the cases of maintenance of divorced wives would be drastically reduced.

It is important also to remember that whereas in relation to bachelors it has been commanded that they practice self-restraint till they acquire means to support a family, the command to the community to marry the divorced and the orphans is absolute in its terms.

It is not uncommon in our country that divorce is pronounced in anger and with a desire to take revenge from the wife and every attempt is made to cause as much injury as possible including separation from her children. This is in direct contradiction to the injunction of the Holy Quran which warns the believers that:

“Let not a mother be oppressed on account of her children nor the father be oppressed on account of his children”. (Q:2:233).

The Holy Quran also commands that when divorce does take place the maintenance of the breast feeding of the child through the mother or a wet nurse be done with mutual consultation, the financial burden of providing this service falling on the shoulders of the father. The requirement of mutual consultation between the parents in this behalf is consistently overlooked. And the legal developments in those case laws which assign the final decision to the father need to be corrected through adequate legislation. How important is the mother and mother’s company for the upbringing of the child is clear from the famous incident reported about Hazrat Umar who had divorced a wife of his and who wanted to take away his young child from his mother. The matter was brought to the notice of Hazrat Abu Bakr, the first Caliph, on a complaint by the mother, whereupon he reprimanded Hazrat Umar in the following words:

“the purest honey that you can provide for the child is not equal to the spit of the mother of this child. Give back the child to her for being brought up”.

Over the years the lesson contained in the above incident has been consistently overlooked much to the undeserved sorrow of numerous mothers and tragedy to the children. A balance in this behalf needs to be restored.

1997 Report of the Commission of Inquiry for Women

Termination of Marriage

Divorce is another aspect in family relations where laws and customs act discriminatorily against women and have been a source of great hardship for affected women and children. Laws for Muslims in Pakistan regarding termination of marriage are fairly simple compared to the provisions contained in the Pakistani laws for non-Muslims. A Muslim man may divorce his wife without having to give any reasons or going to court. Under the present law, it relieves him of his responsibility to maintain his wife after the period of iddat. Even otherwise, his right of divorce bears no connection to his financial obligation of having to pay for the wife even during the stipulated time required under the law. In Malaysia, the law makes it mandatory for the husband to approach the court in order to obtain divorce. In this matter ijtehad is necessary so that it becomes the responsibility of the courts to terminate marriages and to decide all other disputes arising out of the dissolution.

There is a fair amount of resistance to the provision made by the Muslim Family Laws Ordinance, 1961, requiring registration of divorce. It is noteworthy that the requirement does not place any restrictions on a husband's right to divorce but simply requires him to intimate the wife and the Arbitration Council of the fact that he has pronounced talaq. The false impression created is that this requirement somehow violates the right of a Muslim man. Almost every Muslim country requires some kind of registration of the termination of this most important of personal contracts. The Commission not only feels that it is important to register the divorce but also that intimation should not only be given to the Union Council but also to the family courts so that all related matters, like maintenance, custody, ma'ta

[alimony/post-divorce provision for wives], etc. can be settled at the same time.

Recommendations

5. It is important that every divorce, including an oral one, is officially registered. The record is needed, among other things, for subsequent legal decision, as an maintenance, custody of children, settlement of mutual obligations, etc. Thus the law should be amended to give the family courts powers to terminate the marriage and to decide all other connected matters at the same time.
 - a) Every notice of talaq received by the Union Council must also be sent to the family court.
 - b) The family court should decide all the matters arising out of the termination of the marriage within ninety days, failing which talaq may be granted ninety days after having received the notice of talaq. However, proceedings regarding other related matters shall continue and be heard on a day-to-day basis.
 - c) As family courts will be deciding all family disputes affecting marital disputes (as mentioned earlier), therefore such judges be appointed with care and be sufficiently experienced.
6. The law be amended to require the Union Council to notify the family court as soon as it receives intimation from the husband that he has pronounced divorce upon his wife.

INHERITANCE AND WILLS

1956 Report of the Commission on Marriage and Family Laws

Is there any sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a pre-deceased son or daughter are excluded from inheriting property?

It was admitted by all the members of the Commission that there is no sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a pre-deceased son or daughter could be excluded from inheriting property from their grandfather. It appears that during this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognised by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognised among the lineal descendants.

If a person has five sons and four of his sons pre-deceased him, leaving several grandchildren alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large number of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance cannot be irrational and inequitable. Moreover, as the right of representation entitles a grandfather to inherit the property of his grandsons even though the father of the testator has pre-deceased him, why can the same principle be not applied

to the lineal descendants, permitting the children of a pre-deceased son or daughter to inherit property from their grandfather. There are numerous injunctions in the Holy Qur'an expressing great solicitude for the protection and welfare of the orphans and their property. Any law depriving children of a pre-deceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Qur'an.

1976 Report of the Pakistan Women's Rights Committee

[no specific recommendations on inheritance]

1985 Report of the Status of Women Commission

A special provision in the Inheritance law be evolved to ensure that a family man deposits his will of property with the Government appointed authorities at the age of 45-50.

The making of a will for the child/children of a deceased son/daughter by the grand parents should be made obligatory – and the quantum should be upto 1/3rd.

1997 Report of the Commission of Inquiry for Women

7. Women and men should have a right of equal inheritance on the principle mentioned in section 4 of the Muslim Family Laws Ordinance, 1961. Spouses should also inherit from the share of their predeceased partners on the death of a parent-in-law.

Extracts from the National Plan of Action (September 1998)

Strategic Objective D.1

Guarantee the equal status of women by ensuring that no new law is discriminatory towards women.

Action #1	BY WHOM: Ministry of Women's Development, Ministry of Law Justice and Human Rights, Ministry of Interior, Parliamentary committees, Legal Rights Groups	
The report of the Inquiry Commission on the Status of Women must be translated, published and widely circulated. An intensive program of lobbying for its implementation should be launched	HOW:	BY WHEN
	Translate, publish and circulate the Inquiry Commission report	1998
	Constitute and expert committee for changes in personal laws, including laws relating to minorities and the disabled in conformity with universal human rights	1998-99
	Lobby/follow up with parliamentary groups on human rights and women's development, policy-makers to safeguard against discriminatory provisions in proposed legislation and to take-up discriminatory provisions in existing legislation as a key area of work	1998-99
	Initiate (all public and private human right's groups to) the required measures	1998
	Build pressure at non-government level	1998
	Organize gender sensitizing programs for legislators, judiciary, administrators, and social activists	1998
	Debate recommendations at both official and public levels	1998-99
	Repeal of discriminatory legislation and implementation of CEDAW, and propose and debate new laws	By 2003
	Enact and enforce new laws	2003-2008
	Review and amend new laws	By 2013

Strategic Objective G.1

Enhance women's power and decision-making role within the family and community.

Action #1	BY WHOM: Ministry of Women's Development, Ministry of Law Justice and Human Rights, Parliamentarians NGOs, National Core Group, Provincial Core Groups	
Review existing laws/policies (including rules notifications & procedures) that directly affect women's decision-making role and recommend measures to remove obstacles in women's access to power and decision-making.	HOW:	BY WHEN
	Constitute an Experts Committee (consisting of representatives of MoWD, MoLJ&HR, parliamentarians, NGOs, and relevant sector experts); coordinated through the National and Provincial Core Groups, directly linked to the proposed permanent Commission on the Status of Women	1998-99
	Take (experts committee to) all appropriate measures to operationalize recommendations of the Commission of Inquiry on Women and other relevant reports, including modifications in existing rules and legislative measures required to enhance women's decision-making	2000
Action #2	BY WHOM: Ministry of Women's Development, Ministry of Law Justice and Local Councils, NGOs, Judicial Institutions	
Take immediate steps to enforce existing provisions promoting women's decision-making role, particularly for the implementation of laws and procedures in the Muslim Family Laws Ordinance (MFLO) and other personal laws.	HOW:	BY WHEN
	Update and subsequently ensure the registration of all marriages in their areas including those of minorities: - Complete backlog - Create new registration	1998-2000 2000-
	Encourage women to become nikah registrars. Remove any existing procedural and other obstacles for achieving above	1998
	Train nikah registrars to function in accordance with the MFLO and the Family Marriage Rules (e.g. to ensure that the intended spouses are of proper age, are competent, are acting of their free will and without compulsion. Also ascertain their marital status at time of marriage)	1998

	Establish a cell at the subordinate judiciary level to assist women with court procedures and to help overcome delays. Cells to be run by judicial officers appointed for this purpose, supervised by the District and Sessions Judges; and to be linked to the district administration and police	1999
	Monitor & evaluate progress under the supervision of the High Courts e.g. through six monthly reporting of the number of cases filed and disposed of in the Family court; High Court Chief Justices to identify obstacles and causes of unnecessary delays and suggest remedies to ensure rapid and effective remedies	1999

Chapter I. Human Rights of Women

Human rights and fundamental freedoms are the birth right of all human beings; the promotion and protection of these is the first responsibility of all governments. Unfortunately, frequent disruptions of the democratic process and the long periods of dictatorships in Pakistan's history have impeded the full enjoyment of basic human rights by the citizens in general and more specifically by already disadvantaged groups such as women. Though the constitution provides equality for women, these provisions are not often reflected in specific laws and are contradicted by many customary practices. Further Pakistani women are burdened with the negative legacy of laws and measures passed in the 1980s which not only arrested progress in realizing women's human rights but also severely curtailed their existing rights.

The Pakistani women's rights to be treated as equal to men is rooted in the spirit of gender equality that pervaded the freedom struggle, in the constitutional guarantees of fundamental rights that have survived all political upheavals, and in the human rights defined by humankind in its collective wisdom.

The universality and indivisibility of these rights are the essential features of all such international standards, including the UN charter, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Declaration on the elimination of Violence Against Women. The Vienna World Congress Declaration (1993) highlighted the priority attached to the universal realization of women's rights as human rights.

However, the current situation regarding women's rights is determined by five major factors:

- a. Inadequacy of Constitutional guarantees of women's rights and contradictions within the constitution. The Constitution recognizes the principle of equality of all citizens and the rights to equal protection of the law. It also specifically prohibits discrimination on the basis of gender, and makes provision for affirmative action measures by the state. Despite these positive features, there are a number of serious problems, both in terms of the contradictions within the Constitution, as well as in its effectiveness.
 - I. [...]
 - II. The controversy over supreme law, through the insertion of Article 2-A, has prevented challenges that could have been made to discriminatory laws. And the constitution itself bars a large bulk of the most discriminatory legislation from being challenged in court.
- b. Discrimination against women exists in both civil and criminal jurisdictions:
 - I. [...]

- II. [...] and the Muslim Personal Law discriminate against women in a number of ways. The Muslim Family Laws Ordinance (1961) brought some important reforms but it neither bans polygamy, nor has it proved deterrent against it. [...]
- c. [...]
- d. [...]
- e. An absence of a clear policy to remove the impediments to recognition of women's rights presented by belief, custom, prejudice and ignorance has thrown numerous hurdles in the way of women's realization of their human rights. Past experience has shown that cause of women's rights is often sacrificed at the altar of political expediency. This leaves the women's movement alone to fight the forces hostile to their cause, often without the support of state initiatives.

[...]

To achieve legislative equality between women and men by the year 2010 requires concerted efforts to strengthen constitutional guarantees for women's human rights, a systematic review and revision of all discriminatory legal provisions [...].

Strategic Objective I.2

Promote and protect the human rights of women through a continuous process of reviewing and revising as appropriate existing laws.

Action #1	BY WHOM: NA/Senate Standing Committees, Parliamentarians, Ministry of Women's Development, Ministry of Law, Justice and Human Rights, NGOs, Political Parties, Jurists, Ministry of Interior, Parliamentary committees, Legal Rights Groups	
Give priority to personal status law of all communities in Pakistan and all laws affecting women. Assess progress and establish future priorities.	HOW:	BY WHEN
	Establish a Permanent Commission on the Status of Women to function as the main monitoring body for progress of women's human rights issues.	By 1999
	Announce a yearly program for women, under the principles of policy in the constitution	1999
	Ensure women's presence in all permanent standing & relevant committees	1998
Action #2	BY WHOM: MoWD, NGOs	
Establish formal channels for interaction with inputs from autonomous women's groups and focussed interest groups before discussion/ finalization of policies and laws affecting women.	HOW:	BY WHEN
	Facilitate interaction between autonomous groups (e.g. minorities, disabled, agriculturists, business women, rural or urban workers) and Standing Committees on women-related issues	1998
Action #3	BY WHOM: Training institutes e.g. Civil Service Academy, Judicial Academy, NIPA, Police Training Institute, NGOs	
Undertake training for all institutions dealing with women's issues for existing and further cadre development.	HOW:	BY WHEN
	Develop training programs for law enforcement agencies, SWO, judiciary, teachers, health and other government functionaries	2000

Action #4	BY WHOM: Ministry of Women's Development, Ministry of Law, Justice and Human Rights, Home Departments, District. Bar Associations, Legal Aid Groups, NGOs.	
Establish and facilitate multiple legal aid services.	HOW:	BY WHEN
	Set-up cells in the District & Sessions courts to provide free legal aid to women. Link these cells to adequate existing shelter homes and new shelter homes, medical facilities (including psychological help) and other support institutions	1998-
Action #5	BY WHOM: Parliamentarians, Women Politicians, MoWD, Ministry of Law, Justice and Human Rights, National Core Group/Provincial Core Groups, NGOs, Media, Human Rights Activists	
Monitor progress, prepare draft of bills and lobby for change.	HOW:	BY WHEN
	Monitor progress and assist all relevant branches of government and the Law Commission in the drafting of bills for parliament and provincial assemblies Advocate and lobby for changes at all levels. Hold debates and build societal consensus on proposed changes	1998-

Strategic Objective I.3

Promote legal equality for women by repealing discriminatory laws and provisions.

Action #1	BY WHOM: Members of Expert Committee (defined above) MoWD	
Operationalise recommendations of the Commission of Inquiry on Women (1997). Ensure provision of constitutional rights and fulfill Pakistan's obligations under CEDAW	HOW:	BY WHEN
	Review and revise all national laws and provisions in the light of fundamental rights guaranteed under the constitution and Pakistan's obligation under CEDAW	1998-99
Action #2	BY WHOM: Ministry of Women's Development, Law Enforcement Agencies, Judicial System, National Core Group/Provincial Core Groups	
Monitor and evaluate progress in removing obstacles to justice.	HOW:	BY WHEN
	Present six monthly report on family cases to Chief Justice of High Court, for identifying obstacles and unnecessary delays Chief Justice to recommend and implement appropriate changes, to ensure rapid and effective remedies. Chief Justice to ensure that the implementation of laws in lower courts, is in conformity with the rights of the superior courts	Ongoing
Action #3	BY WHOM: MoWD, Ministry of Law, Justice and Human Rights, Representatives of Women and Community decision-makers of Minority Groups, NGOs, legal experts	
Establish a committee for the reform of personal status law in all non-Muslim communities.	HOW:	BY WHEN
	Review all laws	By 2000
	Circulate proposed draft amendments/laws to community members; and finalize	By 2000
	Draft recommendations into bills	By 2001

Strategic Objective I.4

Incorporate international instruments into national laws and ensure enforcement.

Action #1	BY WHOM: MoWD, Ministry of Foreign Affairs, Ministry of Law, Parliament, NCG/PCGs	
Review and revise as appropriate all laws and policies in the light of Pakistan's obligations under CEDAW and the Convention on the Rights of the Child.	HOW:	BY WHEN
	Initiate work on annual reports and assessments	1998-
	Undertake urgent steps towards the ratification of international human rights instruments, particularly-ILO conventions relating to women's employment, Convention 100 on equal pay for equivalent work, international Covenant on Civil and Political Rights; Optional Protocol, etc.	1998-

Extracts from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
 - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

A Brief Survey of Muslim Laws in Other Countries

(submitted by the Human Rights Commission of Pakistan
to the Federal Shariat Court, Lahore, 2 February 1999)

Your lordships,

We would like to bring to your notice that the provisions of the clauses under scrutiny today are not unique to Pakistan but are present in other Islamic countries as well.

Provisions for orphans

With regard to Section 4 of the Muslim Family Law Ordinance (1961) Pakistan is not the only country providing for orphan grandchildren. For example in Turkey, "In case of pre-deceased son or daughter his or her share is transferred to his or her descendant son or daughter upon the death of the grandparents" (p. 162)*. Similar provisions exist in Bangladesh and Iran (p.150).

In countries such as Egypt the Law of Bequest 1946 (Sections 76-79) ensures an inheritance for orphan grandchildren in the form of obligatory bequest:

76. If a deceased person has left behind grandchildren, male or female, whose link-parent died before or with such person, a bequest in their favour will be binding on such person. The amount of such bequest shall be equal to the share which the link-parent concerned would have inherited in case of his or her death just after the death of the praepositus. It shall not, however, exceed one-third of the estate. Such an obligatory bequest shall not be due if the praepositus has already made in their favour either a bequest or a gift equivalent to what would otherwise be the amount of such bequest. The principle shall be applicable to the descendants of a predeceased daughter of the first generation only; among those of a predeceased son all agnatic descendants how lowsoever will have its benefit. Each ascendant shall exclude his own descendants only. The share of each predeceased descendant shall be divided among his or her heirs in accordance with the rule of 'double share for the male'.
77. Where the praepositus has already left a will in favour of a grandchild entitled to an obligatory bequest, if the optional bequest exceeds the amount of obligatory bequest, the excess will be governed by the general law of wills. If the amount of the optional bequest is less than the obligatory bequest, the deficiency shall be made up. If an optional bequest has been made in favour of some of the grandchildren only, the rest of them shall be given their due. The aggregate of the said optional bequest and what is given to the latter shall not exceed one-third of the estate.

* The following extracts are taken from the publication arising out of the *International Conference on Islamic Laws & Women in the Modern World*, Islamabad 22-23 December 1996, published by Giant Forum, Islamabad, ISBN No. 969-8414-00-2

78. If an obligatory bequest cannot be paid out of the remainder of one-third of the estate, optional bequests shall be applied, as far as necessary, to the payment of the obligatory bequest.
79. What remains out of one-third of the estate after the payment of the obligatory bequest shall be applied to pay optional bequests if any.

A similar provision exists in Tunisia. It is, therefore, quite evident from both examples that ensuring an inheritance for orphan grandchildren is not repugnant to the injunctions of Islam.

Procedures for divorce

With regard to divorce, most other Islamic countries lay down specific procedures for divorce and require its registration. For example, in the case of Malaysia, under the Islamic Family Law (Federal Territory) Act 1984, divorce is pronounced both inside and outside the court. The procedure for the former is as follows (p. 366-369):

- (a) A husband or a wife who desires divorce shall present an application for divorce to the Court in the prescribed form.
- (b) Upon receiving an application for divorce, the Court shall cause a summons to be served on the other party together with a copy of the application and the statutory declaration made by the applicant, and the summons shall direct the other party to appear before the Court so as to enable it to inquire whether or not the other party consents to the divorce.
- (c) If the other party consents to the divorce and the Court is satisfied after due inquiry and investigation that the marriage has irretrievably broken down, the Court shall advise the husband to pronounce one Talaq before the Court.
- (d) The Court shall record the fact of the pronouncement of one Talaq and shall send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.
- (e) Where the other party does not consent to the divorce or it appears to the Court that there is reasonable possibility of a reconciliation between the parties, the Court shall as soon as possible appoint a conciliatory committee consisting of a Religious Officer as Chairman and two other persons, one to act for husband and the other for the wife, and refer the case to the committee.
- (f) If the conciliatory committee is unable to effect reconciliation and is unable to persuade the parties to resume their conjugal relationship, it shall issue a certificate to that effect.
- (g) Where the committee submits to the Court a certificate that is unable to effect reconciliation and to persuade the parties to resume the conjugal relationship, the Court shall advise the husband to pronounce one Talaq before the Court, and where the Court is unable to procure the presence of the husband before the Court to pronounce the Talaq, or where the husband refuses to pronounce one Talaq, the Court shall refer the case to the Hakam for action.

- (h) If satisfied that there are constant quarrels between the parties to a marriage, the Court may appoint in accordance with Hukm Shari'a, two arbitrators or Hakam to act for the husband and wife respectively.
- (i) If the Hakam are of the opinion that the parties should be divorced but are unable for any reason to divorce, the Court shall appoint other Hakam and shall confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

In the case of divorce being pronounced outside the court (p. 376-377):

- (a) A man who has divorced his wife by the pronouncement of Talaq outside the Court and without permission of the Court, shall within seven days of the pronouncement of the Talaq report to the Court.
- (b) The Court shall hold an inquiry to ascertain whether the Talaq that was pronounced is valid according to Hukm Shari'a.
- (c) If the Court is satisfied that the Talaq that was pronounced is valid according to Hukm Shari'a, the Court shall, subject to section 124-
 - i) make an order approving the divorce by Talaq;
 - ii) record the divorce; and
 - iii) send a copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

According to Section 124 (p. 382):

Any man who divorces his wife by the pronouncement of Talaq in any form outside the Court and without permission of the court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both fine and imprisonment.

In Tunisia the Code of Personal Status, Section 30 states that no divorce shall take place except before the court (p. 451). Under Section 31(1):

A decree of divorce shall be given: (i) with the mutual consent of the parties; (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it. The party causing material or mental injury by the fact of divorce under clauses (ii) and (iii) shall be directed to indemnify the aggrieved spouse.

According to Section 32, no divorce shall be decreed except after the court has made an overall inquiry into the causes of rift and failed to effect a reconciliation. Thus, in Tunisia, divorce has become a judicial subject.

In Egypt, under Section 5-A of the Law of Personal Status 1929, the law states that a husband who divorces his wife shall get the divorce registered within thirty days from the date of pronouncement. If the divorced wife is present at the time of registration, her knowledge of divorce shall be recognized. But if

she is not present, the registrar shall notify the Talaq to her through a court official and get delivered to her or her nominee a copy of the certificate of divorce. Every divorce shall be effective from the day of the pronouncement except when the husband concealed it from the wife, in which case for the purposes of succession and other financial rights it will become effective on the date when it comes to her knowledge (p. 255).

Under Section 23-A, a person who divorces his wife in violation of this law shall be liable to punishment with imprisonment for a period up to six months or with fine up to 200 Egyptian pounds or with both (p. 262). Similarly, under Section 23-A, a registrar who neglects or fails to carry out his duties under this law shall be punished with imprisonment up to one month and with fine not exceeding 50 Egyptian pounds. He may also be dismissed or suspended for a period up to one year (p. 262).

In Iran today, procedural rules for divorce require an application to the competent court. This is the only legal way to obtain a divorce decree. In 1992 the Expediency Council passed a law ensuring that Notary Publics would not be allowed to register a divorce without the court's order. This order is called a Certificate of Disagreement. This Law emphasizes that the competent authority for approving divorce is the court (p. 310-311).

Provisions relating to polygamy

With regard to polygamy in Egypt, under Section 11-A of the Law of Personal Status 1929, the husband has to notify his first wife or his second wife of his decision to remarry:

A man getting married shall declare his marital status in his application for registration of marriage. If he is already married, he shall disclose the name and address of his existing wife. The registrar shall in that case inform her of the new marriage by registered post, acknowledgement due. A wife whose husband has married again can seek divorce on the ground of material injury caused by it, making it impossible to live with him -- irrespective of whether or not the marriage contract incorporates a stipulation giving her such a right. If the Qadi fails to effect a reconciliation between the parties he will grant an irrevocable divorce. The wife's right to seek divorce under this provision will lapse if she does not initiate action within one year from the date on which she comes to know of the second marriage or if she has consented to it expressly or impliedly. She will, however, have this right each time her husband marries again. If the new wife did not know at the time of marriage the fact of the man being already married and comes to know of it subsequently, she can similarly seek a divorce (p. 256-257).

Under Section 23-A, a person who makes a false declaration to the registrar regarding his marital status or address of his existing wife or wives, or divorced wife (in violation of the provisions in Section 11-A) shall be liable to punishment with imprisonment for a period up to six months or with fine up to 200 Egyptian pounds or with both (p. 262). Similarly, a registrar who neglects or fails to carry out his duties under this law shall be punished with imprisonment upto one month and with fine not exceeding 50 Egyptian pounds. He may also be dismissed or suspended for a period up to one year (p. 262).

In Malaysia, the Islamic Family Law (Federal Territory) Act 1984, Section 23(1) states (p. 259):

No man, during the subsistence of a marriage, shall except with the prior permission in writing of the court, contract another marriage, nor shall another marriage contracted without such permission be registered under this Act, provided that the Court may if it is shown that such marriage is valid according to the *Hukm Shari'a* order it to be registered.

Section 23(3) & (4) add that an application for permission shall be submitted to the Court in the prescribed manner. On receipt of the application, the court shall summon the existing wife or wives to be present at the hearing of the application, which shall be in camera, and the Court may grant permission applied for if satisfied that the proposed marriage is just and necessary; that the applicant can support all his wives and dependents; that the applicant would be able to accord all his wives equal treatment; and that the proposed marriage would not cause *darar syarie* to the existing wife or wives (p. 359-360).

Under Section 123, any man who during the subsistence of a marriage, contracts another marriage in any place without prior permission in writing of the court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment (p. 382).

In Tunisia the most prominent reform was the abolition of polygamy. Polygamy is also banned in Turkey (p. 462). Section 18 of the Tunisian Code of Personal Status 1956 states (p. 450):

(i) Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again shall be liable to imprisonment for one year or for a fine of 240,000 malims, or to both, even if the second marriage is in violation of any requirement of this Code.

The Requirement of Registration of Marriage and Divorce and Provision of Punishment for Contravention

(submitted by Shirkat Gah, Women's Resource Centre to the Federal Shariat Court, Lahore, 2 February 1999)

Background: The Role of the State

In the matter of the registration of marriage and divorce and the provision of punishment in the event of contravention, a major issue is: what is the state and the nature of its responsibilities? These responsibilities relate both to the regulation of relationships between individual citizens and between the citizen and the state. The constitution is the guiding instrument which describes the institution of the state, its functions, its mechanisms, the authority and role of various basic institutions and their authority over citizens, the rights and obligations of citizens, and - perhaps most important to our present discussion - the state's obligations towards citizens.

The 1973 Constitution of Pakistan clearly defines many of these things, with its guiding article being Article 2-A, which was originally the Objectives Resolution passed in 1949). The Objectives Resolution was originally incorporated as a preamble, designed to form the basic guideline of the Constitution, but in 1985 was included as a substantive part of the Constitution. For our argument here, it is important to note that a basic emphasis of Article 2-A is on social justice and the state's responsibility to guarantee Fundamental Rights.

In human society, the family - in a variety of forms appropriate to each stage of human development and each cultural setting - is the foundational social unit. Article 35 of the Constitution under Principles of Policy recognises this by obliging the state to "protect the marriage the family, the mother and the child."

This forms the background to the issues at hand, where the registration of marriage and divorce carries implications for the basic rights of the parties and the responsibility of the state to ensure these basic rights.

The Nature of Marriage Under Muslim Law

To understand the importance of registration of marriage and divorce, and the provision of punishment in the event of contravention, we first need to understand the nature of marriage under Muslim law, the law which applies to the majority of the citizens of Pakistan.

According to the known jurist Syed Ameer Ali:

"Under Mohammadan Law marriage is essentially a civil contract. A marriage contract as a civil institution rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers, and according to the majority of the schools, have the power to dissolve the marriage should the circumstances render this desirable.⁽¹⁴⁾

¹⁴ *Mohammadan Law*, Syed Ameer Ali, 6th edition, PLD Publishers, Lahore, p. 243

According to Mulla's Principles of Mahomedan Law, "Marriage (nikah) is defined to be a contract which has for its object the procreation and legalisation of children".⁽¹⁵⁾

The basic requisites of marriage are: that the parties be of sound mind and adult, there should be a proposal and acceptance, (which implies the free consent of the parties) witnesses and dower.

The provision of dower is a clear injunction, specified in numerous ayaat: Surah Al Maidah, verse 5:

... when ye give them their due dowers⁽¹⁶⁾

Surah Al Nisa, verse 24:

... give them their dowers as prescribed⁽¹⁷⁾

Dower is also mentioned in Surah Al-Baqarah, verses 236 and 237, and Surah Al Nisa, verse 20. If there is no registration of marriage and divorce and no solid record of the dower, whether prompt or deferred, how is it to be proved that this essential requisite has been fulfilled? Removal of the requirement of registration of marriage and divorce would effectively lead to violations of this holy injunction and such an amendment in the MFLO would itself be repugnant.

According to 'The Marriage Contract in Islamic Law' by Dawoud S. El Alami:

"The expressions used in the contract should be definite in the meaning which they indicate, that is, the desire to marry. These may be strictly literal, meaning marriage, or they may be in the form of a metaphor supported by the context such that the wording becomes clearly an expression of this desire."⁽¹⁸⁾

As mentioned above, marriage is a civil contract and as for all contracts, the terms and conditions of the contract are to be clearly specified and duly recorded so that this serves as a reference to regulate the contract in accordance with its terms and conditions. The marriage contract is unique in that it not only has implications for the rights and responsibilities of the two contracting parties, but also carries implications for the offspring which arise out of the contract. By virtue of the contract, a number of other matters come into play automatically: legitimacy of offspring, their paternity and guardianship, their right to maintenance and succession.

With mutual consent, the contracting parties may at any time modify the terms and conditions of the contract, which also requires specification and recording. Moreover, while the marriage contract automatically brings in certain mutual rights and responsibilities, e.g., maintenance, conjugal rights, dower, the details of these rights and responsibilities are to be found in the contract specific to a particular couple. Thus, the precise amount of dower may be mentioned, the delegation of certain rights may be mentioned, the amount of maintenance may be specified in the contract and may vary from couple to couple.

¹⁵ *Mulla's Principles of Mahomedan Law*, M. Hidayatullah, 19th edition, section 250

¹⁶ *The Holy Qur'an, Text, Translation and Commentary*, Abdullah Yusuf Ali, New Revised Edition, Amanat Corporation, 1989

¹⁷ *ibid.*

¹⁸ *The Marriage Contract in Islamic Law*, Dawoud S. El Alami, Graham and Trotman, 1992, p. 23

The marriage contract regulates not only the present rights and mutual obligations of the two spouses, but also regulates the future situation. In the future, this contract may come to a natural end through the death of one of the parties or the contract may be terminated by either party. In both situations, despite the end of the contract, its effect continues depending upon the specific situation. For example, in the event of the death of one spouse, the surviving spouse has rights of inheritance. In the event of termination of contract (dissolution of marriage other than through death), while the mutual rights of inheritance between the spouses are ended, the rights of the children to inherit, their legitimacy and paternity remain. Unless there is a clear record of the contract and its terms and conditions, regulation of all these matters under the various possible situations becomes impossible and the rights of either of the parties and/or the offspring may be affected. The due rights of some may be denied, while others may take undue advantage of the situation.

Legislative Developments in Pakistan

The state has a responsibility to ensure that in a given Muslim society the basic rights and responsibilities of the spouses are safeguarded and the institution of marriage is regulated. It was in this context that the Rashid Commission was established in 1955. Its terms of reference were:

“Do the existing laws governing marriages, divorce, maintenance and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam?”⁽¹⁹⁾

The Commission in its Report noted that its framework was Islam:

“It is an indisputable article of Muslim creed professed by every Muslim that so far as the basic principles and fundamental attitudes are concerned Islamic teaching is comprehensive and all-embracing, and Islamic law either actually derives or should derive its principles and sanctions from divine authority as revealed in the Holy Qur’an or clear injunctions based on the Sunnah.”⁽²⁰⁾

The Commission further pointed out that “if a well defined code about Marriage and Family Laws already existed, where was the necessity of appointing a Commission for the purposes of any revision or modification?”

The Commission gave its reasoning as follows:

“So far as the Holy Book is concerned the laws and injunctions promulgated therein deal mostly with basic principles and vital problems and consist of answers to the questions that arose while the book was being revealed. The entire set of injunctions in the Holy Qur’an covers only a few pages. It was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life-time. His precepts, his example and his interpretation or amplification constitute what is called the Sunnah. As nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and

¹⁹ The Rashid Commission, Gazette of Pakistan, extraordinary, June 20 1956, pp. 1197-8

²⁰ *ibid.*, p. 1198

judicial decisions even for his contemporaries who had the Holy Qur'an and the Sunnah before their eyes. This is the principle of Ijtihad or interpretive intelligence working within the broad framework of the Qur'an and Sunnah.”⁽²¹⁾

The Qur'an thus provided the basic principles for society, but leaves the details of how, precisely, to regulate any given society at any given point in history up to 'legislative enactments and judicial decisions.'

At the time the Qur'an was revealed, many dealings were verbal but the Qur'an sought to change this by repeatedly recommending that all dealings between individuals be recorded. Similarly, there was a time in Pakistan's development when many dealings were verbal. It was a small, close, tribal society in which to a great extent nobody functioned as an individual. Through a natural evolutionary process, this changed and by 1955 it became evident that evidence was now required to prove the terms and conditions of dealings between individuals. Under all laws, the most important evidentiary proof is documentation.

The need for documentary evidence in matters of marriage and divorce is particularly important since any disputes that arise are inevitably between interested parties and even the witnesses are unlikely to be independent. This brings in the need for a third party in the form of the Nikah Registrar and the Union Council which is an independent entity, without interests in either of the parties to a marriage and which can thereby provide sound evidence regarding marriage and divorce.

The need for independent evidence is particularly significant in the event of talaq. While marriage is by implication and general practice a very public affair, talaq is a more private matter. This makes evidence of its occurrence more difficult to prove, especially given customary practices prevailing in Pakistan which recognise as valid an oral, triple talaq without witnesses. Without documentary evidence of talaq, there is nothing to stop a man from pronouncing talaq, revoking it, pronouncing it again and so on, creating chaos and making regularisation and institutionalisation of talaq an urgent necessity.

Let us for the time being return to registration of marriages. Under the given law, there is a standard nikahnama which carries clauses which must be filled for a valid marriage and certain clauses which are optional to the two parties. It has to be duly registered with a state functionary, the Nikah Registrar and any violation of this compulsion carries a punishment. The registered nikahnama serves as the proof of the existence of a marriage between two persons. In the event of any violation of any of the rights mentioned in the contract, the nikahnama serves as a reference point for deciding the relief to be granted to the parties. In the absence of registration, the court approached for relief will have nothing to rely upon to help it decide the appropriate relief and in certain situations one party may in totality deny the very existence of the marriage. This is clearly a situation leading to chaos.

While the absence of documentary proof may invalidate a normal contract, the marriage contract is not invalidated by non-registration. However, by removing the threat of punitive action in the event of non-registration, registration is effectively made optional, leaving the state no mechanism through which to regulate the terms and conditions of a marriage.

²¹ *ibid.*, p. 1199

On the creation of Bangladesh in 1971, it inherited the Muslim Family Laws Ordinance, but looking at societal trends it felt the need to strengthen the provisions regarding registration of marriage and divorce under the MFLO through the Muslim Marriages and Divorces Registration Act 1974 and the 1975 Rules thereunder. Till date, Bangladesh has been bring a number of changes in the legislative provisions regarding marriage and divorce to further improve the situation.

The preamble of this Act indicates that in Bangladesh the state felt that registration was a significant matter and the preamble to the 1974 Act reads:

“Whereas it is expedient to consolidate and amend the law relating to registration of Muslim marriages and divorces...”

Regarding registration of marriages, Section 5 of the MFLO was repealed and Section 3 of the Muslim Marriages and Divorces Registration Act 1974 reads:

“Registration of Marriage: Notwithstanding anything contained in any law, custom or usage, every marriage solemnised under Muslim Law shall be registered in accordance with the provisions of this Act.”

Punishment for non-registration of marriage under S. 5(2) of the 1974 Act reads:

“Whoever contravenes the provision of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to three months or with fine which may extend to five hundred taka, or with both.”

In Pakistan, under S 9 of the West Pakistan Rules under Muslim Family Laws Ordinance 1961, a registration fee is to be paid to the Nikah Registrar. But in Bangladesh in order to encourage the registration of marriages and make it free from complications, the fee for registration has been done away with under S.9 of the Muslim Marriages and Divorces Registration Act 1974.

Meanwhile, Bangladesh retained the MFLO provisions for talaq under S. 7 but reinforced these within the MFLO through Ordinance 21 in 1982 by strengthening the provisions for punishment under S. 7(2):

“Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both.”

These provisions were even further reinforced through S. 6 of the Muslim Marriages and Divorces Registration Act, 1974, which introduces an additional system of registration through Nikah Registrars and provides for procedure in the event of the refusal by the Nikah Registrar to register a divorce.

Also to be noted is the fact that in Bangladesh the qualifications and regulation of the office of Nikah Registrar have been greatly strengthened under the Muslim Marriages and Divorces (Registration) Rules of 1975.

As we have already noted, there is a need to ensure that Nikah Registrars act in accordance with the law and are familiar with Muslim Family Laws and Rules. There have been numerous instances where Nikah Registrars, who are invariably the imam of the local mosque have refused to register a marriage even though the couple have solemnised the nikah fulfilling all the requisites of a Muslim marriage. This

generally occurs when the marriage has been solemnised by someone other than the Nikah Registrar and when the wedding has not been a big public gathering although the required number of witnesses have been present. This may occur when a couple does not have the blessings of one of the families or is unable to bring family members due to migration or the simple fact that one of the parties may not have any close family members. In such instances, Nikah Registrars have been known to demand the presence of a family member although this is not required under jurisprudence and law, provided all other requisites of Muslim marriage have been fulfilled. Nikah Registrars have also been known to refuse to register a nikah when the bride is a Christian. This demonstrates their lack of knowledge of jurisprudence which permits the marriage of a Muslim male with an Ahle-Kitab woman (belonging to one of the revealed religions).

Ss.5 and 6 of the Muslim Marriages and Divorces (Registration) Rules, 1975, provides a detailed process and criteria for selection of Nikah Registrars. Whereas in Pakistan under S. 7(2) of the Muslim Family Laws Rules 1961, a Union Council may grant a Nikah Registrar licence if it “is satisfied that the applicant is a fit and proper person”, under S.6 of the Bangladesh law a candidate must:

- possess Alim Certificate from a Madrasha Board established under law;
- be between 21 and 40 years of age;
- resident of the area.

Moreover, under S. 21, the Bangladesh Rules provide for procedure in the event of refusal to register a marriage, as well as detailed provisions for the revocation, suspension and annulment of licences under S.8.

The important nature of the responsibilities placed upon the Nikah Registrar were brought out clearly in Shah Din and others vs. The State PLD 1984 Lahore 137, a case in which a woman alleged she had been abducted and raped while the counter allegation was the existence of a registered nikah.

Hearing a bail application, the honourable court in its judgement noted that

“The incidents giving rise to proceedings like the one in hand would be greatly reduced if the Nikah Registrars appointed under the Muslim Family Laws Ordinance 1961, instead of not simply filling the various columns of nikahnama, in routine, realise that the duty they were required to perform is very sacred because rights to succession, maintenance, dower, divorce, legitimacy of children and several other rights flow from valid marriage. As public servants which essentially they are, they should demonstrate more sense of responsibility before authenticating the Nikah making proper enquiries as to the competency of the parties to understand the nature of their act, their ages and whether or not they are acting of their free will and without any compulsion.”

The court also noted the Nikah Registrar’s liability to criminal charges for his failure to perform his duties properly.

The Effect of Non-Registration of Marriage and Divorce

The question must be asked as to why anything is made compulsory in law and why such a compulsion is enforced through a punishment in the event of contravention. Let us take the example of registration of an FIR. It has been made compulsory upon the Police to register an FIR. Why? Because the state recognises the consequences of failure to register an FIR as likely to lead to a serious disturbance of the social order. Similarly in marriage and divorce, while an unregistered marriage remains valid, the state functionary responsible for registration is liable to punishment because he has failed to facilitate the state in regulating the foundational institution of marriage, with severe potential consequences for the social order.

As has been seen by decades of case law since the promulgation of the Muslim Family Laws Ordinance in 1961, social conditions in Pakistan are such that despite the compulsion of registration of marriages and divorces, attitudes preferring registration are only changing very slowly and there are many unscrupulous persons waiting to take undue advantage of non-registration. The removal of the compulsion for registration may lead to a variety of chaotic situations and will give licence to all sorts of immoral activities.

First, it leaves open the possibility of the claim that there was no marriage at all; second, it will allow false claims by one party against another; and third, it may give licence to immorality in that anyone can claim to be validly married and there will be no means of proving to the contrary. This situation will effectively lead to making legitimate that which is illegitimate and to making that which is illegitimate legitimate. For example, where one validly married couple migrates to another part of the country, without registration they may have no means of proving the validity of their marriage and may be open to punishment for zina. On the other hand, an abductor may be able to produce false witnesses that a marriage took place and escape punishment for abduction. Another example, common to our social circumstances, is the event of abandonment. If a married woman is abandoned while pregnant, without registration she will face great difficulty in subsequently proving paternity and legitimacy. Further, without compulsory registration of marriage and divorce, the status of divorced women will remain unclear for their entire lives, a situation of great hardship and one which may leave them vulnerable to the threat of criminal liability in the event that they subsequently remarry. Yet another example of the possible hardship created by non-registration of marriage and divorce is that it makes a widow and her children vulnerable to the false claim that she was either never married to the deceased or he had divorced her prior to his death. What about those marriages where there has been no *rukhsati* (departure of the bride to the husband's home, implying consummation)? In the absence of documentary proof, there will be no marriage in effect. If this becomes disputed, the wife will have no means whatsoever to claim due dower and her status, even though the marriage has not even been consummated, will remain unclear for the rest of her life.

By removing the compulsion for registration of marriages, the office of Nikah Registrar will be effectively made defunct. This has widespread implications. The Nikah Registrar's duty is not only to register marriages, but also to check the capacity and status of the contracting parties. In the absence of registration there shall be no means to check this. This may lead to many unjust and unequal marriages such as the marriage of an insane person to a sane person without the latter's consent and similarly the marriage of a child to an aged person. Further, since the nikahnama records the existence of previous marriages, the removal of the compulsion of registration may lead to uncontrolled multiple marriages. In several parts of the country, the practice of trafficking of women and sale of women in marriage persists.

In the absence of compulsory registration, marriage may well be turned into a business. But even in less extreme situations, the absence of the requirement of registration of marriage will profoundly affect the rights of wives in a polygamous marriage. A woman will be unable to prove unequal treatment if she cannot prove that her husband has taken a subsequent wife or wives. This will also give licence to men in particular to contract secretive marriages, undermining the rights of the existing wife or wives.

In opposite situations where, in particular, women exercise their right to choice in marriage, it is quite common for parents to register false cases against the couple and many cases which have already come before the superior courts have shown that there are attempts to claim previous marriages and to have the couple charged with bigamy and zina. In the absence of compulsory registration, every adult Muslim's right to exercise free choice in marriage shall effectively be done away with. This will also lead to a bulk of civil litigation with people having to clarify their status through the courts, while also facing criminal liabilities of zina.

There is a basic distinction between the registration of marriage and divorce. By doing away with compulsory registration of marriages, you do not do away with marriage if the requisites have been fulfilled, but by doing away with compulsory registration of divorce, you effectively do away with the procedure of talaq: notice to the Union Council means informing of the intention of talaq. Without this, how is it to be proved that there was the intention of talaq? Intention of marriage is clear as its is a public event, but talaq is a private affair and thus without notification, how is the intent to be proved? Without being able to prove intention, the right of talaq becomes a weapon that can be abused.

Without a clear and definite date of talaq, duly recorded in documentation, how is iddat to be calculated? The primary purpose of iddat in the event of divorce is to ascertain pregnancy and to prove paternity in the event of pregnancy. With no recorded date of talaq and no clear calculation of iddat, how will paternity be proved? How will the rights of the mother and of the children be ensured? The observation of iddat following divorce is a clear injunction, as indicated by Surah Al Baqarah, verse 228, which reads:

“Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And Allah is Exalted in Power, Wise.”⁽²²⁾

The requirement of iddat is also specified clearly in Surah Al Baqarah, verses 231 and 232 which both begin with the same words:

“When ye divorce women, and they fulfill the term of their (Iddah)...”⁽²³⁾

²² *The Holy Qur'an, Text, Translation and Commentary*, Abdullah Yusuf Ali, New Revised Edition, Amanat Corporation, 1989

²³ *ibid.*

Surah Al Baqarah also specifies that a divorced woman should not remarry until her iddat is fulfilled:

“There is no blame on you if ye make an offer of betrothal or hold it in your hearts. Allah knows that ye cherish them in your hearts: but do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah knoweth what is in your hearts, and take heed of Him; and know that Allah is Oft-Forgiving, Most Forbearing.”⁽²⁴⁾

Iddat is again prescribed in Surah Al Talaq, verses 1 and 2:

“O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.”

“Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endowed with justice, and establish the evidence (as) before Allah. Such is the admonition give to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out.”⁽²⁵⁾

The above-mentioned verses Surah Al Baqarah, verses 228, 231 and 232, and Surah Al Talaq, verse 2 also make it clear that the sequence is **first** divorce, **then** iddat and possible reconciliation through some coming to terms. Nowhere is it mentioned that iddat precedes a pronouncement of divorce.

It should also be mentioned that three authoritative translations of the Qur’an:

‘The Holy Qur’an - Text, Translation and Commentary’
Abdullah Yusuf Ali, New Revised Edition, Amana Corporation, Maryland, USA, (1989);

‘The Meaning of the Glorious Qur’an - Text and Explanatory Translation’
Marmaduke Pickthall, Taj Company, Pakistan, (n.d.)

‘The Holy Qur’an Vols. I & II - Text, Translation and Brief Note’
S. Abul A’la Maududi (English rendering Abdul Aziz Kamal), Islamic Publications,
Lahore (1982)

use the terms ‘monthly periods’ ‘courses’ or ‘monthly courses’ leaving no doubt as to the meaning of the prescribed period. In Allahdad vs. Mukhtar 1992 SCMR 1273 it was held that iddat **may be** as short as 39 days. But in fact, in this case a woman had remarried after a period of 79 days and it was declared that in the absence of any proof that she had not undergone three menstruations, she was free of criminal liability. Thus, the basis of calculating iddat needs to remain three courses and for the sake of avoiding complications, the period of 90 days allowed under S. 7(3) appears most appropriate.

²⁴ ibid.

²⁵ ibid.

It is also clearly specified that during iddat women are to continue to be maintained by their husbands:

“Let the women live (in iddah) in the same style as ye live, according to your means; annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden; and if they suckle your (offspring), give them their recompense: And take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father’s) behalf.”⁽²⁶⁾

Moreover, the period of iddat is also designed to allow a time period for reflection, an opportunity to reconsider. Indicating that the purpose of iddat is not simply proving of paternity, Surah Al Talaq, verse 4 reads:

“Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their period is until they deliver their burdens: and for those who fear Allah, He will make their path easy.”⁽²⁷⁾

Talaq is not a light matter. The intention of marriage was permanency, so undoing this is a serious matter with profound implications for the parties and the offspring. If no definite date of talaq is recorded, if iddat cannot be calculated, what happens to this vital waiting period? How can a woman claim maintenance for the iddat period? If registration is done away with, it would effectively lead to a violation of the Qur’anic injunctions regarding iddat and thus any such changes in the MFLO would themselves be repugnant.

By doing away with the compulsory registration of talaq and other forms of dissolution of marriage, women in particular will be made vulnerable to Hudood cases in the event that they remarry and in almost every case, the woman will have to file a case in the Family Court to prove her status as married or unmarried. There will also be continuing disputes about the period of iddat, affecting rights of maintenance during iddat and making it impossible to determine precisely when a woman is free to remarry following a divorce.

A number of cases have already come before this honourable court in its appellate jurisdiction, in quashment and in bail applications, which relate to situations where women have been verbally divorced and where they remarry through an unregistered nikah, or where widows have remarried through a verbal nikah and where other laws existing in the country, notably the Zina (Enforcement of Hudood) Ordinance comes into play. There have been cases before the courts where in order to deprive a widow of her property, either her previous husband’s family or even her own family have registered a false case of zina against her following her remarriage against their wishes.

The negative impact of certain prevalent customs such as child marriage and *watta satta* (exchange marriage) will also be heightened by the removal of the compulsion of registration and divorce. If, for example, on reaching puberty a man verbally nullifies his marriage contracted as a minor, in the event that his wife marries another person, she will be open to a charge of zina.

²⁶ ibid.

²⁷ ibid.

These cases demonstrate the chaos caused by unregistered marriage and divorce and the potential for further chaos should the compulsion of registration be done away with. Ultimately, the absence of registration of marriage and divorce would reduce the status of honourable women to that of an abductee or mistress.

The entire burden of addressing this chaos will fall upon the state which has sought to abdicate its responsibility to check that there is no misuse of law. Under the Constitution of Pakistan, Principles of Policy, the state is bound to protect the family, marriage, the mother and the child (Article 35). Furthermore, according to Article 2-A, “sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust” and the State of Pakistan shall guarantee fundamental rights including social justice. It would be a clear breach of this a sacred trust if the state were to withdraw from its responsibility to regulate the institution of marriage.

The disastrous consequences of the state’s failure to strictly applies its responsibility to enforce the punitive action in the event on non-registration of marriage and divorce are already clear. In the case of husbands who register false zina cases against wives whom they have discarded through unregistered talaq, how many such irresponsible husbands have been punished under the law and how many such husbands have been punished for *qazf* [false imprecation]? What is needed is not removal of the punitive action, but ensuring that it is strictly applied according to the circumstances.

Case Law Illustrating the Impact of Non-Registration

This honourable court has already dealt with numerous cases of Hudood filed because the documentation required under Sections 5 and 7 does not exist. While in a vast majority of instances, couples have been ultimately acquitted by this honourable court it has been at the cost of lengthy litigation, often reaching the Supreme Court, and years of jail suffered by the one or both of the parties. We shall cite here just a few examples.

In Muhammad Azam vs. Muhammad Iqbal PLD 1984 Supreme Court 95 the court dealt with the highly complex issue of a case of abduction and false marriage of a young girl. While the court ultimately provided guidelines for the treatment of such cases and the complex interaction of civil and criminal law, it has been seen that such problematic cases continue to take up the valuable time of the courts, all of which could be avoided by the enforcement of the compulsion of registration.

Muhammad Sarwar vs. The State PLD 1988 FSC 42 revealed the potential for abuse by vindictive husbands in the event of non-registration of talaq. In the absence of registration of talaq, a woman and her second husband are unable to prove the legitimacy of their status, making women the playthings of men and introducing the possibility of forced sexual relations: one day a man may divorce his wife and another day he may claim he has revoked the talaq, and the woman has no means to prevent this.

Noor Khan vs. Haq Nawaz (PLD 1982 FSC 265) further revealed the potential for abuse in the event of non-registration of talaq. This case related to a couple who had been married 10 years prior to the registration of a mala fide case of zina and had had three children out of this wedlock. It took some two and a half years for the case to be rejected. In that time can anyone imagine the suffering of the couple and their three innocent children? But this case clearly revealed the problems created by unregistered marriage and divorce.

This honourable court, while upholding the couple's acquittal on zina charges, noted (at p. 285) that it had to give maximum benefit of doubt to the couple. Their claim that the wife was first divorced and a marriage subsequently took place between them was on such a weak footing due the lack of documentary evidence. The couple has to rely entirely on verbal evidence which, due to the passage of no less than ten years before the complaint was lodged, was extremely difficult to provide to the satisfaction of the court. The honourable court further noted that while it was acquitting the couple, it was in no way upholding the validity of either the verbal talaq nor the verbal marriage subsequently claimed to have taken place.

In the absence of uniform mechanisms for divorce, it becomes impossible to establish the validity of a divorce leaving the question of responsibility for maintenance hanging in the balance. The dispute between Tahira Begum and her husband Mirza Qamar Raza took no less than 10 years to decide and required ultimate resort to the Supreme Court (*Federation of Pakistan vs. Mst. Tahira Begum and others* 1994 SCMR 1740). It is an example of the uncertainty which arises out of non-uniform mechanisms for divorce.

Talaq or dissolution of marriage invariably takes place against the wishes of one of the parties. But even where there has apparently been mutual consent, absence of registration leaves the door open for one of the parties to subsequently agitate against the other. In *Kaniz Fatima vs. Wali Muhammad* PLD 1993 SC 901, following a mutual agreement not to go through Union Council procedures the wife subsequently filed for maintenance. It can also be seen from this example that non-registration also affects the rights of husbands.

There can be an almost endless list of cases where this honourable court and various other superior courts have found themselves in an impossible situation whereby due to the failure to follow civil procedure a couple genuinely believing themselves to be validly married has been exposed to criminal liabilities and on the other hand where the mala fide use of civil procedure has opened the door to a party being excused from a criminal liability.

This list includes such known cases as *Muhammad Sarwar vs. The State* mentioned above; 1988 SC 186; *Allahdad vs. Mukhtar* 1992 SCMR 1273; *Mohammad Rafique vs. Ahmad Yar* PLD 1982 Lahore 825; *Amanullah Shah vs. Eidat Shah* NLR 1981 Criminal 164; *Mukhtar Ahmad vs. Ghafoor Ahmad* PLD 1990 Lahore 484, to name but a very few.

Conclusion

The solution here is not to effectively do away with registration by removing the element of compulsion. If a child fails to note down his homework, the teacher may punish him according to the circumstances of the case: did the child simply forget, was his hand hurting making him unable to write, did he do it deliberately to avoid the work? The solution is not to abandon the discipline of writing down homework which would ultimately abolish homework altogether. If registration of marriages and divorces is effectively done away with, the currently problems facing the courts will not be solved. Instead there will be a surge in litigation with hundreds of thousands of couples having to go through litigation in order to prove their status. The existing burden on the courts will be greatly increased while the social order will be profoundly disturbed.

JAC Press Statement

The Joint Action Committee for People's Rights is deeply concerned at the judgement of the Federal Shariat Court striking some provisions of the Muslim Family Laws Ordinance (MFLO) 1961 as un-Islamic. The Federal Shariat Court has no jurisdiction to rule upon Personal Law thereby interfering with the rights of women and orphan grandchildren in family matters.

The Joint Action Committee has always held the view that the Federal Shariat Court is an unnecessary branch of the judiciary which has complicated law making. Their past record shows that their judgements favour privileged classes and bear a bias against the rights of women.

The Federal Shariat Court has misused its power to legislate on important issues which require debate in Parliament rather than a narrow minded interpretation by a hand full of judges. The Muslim Family Laws Ordinance 1961 needed to be strengthened rather than eroded. Any move to amend the MFLO in the light of this judgement will do away with the entire purpose and spirit of this law, which has been one of the few pieces of legislation offering protection to women and children's rights within the family.

The Federal Shariat Court has added numerous hurdles in the smooth governance of the country. It has ruled against the interest of the peasants, religious minorities, women and children. Its pronouncements have helped the exploitation of the vulnerable sections of the society. The proposed amendments will lead to a massive increase in the existing burden of litigation on the courts, and will lead to greater injustice.

On the one hand, this judgement has upheld MFLO provisions requiring registration of marriage, and has even directed them to be strengthened, recognising the obligation of the state to safeguard registration. But on the other hand, it has undermined provisions requiring registration of divorce, even though the protective purpose of registration is the same in both instances.

There shall be a number of serious implications if the MFLO is amended as directed by the FSC. By striking down Ss 7(3) and 7(5), the entire provisions of Section 7 relating to procedure and registration of divorce are effectively done away with. This will create a situation where registration of talaq is dispensed with.

By striking down section 4 of the MFLO the court has exposed its insensitivity towards the rights of orphan. The courts are normally looked upon as guardians of the underprivileged rather than usurpers of their rights.

JAC calls upon all human rights and women's rights organizations to come together for discussion and concerted action on this judgement and the existence of the Federal Shariat Court itself.

HRCP Dismayed at Challenging of Family Laws

Karachi: The Human Rights Commission of Pakistan has expressed its dismay over the challenging of the Muslim Family Law Ordinance, 1961, in the Federal Shariat Court.

In a statement here on Thursday, the HRCP said any disturbance to the four sections of the Ordinance challenged in the court would be a serious blow to the rights of every Muslim women and girl in Pakistan.

It said family laws affect every single Pakistani woman. So far the point of view of women, who constitute 50 per cent of population, has not been heard and they are not a party to the proceedings of these hearings.

It said: "The 1961 Ordinance was promulgated after a decade of struggle by women for concessions for protecting their rights. Ever since, the promulgation of the Ordinance, the orthodoxy has persistently tried to undo even these token protections given to the women".

"There is no doubt that Pakistan's orthodoxy has decided to pursue its bigotry policy and continue to remain a thorn in the side of the rights of women. Every now and then they instigate a confrontation by making all sorts of efforts to subjugate women. They are proposing to do away with the registration of marriages and divorces. This will cause confusion to the marital status of every woman," it said.

"A man may verbally divorce a woman and then deny the same once she remarries another person. This will expose her to the allegation of Zina. On the other hand, any separated woman claiming maintenance can be defeated from doing so at the statement of her husband claiming that he had already divorced her," it said.

It maintained that the 1955 Women's Commission Report has pointed out that several cases of property disputes were pending between widows and their in-laws simply because a woman had difficulty in proving that she was not divorced by her deceased husband.

Dawn, 14 January 2000

نحوائيزه زير اثر مسام قوانينه

Women living under muslim laws

النساء في ظل قوانين المسلمين

Femmes sous lois musulmanes

International solidarity network
Reseau international de solidarite'

Central Coordination:

P.O.Box 28445, London N195NZ,
United Kingdom.

Coordination Asia:

P.O.Box 5192, Lahore-Pakistan.

Women living Under Muslim Laws

Is a network of women whose lives are shaped, conditioned or governed by laws, both written and unwritten, drawn from interpretations of the Koran tied up with local traditions.

General speaking, men and the State use these against women, and they have done so under various political regimes.

Women living Under Muslim Laws

Addresses itself

to women living where Islam is the religion of the State, as well as to women who belong to Muslim communities ruled by minority religious laws,

to women in secular states where Islam is rapidly expanding and where fundamentalists demand a minority religious law, as well as to women from immigrant Muslim communities in Europe and the Americas,

and to non Muslim women, either nationals or foreigners, living in Muslim countries and communities, where Muslim laws are applied to them and to their children.

Women living Under Muslim Laws

Was formed in response to situations which required urgent action; during the years 1984-85.

The case of three feminists arrested and jailed without trial, kept incommunicado for seven months, in Algeria, for having discussed with other women the project of law known as "Family Code", which was highly unfavorable to women.

The case of an Indian sunni woman who filled a petition in the Supreme Court arguing that the Muslim minority law applied to her in her divorce denied her the rights otherwise guaranteed by the Constitution of India to all citizens and called for support.

The case of a woman in Abu Dhabi, charged with adultery and sentenced to be stoned to death after delivering and feeding her child for two months.

The case of the "Mothers of Algiers" who fought for custody of their children after divorce.

Amongst others...

The campaigns that have been launched on these occasions received full support both from women within Muslim countries and communities, and from progressive and feminists groups abroad.

Taking the opportunity of meeting at the international feminist gathering "Tribunal on Reproductive Rights" held in Amsterdam, Holland, in July 1984, nine women from Muslim countries and communities ; Algeria, Morocco, Sudan, Iran, Mauritius, Tanzania, Bangla Desh and Pakistan, came together and formed the Action Committee of Women Living Under Muslim Laws, in support of women's struggles in the concerned contexts.

This Committee later evolved into the present network.

The objectives of Women Living Under Muslim Laws are

- to create links amongst women and women's groups (including those prevented from organizing or facing repression if they attempt to do so) within Muslim countries and communities,
- to increase women's knowledge about both their common and diverse situations in various contexts,
- to strengthen their struggles and to create the means to support them internationally from within the Muslim world and outside.

In each of these countries till now women have been waging their struggle in isolation.

Women Living Under Muslim Laws aims at

- providing information for women and women's groups from Muslim countries and communities.
- Disseminating this information to other women from Muslim countries and communities.
- Supporting their struggles from within the Muslim countries and communities, and make them known outside.
- Providing a channel of communication amongst women from Muslim countries and communities.

These objectives are fulfilled through

- building a network of information and solidarity
- dissemination information through "Dossiers"
- facilitating interaction and contact between women from Muslim countries and communities, and between them and progressive and feminists groups at large.
- Facilitating exchanges of women one geographical area to another in the Muslim world.