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## **ISSUES AND APPLICATION OF FAMILY LAWS IN PAKISTAN: AN OVERVIEW**

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**Abstract:** ‘Family law’ is that branch of law which regulates family relations within the society. The matters being dealt within the ambit of family law are marriage, divorce, dower, dowry, paternity, maintenance, succession and custody of children and allied matters thereto. In Pakistan, numerous laws deal with different family matters. Judiciary and ulema have played their role in the development of family law in Pakistan. Due to the abrupt changes in family structure, the State is facing many issues when it comes to the adjudication upon matters allied to family life. These issues need to be resolved holistically and proactively. This article will provide an overview of different family law enactments pertaining to Muslims and also provide an analysis of these laws at the end.

**Key Words:** Family law; Pakistan; Acts; Islamic law.

## Introduction

Family is the basic institution of any society and the harmonious progression and development of any society rests upon the peaceful and healthy family relations within that society. In order to regulate the family matters and matters allied thereto, different rules and regulations are being made by the societies. These rules and principles are necessary when it comes to the family disputes, firstly for their amicable settlement and lastly for maintaining cordial family environment. As Pakistan is an Islamic state, so the groundwork for Muslim family law has been there, the basis of which are derived from fiqh and Islamic law. The rules and principles governing different aspects of marriages, dower, divorce, maintenance, child custody, parentage and succession are derived and elaborated upon from Islamic law as ordained in holy Quran and Sunnah and as developed by different Muslim scholars like Imam Abu Hanifa, Imam Malik, Imam Shafai, Imam Hanbal and Imam Jaffer as Sadiq AS along with their disciples. There are Muslims, belonging to different schools/ fiqhs, living in Pakistan. These schools have somewhat different aspects and rules when it comes to family law jurisprudence, so in order to bring harmony and uniformity in this regard, the State has enacted different laws pertaining to family matters and formulated different forums, judicial as well as, non-judicial, to settle the family issues. However, it may be kept in mind that the personal law of the parties also plays a vital role, when there is a difference of opinion as far as the state law is concerned and usually personal law is given preference in such family matters, when it comes to the jurisprudential aspects, whereas, as far as procedural aspects are concerned, the state law is followed irrespective of any personal laws, which deal with Muslims in Pakistan, out of which few important are discussed in this article to give an idea to the readers about these important laws and procedures involved therein.

### **Family Laws: *The Concept***

All those laws which regulate different aspects of family matters, either directly or indirectly can be termed as 'family laws'. These laws are enacted and legislated by keeping in view the societal needs, state policies, religious affiliations and sometimes international commitments. As Pakistan is an Islamic state, the laws available/ present in Pakistan, when it comes to family life, have been inspired by Islamic principles. When the process of Islamization started in Pakistan, family matters were also an important aspect, which was covered throughout the process. All the policymakers including but not limited to state, parliament, judiciary, legal fraternity and ulema played their role in this regard and we came across progressive interpretations towards the family matters esp. when it comes to rights of women and children in a family; however, there are different aspects upon which no progress has yet been made like post-divorce maintenance of a divorced wife where

husband is at fault and to be blamed. In many states, classical Islamic law has been bit modified by modern legislators either in the name of rights of women and children or due to international commitments/ pressure in the name of reforms to harmonize the traditional principles of Islamic law with the needs of a modern society (Dr. Mansoori, MT, 2021). However, much deviation has not been made from the classical Muslim family law and device of eclecticism has been used for introducing reforms in this regard. Sir Rahim, A (1911) is of the view that under Islam family life is not meant to overshadow the fundamental principles of individual responsibility and liberty and each member is individually responsible for his acts as well as, there is no concept of any joint family system of holding property as available in Hindu law. The family relations are based on consanguinity and affinity.

### **Muslim Family Law in Pakistan**

Dr. Mansoori (2021) is of the view that in Islam family institution has totally different aims and objectives as well as, characteristics, if we compare it with Western system, such as the concept of extended family, social security system regarding maintenance of wife and children, different roles assigned to husband and wife are few of the unique features of Muslim family law unknown to West. Abbasi, Z and Cheema, S (2018) are of the view that family law is simple when compared to other branches of law esp. criminal and constitutional laws, however when it comes to different issues creeping out of family matters, it becomes very challenging. In Pakistan, most important legislation regarding Muslim family laws, has been Muslim Family Laws Ordinance 1961, which was considered to be most progressive piece of legislation as far as reforms in family laws pertaining to registration of marriages, polygamy, process of divorce and right of succession in grandparent's property is concerned. The same has been criticized by different corners, yet it is still very much in force despite all the criticism and famous judgment of Federal Shariat Court in Allah Rakha versus Federation of Pakistan (2000). Family law in Pakistan has undergone different phases since 1947 and in its development legislature, ulema, higher judiciary (Supreme Court, High Courts and Federal Shariat Court) and different commissions on marriage and family laws alongwith Ministry of Religious Affairs have played a vital and key role. When we talk of family law in Pakistan, the personal law of the parties i.e. the beliefs of an individual or his /her fiqh plays an important role, when the issue is adjudicated upon by the judiciary. The law in Pakistan also acknowledges this aspect in family matter's adjudication. The Constitution of Pakistan's article 35 deals with protection of family life etc and article 203 B (c) of the Constitution excludes Muslim personal law from the jurisdiction of Federal Shariat Court. It should be remembered here that Muslim personal law is that branch of law which applies to all aspects of family life and matters attached therewith regarding custody and guardianship

of children, disposal of property either *inter vivos* or testamentary or even through inheritance (Abbasi, Z and Cheema, S. 2018, 16). In this article an overview of following family laws has been provided:-

- (a) Muslim Family Laws Ordinance, 1961
- (b) Family Courts Act, 1964
- (c) The guardian and Wards Act, 1890
- (d) The Dissolution of Muslim Marriages Act, 1939
- (e) The Majority Act, 1875
- (f) Child Marriages Restraint Act, 1929
- (g) Dowry and Bridal Gifts (Restriction) Act 1976

### **Muslim Family Laws Ordinance 1961**

This Ordinance was promulgated in 1961 to give effect to the recommendations of the Commission on Marriage and Family Laws. Its application is throughout the country and upon all citizens, who are Muslim, even if they are outside the country. In 2012 it was decided by the honorable court that subjects of Azad Kashmir, who hold Pakistani passports, are to be deemed to be citizen of Pakistan for the application of this Ordinance (see, Muhammad Zaman versus Uzma Bibi, 2012 CLC 24). The Ordinance comprises 13 sections and it applies to marriages, divorces, khula, polygamy, maintenance, dower and succession. The Ordinance prescribes procedure for registration of marriage as well as, penalties in case of violation of any mandatory clause. The definitions of Arbitration Council, Chairman Arbitration Council, Union Council and ward are also prescribed. As per section 3, the Ordinance has overriding effect over any other custom, usage or law and no arbitration law or Civil Procedure Code applies before the proceedings of arbitration council. The shares of grand children in the left over property of their grandparents as enshrined in section 4 have been criticized in Allah Rakha versus Federation of Pakistan (PLD 2000 FSC 1) by Federal Shariat Court, yet the section is still very much operative. As per latest amendment on section 4 (2021) the share of widow of a Ahl-e-Tashih has been clarified and legislated upon, both in cases of no child and children, as well as, husband's right in his deceased wife's property has also been recognized and in case of any dispute parties are given two options either to resort to a court of law or to contact the Mujtahid-e-Alam from the panel maintained by Council of Islamic Ideology, whose decision is to be treated as an award under Arbitration Act 1940. The new amendment also clarifies the qualifications of Mujtahid-e-Alam and also states that such inheritance issue of Ahl-e-Tashih is to be dealt with their personal law.

Section 5 deals with process of registration of marriages and role of nikkah registrars is also stated. In case, someone does not register his nikkah, a punishment alongwith/or fine has also been prescribed. The law prescribes that nikkah nama is a public document and any person can get its copy from

the office of Union Council after paying the prescribed fee. Section 6 deals with polygamy, its permission and the process to get the permission, alongwith penalties, for conducting second marriage without permission/s, in the form of payment of entire dower amount immediately, and conviction upto one year and Rs. 5000 fine (In Punjab as per 2015 Amendment, Rs. 500000/- fine is prescribed). The same has been under severe criticism from the religious corners on the pretext of getting permission from Arbitration Council and /or existing wife. Sections 7 and 8, deal with process and requirements of talaq and khula in Pakistan. The requirement of notice/s to Union Council's Chairman has also been prescribed alongwith punishment for not complying with the requirements. Same section has also been amended via Muslim Family Laws (Second Amendment) Act 2021, through which procedure and requirements of talaq of Ahl-e-Tashih has been discussed and requirement of two witnesses in case of this divorce has also been prescribed. Section 8 deals with the same process to be followed, in case dissolution of marriage is otherwise than talaq, especially right of tafweez has also been recognized. Sections 9 and 10, deal with maintenance and dower. Further clarification and explanations have been provided by the West Pakistan Rules under MFLO, 1961 which comprises 21 rules explaining different aspects in this regard pertaining to Arbitration Council, polygamy, complaints, fees payment and inspection of record.

#### **Family Court Act 1964**

This is an important enactment, when it comes to issues pertaining to family laws/ life is there. It comprises 28 sections and a schedule. The main purpose of this statute is to settle and dispose of family issues expeditiously. It defines Family Court too, alongwith other definitions. The qualifications of family judges (Sec 4) are also prescribed, their jurisdiction (Sec 5), place of sitting (Sec 6), process and method to institute a family suit (Sec 7), information to defendant (Sec 8), written statement (Sec 9) and also very clearly explained. Important thing is the presence of pre-trial proceedings under section 10 and modes of recording of evidence (Sec 11). The law also makes it incumbent on the family court to dispose of cases within six months (Sec 12-A). The provisions of Qanoon-e-Shahadat Order 1984 and Civil Procedure Code 1908 (except sections 10 and 11) do not apply to family courts (Sec 17). However, sections 8 to 11 of Oaths Act 1872 apply. Court is also given power to issue commission to inspect any person or property (Sec 18) and rupees fifteen court fee has also been prescribed (Sec 19) for any suit to be files in family court for adjudication. Family court can also issue interim order in pending suits, if it thinks so (Sec 21-A). However, it cannot issue stay or injunction against the proceedings taking place before Arbitration Council (Sec 22). The law pertaining to family courts has been clarified and elaborated

via West Pakistan Family Court Rules, 1965 (comprising 24 Rules). The family court is competent to adjudicate following matters:-

- (a) Dissolution of marriages including khula
- (b) Dower issues
- (c) Maintenance
- (d) Restitution of conjugal rights cases
- (e) Custody of children and visitation rights of parents
- (f) Guardianship
- (g) Matters pertaining to return of child under Hague Convention on the Civil Aspects of International Child Abduction 1980 (added in 2019)
- (h) Jactitation of marriage
- (i) Dowry
- (j) Personal property and belongings of wife (in Punjab personal property of child is also added)
- (k) Any matter arising out of nikkah nama.

#### **The Guardian and Wards Act 1890**

This Act was enacted to amend and consolidate the law pertaining to guardian and wards and comprises 53 sections. As per this Act, the definition of minor is the same as provided in Majority Act 1875. The Act is divided into 4 chapters, which comprehensively deal with who is a guardian, how guardian is to be appointed, which court has the jurisdiction in this regard, what are the contents of an application and how things will proceed, once the application is accepted. The Act also gives power to the court to issue interlocutory order for production of minor as well as, interim protection of property and person of minor (Sec 12). The matters, which are considered supreme while appointing a guardian (Sec 17) are personal law of minor, age, sex, religion of minor, character and capacity of the person who intends to be the guardian, relationship of that person with the minor, wishes of parents (deceased) if any, and where minor is old enough to make an intelligent preference, his/ her wishes can also be considered. The crux is, court has to see 'welfare of minor' while appointing someone as a guardian. It must be remembered that guardian stands in fiduciary relation with the ward (Sec 20). There are elaborated provisions pertaining to duties, remuneration and powers and liabilities of guardian, as well as, in what circumstances a collector can act as a guardian (Sec 23). The guardian can be discharged from his guardianship in certain cases (Sec 40) and can also be removed (Sec 39) if he abuses his trust, fails to perform his duties, becomes incapacitated, ill treats the minor, fails to take proper care of the minor, has been convicted of an offence of moral character, becomes insolvent in case of guardianship for property, ceases to reside within local limits of the court of ward, starts to create adverse title or changes his religion. The Act also prescribes certain penalties (Sec 45) and list of orders against which appeal can lie to the High Court (Sec 47).

### **The Dissolution of Muslim Marriages Act 1939**

This Act deals with the law relating to institution of suits for dissolution of marriages by Muslim females and also removes doubts as to effects of conversion to other religion by a married woman (Sec 4). The Act extends to whole of Pakistan and under section 2 many grounds have been provided which entitle the married woman to obtain a decree for dissolution of her marriage. These include following:-

- (a) If husband's whereabouts are unknown for four years but decree of the court will not be effective unless six months are passed from the date of order as husband may come and provide cogent reason for his absence.
- (b) If husband has conducted another marriage in violation of provisions of MFLO, 1961 (Sec 6 MFLO 1961).
- (c) If he neglects to perform his conjugal duties for a period of three years.
- (d) If he fails to provide maintenance for a period of two years.
- (e) If he is sentenced (sentence get finality) for a period of seven years or upwards.
- (f) If he was impotent at the time of marriage and continues to be so. However, he can apply to the court and get time for treatment for a year and if court is satisfied then it may allow him.
- (g) If he has been insane for a period of two years or suffers from leprosy etc.
- (h) If the wife was given in marriage by her father/ guardian before puberty.
- (i) She can file suit on the basis of lian by husband.
- (j) Ill treatment, physical or mental, by the husband, assault, disposing her property, leading immoral life, obstructs her in the observance of her religious profession and in case of having more than one wives, does not treat her equitably.

These are the grounds mentioned in the Act, upon which she can file a suit for dissolution of her marriage along with any other ground recognized by Muslim law. It should be noted that the grounds for dissolution of marriage are treated as reoccurring cause of action (see, Dost Muhammad versus Mst. Maqsoodan Bibi, PLD 1985 Lah. 340).

### **The Majority Act 1875**

The Act deals with law respecting the age of majority. However, Muslim personal law overrides the provisions of this Act, otherwise eighteen years has been prescribed as age of majority and the day upon which a person is born is to be included while computing the age (Sec 4). Where guardian of a minor is appointed, such ward is presumed to attain majority at the age of twenty one (Sec 3).

### **Child Marriages Restraint Act 1929**

The Act comprises 12 sections and the purpose of the Act is to restrain the solemnization of child marriages. The provisions of this Act apply to all citizens of Pakistan, where ever they may be and the Act extends to whole of Pakistan. The Act declares child, a person if male below eighteen years and if female below sixteen years of age and child marriage is a marriage in which either of the parties or both are children (Sec 2 (b)). The Act categorizes three kinds of persons as offenders and liable to be punished (Sec 4, 5, 6) i.e. (a) the one who contracted child marriage; (b) the one who performed or solemnized child marriage and (c) the person having charge of such child in any capacity, having promoting such marriage or failed to prevent it. The family Court having powers of judicial magistrate first class is empowered to conduct the trial (Sec 9-Punjab Amendment). Even the court has the power to issue injunction to prohibit child marriage if it has received information via a complaint or otherwise and is satisfied in this regard (Sec 12).

#### **Dowry and Bridal Gifts (*Restriction*) Act 1976**

The purpose of this Act is to restrict dowry and bridal gifts. It defines bridal gift as the property given as gift, at, before or after the marriage, either directly given or indirectly given, by the parents of bridegroom to the bride but does not include mehr (Sec 2 (a)). Whereas, dowry is defined as any property, given at, before or after the marriage, directly given or indirectly given, by the parents of bride to her on marriage, however, inherited property is not included (Sec 2 (b)). The Act places upper ceiling of R. 5000/- upon aggregate value of dowry and presents given to bride by her parents (Sec 3). As per the Act such restriction applies before or after six months of nikkah and if rukhsati has taken place after sometime of nikkah, after six months of such rukhsati (Sec 3(2)). Plus, the ownership of any gift/ property is to be vested in bride (Sec 5). There is also a restriction upon the value of any present by others (Sec 4). The Act also talks of total expenditure to be spent on all the ceremonies and functions of marriage @ two thousand and five hundred rupees and makes it incumbent upon the father of bridegroom to submit a declaration regarding expenditure to registrar (Sec 8) i.e. nikkah registrar. A complaint can be submitted to deputy commissioner in case of violation of this Act. The Act also prescribes penalties under section 9. The Act is supplemented by Dowry and Bridal Gift (*Restriction*) Rules 1976. There is also Marriage Functions (*Prohibition of Ostentatious Display and Wasteful Expenses*) Ordinance 2000. There has been need to make amendments in the law to make it upto date as the times have changed and the amounts mentioned therein are not at par with the current times and need to be revised accordingly, like has been done in Khyber Pakhtunkhwa Dowry, Bridal Gifts and Marriage Functions Restriction Act (2017). Further, there has been Dowry and Bridal Gifts (Restrictions) (Amendment) Bill 2020 which proposed to increase the lower limit of bridal gift from Rs. 2500 to four tolas of gold and like amendments.

### Issues in Family Law

In this contemporary world where distance is shrinking and inter-state and inter-sect marriages are frequent, the family relations are becoming more intricate and complicated, resulting into more complicated issues which need progressive approach by the policymakers and adjudicators. The divergent customs, social structures and legal systems involved in such family ties have resulted into unique issues for the state law and legislators. One of the most important issues in this regard is how to bring about conciliation between the classical Muslim family laws and requirements of modern state. Another issue is regarding making harmony between Muslim family law and recent international human rights commitments and conventions pertaining to rights of women and children. Few of the other issues faced by family law and legislation are as under:-

- (a) There are gendered implications regarding role of spouses in classical family system and in modern families.
- (b) Inter-continental and interstate marriages have resulted into intricate issues regarding child custody in case of separation and succession issues in case of death of any spouse.
- (c) There are compatibility issues between the pure Islamic state law and international human rights documents regarding rights of women and children.
- (d) More and more women esp. from European jurisdictions are preferring to settle their family disputes outside the Pakistani state law and rules of Muslim family law.
- (e) Due to abrupt changes in family structure like from extended family to small units living separately and economic independence of both spouses, there has been challenges for classical Muslim family law, which need to be handled with care and keeping in mind the new societal needs, as these warrant progressive reforms in laws regarding marriages, divorces and child custody.
- (f) The presence of intercontinental issues has urged the state to restructure and remodel the family law where most important thing is how to keep balance between the ground realities and Muslim family law's traditional rules and principles.
- (g) The diversities in different legal systems involved have also created unprecedented issues which need holistic and proactive approach while making policies to handle these.
- (h) The demands from the feminists for equality and justice have also resulted into procedural and jurisprudential issues for the state and adjudicators.
- (i) There have been delays when it comes to the procedures in courts, which need to be resolved.

- (j) When it comes to issues pertaining to dowry articles, it becomes difficult for the family of bride to prove what articles they gave as dowry, so there should be a provision for the complete list of dowry articles attached with the nikkah name or separately entered into. For that purpose it must be kept in mind that there needs to be some amendment in the Dowry and Bridal Gifts (*Restriction*) Act 1976 by bringing the upper limit of such items at par with the modern era.
- (k) Further many family lawyers are of the view that the family court must not issue order of divorce without recording evidence from both sides, whereas practice is the family court on the first or second date of hearing, when reconciliation fails, issues khula order.
- (l) The divergent opinions from religious scholars regarding method and time of effectiveness of divorce make it more complicated and intricate for the parties and state law becomes helpless in this regard.
- (m) The law regarding disposal of family cases talks of speedy disposal of cases, yet there have been delays in the disposals due to unrealistic workload of family judges, frequent transfers of judges and frivolous transfer applications and other tactics used by litigants. This needs to be handled through stringent actions through legislation and making the procedures smooth for early disposal even help can be taken from alternate dispute resolution methods approach in this regard.
- (n) The usual practice of administration has been to assign family cases to junior judges, which needs to be changed and senior and experienced judges should be assigned the task as family matters are intricate, complicated and need special attention, as stakes of families are very high in family matters.
- (o) There is an issue of knowledge and information regarding family rights and matters allied thereto, it is need of the time to include these topics in curriculum and information in this regard is to be disseminated through media, social and print media and training programs at college and university level. One option can be to compulsorily attend few sessions regarding family life, laws, rights and remedies in case of clashes, before nikkah is registered and a certificate of attendance be attached with the nikkah nama, as the spouses esp. females are usually unaware of their marital rights and remedies while entering into marriage tie.
- (p) There is a dire need to curb the practice of providing wrong and incorrect address of other party and trying to get *ex parte* decrees. Need is to formulate rules and procedures to provide correct addresses via nikkah nama, CNIC or data from NADRA before start of adjudication and there needs to impose strict criminal liability on the plaintiff if

incorrect address is provided as this practice hinders the very purpose of dispensation of justice by the courts.

These issues need to be resolved with taking on board all the stake holders, including but not limited to women activists, ulema, policy makers, judicial officers, legal fraternity and legislators and going for proactive and progressive approach towards family matters. Need of the time is to create a balance between classical Muslim family law and modern family needs. But one thing is to be remembered that adopting modernity does not mean leaving aside basics of Muslim family law and reforms must be within the Islamic legal framework. There is a dire need to bring about procedural reforms and amendments into the family law. While dealing with the issues need is to reconsider the new definition and concept of '*family*', so that the solutions should be acceptable for all the stakeholders within the modern family structure.

### **Conclusion**

As discussed above family law has been on the political, social and legal debate among Muslim scholars in the recent past in this contemporary world. A more liberal interpretation of Muslim family law is need of the time, so that women and children can get benefit from it. The old concept of dominance of one spouse over the other needs to be replaced and reformed with the more loving and equal relationship within the family tie through legislation i.e. the principles of equality and justice need to be included into family laws. In Pakistan the laws dealing with family matters of Muslims have undergone many changes over the period of time, yet it is important to note that the spirit and roots of Islam have not been affected. The judiciary has played a vital role when it comes to the liberal interpretation of different laws esp. pertaining to khula rights of women and consent of a young adult girl while entering into marriage tie. Whereas, there are many aspects in which our judiciary has kept itself silent like post-divorce maintenance and has not given any verdict unless there is legislation available. The family laws regarding Muslims in Pakistan are many and comprehensive, need of the time is to create awareness among masses and resolve the procedural delays available when it comes to remedies and solutions in the judicial system. The modern family ties, where more and more women are option for independent careers and becoming economically independent, have undergone drastic changes when it comes to understanding the family life, societal norms and arbitration when a dispute arises, as many working women are not contesting for the custody of their children and are ready to leave child with the father and settle their issues outside the court. Further, the columns in nikkah nama, which once were not treated as important and were used to be left blank, have now become important and people are taking them seriously while solemnizing the nikkah. There have been voices to make amendments in nikkah nama too, in

order to cater latest developments, avoid future differences and meet societal needs. These new developments need to be handled carefully and diligently by the legislators and judiciary.

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