

Muslim Family Laws in Pakistan

Research and Written By:

Rukhshanda Naz and Maliha Zia

Aurat Foundation

Part A: Introduction

The development of Muslim Family Laws in Pakistan may be perceived through different periods of time and political influences on legislation. The Muslim Jurisprudence was introduced in 712 A.D, but the legal system was established at the end of 12th century. The legal system in the Indian subcontinent before the British Rule was based on Shariah with even the Mughal Emperors taking the role of judiciary. This Muslim jurisprudence continued to be used for formal administration of justice system during British Rule. The present day situation of family laws in Pakistan is a mixture of codified law and customary law based on religious norms. The codified Muhammedan law clearly defines Muslim personal laws according to predominant School of Thoughts i. e. Sunni & Shia, however, the Shariat Application Act laid down that in Muslim family matters, the rule of decision would be Muslim personal law. A substantial portion of personal law, therefore, remained un-codified and subject to interpretation by the courts. Facing a situation of inequality, discrimination and insecurity, both in codified and un-codified law, women began demanding law reform.

After the formation of the Commission on Marriage and Family Laws in 1955, its recommendations were accepted in a diluted form and the Muslim Family Laws Ordinance (MFLO) was promulgated in 1961. Its main aim was to discourage polygamy and regulate divorce. While the law also ensured the right of inheritance of grand children and provided for procedures and much needed documentation of marriages and divorces, it did not grant women any substantive rights. Despite the good 'intentions' to provide protection to women in the realm of family law, the law, along with the others continues to have lacunas that discriminate against women and did not measure up to the expectations of the women who had struggled on its behalf. Commissions set up in 1975¹, 1985² and 1994³ all proposed further recommendations, some of which were incorporated into the law sporadically, including amendments in ⁴MFLO, 1961 and ⁵WPFCA, 1964; but no attempt was made to address the issues comprehensively. Thus the gains made were only marginal and family laws continued to remain discriminatory to women.

Amendments made to the Family Courts Act in 2002 proved to be a lot more positive. Concrete and welcomed changes were made to make it easier for women to get a '*khula*' within a specified time-period, and courts are now mandated to complete a case of divorce and other related issues such as maintenance and guardianship within six months.

¹ Pakistan Women's Rights Committee

² Pakistan Commission on the Status of Women

³ Commission of Inquiry for Women

⁴ - The Muslim Family Laws Ordinance, 1961

⁵ - West Pakistan Family Court Act, 1964

Muslim family laws prevailing in the country may be divided into 15 categories as mentioned below:

- The Divorce act, 1869
- The Special Marriage Act, 1872
- The Birth, Deaths and Marriages Registration Act, 1886
- The Guardians and Wards act, 1890
- The Marriages Validation Act, 1892
- The Foreign Marriages Act, 1903
- Child Marriage Restraint Act, 1929
- The Dissolution of Muslim marriages Act, 1939
- The Muslim Laws Ordinance, 1961
- West Pakistan Rules Under The Muslim Family Laws Ordinance, 1961
- West Pakistan Family Court Act, 1964
- West Pakistan Family Court Rules, 1965
- Dowry and Bridal Gifts (Restriction) Act, 1976
- Dowry and Bridal Gifts (Restriction) Rules, 1976

The over-arching issue that persists throughout all the legislation is the prejudicial aspect of family laws for women, as the constitution of most of them is based on strong patriarchal values, where the husband always has a dominating position and the concept of the 'husband' as the sole provider; head of the family and household; and having the right of restoration of conjugal as compared to wife. A woman's personal status within the family directly impacts her status at all other levels, since her rights in the public and private sphere are inextricably linked. If she is not recognized as an equal within the family and remains vulnerable in terms of her personal and financial security, a woman cannot freely make decisions concerning her own life or participate equally with men in other arenas of public life, even if she is given equal social and political rights.

Keeping this in mind, the biggest contention with the law of divorce and maintenance is that while giving men this 'power', it also leaves space for them to walk away from responsibilities i.e. if wife wants to continue living with her husband, he may reject her plea to live together and leave her destitute without any obligations of maintenance or support beyond the three month *iddat* post-divorce period. In a society like Pakistan, where women usually do not work, nor have the necessary qualifications to attain employment, they are mostly left dependent on their own families who, also reserve the choice as to whether they wish to accept them or not – the idea being that once a woman leaves her home for her husband's home, she ceases to belong to her parents household. Furthermore, a woman is considered a burden and divorce shameful, which results in many families refusing to aid or assist the divorced woman.

The Guardianship⁶ laws also give an inferior position to the mother as automatic guardian in absence of father, although concept of natural guardian has been changed. Women, as single parents, have to seek the permission of court to be able to become so. As a consequence the law gives unilateral freedom to men, and women to be left dependent and vulnerable.

⁶ Guardians and Wards Act, 1890

Furthermore, the implementation of law against polygamy; child marriage; the minimum age of marriage of the girl; and citizenship for a foreigner husband⁷ are still crucial issues. The religious political parties and groups with support of conservative religious scholars always influence and effectively block any positive attempt for progressive legislation or amendment.

It therefore remains a fact, that women remain vulnerable under the current regime of Muslim family laws, whether under legislation or the informal personal law, both of which are influenced by custom and traditions and the patriarchal interpretation of religion.

Part B – Equality and Justice are necessary

The family laws in Pakistan are meant to be according to Islamic principles. Although Pakistan primarily follows the Hanafi school of thought, there are overtones of principles from other schools. The family laws operate under a set of 15 categories, as mentioned in Part A, and through years of case law precedents that have shaped and given further definition to the legislation. The main laws such as the Muslim Family Law Ordinance (MFLO) 1961 and Dissolution of Muslim Marriages Act through judicial interpretation and amendments in other related laws, have become out-dated and are in dire need to be given clear interpretation and understanding in light of the current day scenarios.

The law, being given shape through case law, has highly patriarchal overtones and has, as a result, a discriminatory effect on women and children. The MFLO was promulgated with the intention of providing women with safety against arbitrary divorce, first wives from non-consensual and lack of knowledge of second marriage etc, however, while dealing with actual cases, judgments continue to give discriminatory and varied verdicts, resulting in confusion as to what is applicable and leaving space for manipulation and violation of the rights of specifically women. A number of contentious and discriminatory clauses remain in the legislation including the right to contract a second marriage. While this has been made illegal in many other Muslim countries, it remains legal and in fact the only condition is to inform and receive consent from the first wife. Not attaining consent or letting the first wife know does not make the marriage illegal and in fact only has a very nominal punishment.

The biggest issue that has arisen relate to the requirement of applying to the Arbitration Council for the divorce certificate and the requirement of 90 days *iddat* period: the procedural method as opposed to the ‘Islamic’ method. This has resulted in two different streams of case law with no final and clear indication as to which should prevail. The case of Allah Rakha⁸, which asks this specific question, has been challenged in the Supreme Court, but the judgment has been delayed for a number of years.

Maintenance for the wife lasts only for 3 months. In a patriarchal country like Pakistan, where women do not usually attain the necessary level of education, nor work and devote their lives to their families, when they are divorced, unless their families are willing or able to support them, they are left distraught and penniless. A woman’s work in the home

⁷ Shafrifan vs Federation of Pakistan , PLD 1998,Lahore.

⁸ Allah Rakha vs Federation of Pakistan, PLD, 2000, FSCI.

is not recognized as 'labour' nor is it considered as a measurable amount, which can be compensated by the husband.

Inheritance has remained a central issue for women and girls in Pakistan. Family disputes always settled on the basis of personal laws of the parties but right of inheritance is still matter of prevailing tradition of the families, especially the inheritance regarding agriculture land. While following the Islamic procedure – many women are robbed of their rightful inheritance.

Guardianship is often awarded to the father has often he has the means to 'maintain' the children, as opposed to the mother who may not be able to earn etc. Furthermore, the guardianship, if awarded to the mother is often challenged and given to the father in event of the mother re-marrying, as it means the introduction of another man in the household. There are also cases of guardianship awarded to the grandfather in absence of father. This is a highly discriminatory practice.

Part C: Equality and Justice are possible

As mentioned above, the amendments made in the Family Courts Act 2002 have shown a positive change. These amendments came after years of struggle from the women's movement and include a number of recommendations forwarded by Aurat Foundation in 2000 and years of advocacy, especially in collaboration with the Law and Justice Commission of Pakistan.

Although these recommendations have been applauded and welcomed, it is not nearly enough. Aurat Foundation has continued to take up the agenda of amendments in the Muslim family laws. In the year 2007 – 2008, it has re-initiated the movement and organized a national working group meeting in August 2008 to discuss six of the laws and the *nikahnama* (marriage deed). The participants included some of the most eminent lawyers and jurists from across the country. The recommendations were finalized by a 2nd working group held in October 2008 and shared with civil society in the country through nation-wide seminars. The recommendations are due to be shared with the Ministry of Women's Development and Ministry of Law within the coming month. Some of the recommendations are mentioned below:

- The laws should extend to the whole of Pakistan and not exclude the Tribal Areas
- At least one Family Court in each District shall be presided over by a woman Judge. No person shall be appointed as a Judge of a Family Court unless she/he is or has been or is qualified to be appointed as a District Judge, an Additional District Judge, a Civil Judge with a three year standing.
- A plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongs of wife, custody of children and visitation rights of parents to meet their children.
- Provided that notwithstanding any decision or judgment of any Court or Tribunal, the Family Court in a suit for dissolution of marriage on the sole ground of Khula, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and determine, the amount of dower, if any, and restore the same to the husband..
- An application for permission to contract an additional marriage as provided in sub-section Section 6 of the Muslim Family Laws Ordinance, 1961, shall be submitted in such manner

and in such form as is prescribed under the rules. The application shall contain all the material facts as prescribed under the rules.

- The consent to the proposed marriage, in whatever form, the Judge shall meet the wife separately in chamber and satisfy himself that her consent has been voluntarily and freely given, right of own residences, financial status and dower.
- No permission for contracting a child marriage shall be given unless the intending spouses, or the child or children for whose marriage the permission is being sought, are present and have been heard by the Court.
- The interim maintenance and in the final decision in a suit for maintenance, the Court shall simultaneously direct the husband or father, as the case may be, to pay the entire decreed amount within one month and fix a schedule for future maintenance, failing which ten per cent penalty shall be charged for every month of delay in payment. If the husband as the case may be, fails to deposit the lump sum amount, he shall be liable to punishment for imprisonment of any description for any term, which may extend to one year, or with fine, which may extend to twenty thousand, or both. The proper age of bride according to law should be eighteen years and punishment suggested for violation of law. These are imprisonments of either description for a term for a minimum of 1 year and may extend to five years and with fine which may extend to twenty-five thousand rupees, or with both, if the bride is less than sixteen years of age; and imprisonment of either description for a term for a minimum of 16 months and may extend to three years or with fine which may extend to twenty thousand rupees, or with both, if the bride is more than sixteen but less than eighteen years of age, and the requisite permission from the Court has not been obtained.
- Punishment for solemnising a child marriage – Whoever, performs, conducts or directs any child marriage shall, unless he proves that he had reason to believe that the marriage was not a child marriage, be punishable with imprisonment of either description for a term of minimum nine months and may extend to three years and with fine which may extend to twenty thousand rupees, or with both, if the child is less than sixteen years of age; and imprisonment of either description for a term of minimum three months and may extend to one year, or with fine which may extend to ten thousand rupees, or with both, if the child is more than sixteen but less than eighteen years of age, and the requisite permission from the Court, has not been obtained. Punishment for parents or guardian concerned in a child marriage, either description of a term of minimum nine months and may extend to three years, and with fine which may extend to twenty thousand rupees, or with both, if the child is less than sixteen years of age; and imprisonment of either description for a term of minimum three months and may extend to one year, or with fine which may extend to ten thousand rupees, or with both, if the child is more than sixteen but less than eighteen years of age, and the requisite permission from the Court has not been obtained.
- The court should ensure right of divorce, where the whereabouts of the husband have not been known for period of two year; husband has neglected or has failed to provide for her maintenance for a period of one year; the husband has been sentenced to imprisonment for a period of three years or upwards; that the husband has failed to perform, without reasonable cause, his marital obligations for a period of one year; the husband was impotent at the time of the marriage and continues to be so; or has been medically declared sterile. Drug addict or has been medically declared insane, or is suffering from leprosy or a virulent venereal disease; Frequently assaults her or makes her life miserable by cruelty of conduct leads an infamous life, if he has more wives than one, does not treat her equitably;
- A decree passed on ground of Khula shall not take effect for a period of three months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the court shall set aside the said decree;

- Rights to dower, Ma'ta and maintenance not to be affected:- Nothing contained in this Act shall affect any rights which a married woman may have under Muslim law to her dower or any part thereof, Ma'ta, maintenance or other benefits on the dissolution of her marriage

In November 2008, the Council of Islamic Ideology (CII), a constitutional body responsible for giving legal advice on Islamic issues to the Pakistan Government and the Parliament, published a list of recommendations relating to Muslim family laws. The Council recommended that a written divorce demanded by a woman would take legal effect in case the husband fails to oblige after 90 days. It was also recommended that divorce papers shall also be registered as the *Nikahnama* (marriage deed) is filed under the law. Any divorce must be registered with the state authorities in written form have proper legal status. It has recommended that the bridegroom will declare his assets at the time of his first wedding and give complete details of his first wife and children in *nikahnama* when entering into a second marriage. Similarly, the Council recommends that declaration of first divorce announced by the husband would be registered, following which the second and third declaration would seal the fate of marriage. Another clause will be added in *nikahnama* by which the husband will assign right of divorce to the wife. Regarding performance of Hajj by women without a *Mehram* the Council said that under the Constitution and other laws of land women can freely travel inland and abroad and there is no restriction in this regard. Furthermore, the recognition of the woman's right of *mata* (maintenance of the wife until re-marriage or death) as an Islamic concept. The CII has based its recommendations on a large number of research papers and Islamic texts. These revolutionary recommendations have been applauded by civil society, but religious parties have claimed them to be un-Islamic. Nevertheless, the CII is in the process of conducting discussions on these recommendations before passing them onto the Government and Parliament.

Methodology:

Civil Society in Pakistan has made significant headway working with the government relating to pro-women bill such as the Family Courts Amendment Act 2002, Criminal Law (Amendment) Act 2004 – the Honour Killings Act – The Protection of Women Act 2006 – amending the Hudood Ordinances. Although civil society will not call them as complete laws and therefore, not complete successes, it is notable that women's issues are being recognized and the voice of civil society is not just considered only a nuisance, but as pressure groups, demanding the government to act. The announced introduction of the Sexual Harassment in the Work Place bill by the government in the near future is also to be noted, as well as its collaboration with civil society. It is encouraging to see that woman's needs and rights are being given recognition.

Aurat Foundation (AF), along with several partner organizations, legal personalities and activists, has been campaigning for many years for amendments in the out-dated and redundant provisions of the different legislations that deal with Muslim family laws, including the confusing Muslim Family Laws Ordinance, the archaic Child Marriage Restraint Act and the Dissolution of Muslim Marriages Act.

The methodology used so far includes a number of working group meetings on the relevant legislation that have included the participation of some of the country's top legal experts including a former Chief Justice: Nasir Aslam Zahid, two of the country's first high court female judges: Justices (retd.) Nasira Iqbal and Justice (retd.) Majida Rizvi, and the current Secretary of the Law and Justice Commission of Pakistan: Dr. Faqir Hussain.

The groups analyse the law clause by clause and then present recommendations for amendments on the laws that have been presented to larger groups, as well as to the government, members of parliament, standing committees etc. As mentioned above, a number of these amendments have been incorporated into the Family Court Act 2002, but there remains a need for further and more comprehensive amendments.

There is a constant need to keep up-dated the recommendations, keeping in view of changing legislation and case law that may directly or indirectly affect the status of the family laws. Consequentially, in 2008, a drive to amend the family laws was once again started with the new democratic government taking its place. Under the auspices of AF, a national working group meeting was conducted on 6 August 2008 in Islamabad to re-analyse the set of laws on the basis of an up-dated version of previous recommendations, authored by Dr. Faqir Hussain. The house discussed in detail clauses that need to be amended to facilitate women seek justice in matters related to marriage, divorce, 'khula,' maintenance and discouraging practice of child marriages. After a day long detailed discussion, a set of recommendations was agreed upon and a smaller working group was designated to finalize the set of recommendations.

Accordingly, the working group meeting was held on 29 October 2008 in Karachi and included the participation of a number of the country's top legal minds. After detailed discussion and analyses, recommendations for four of the acts were finalized. These recommendations have been shared with larger groups including representatives of the government, other political parties and the Ministry of Women's Development and Law in the different regions of Pakistan for further discussion and adoption. After collaboration with various stakeholders, these recommendations will soon be presented to the government.

Part D: Needs

- Advocacy and Training
- Training of trainers on law, international obligations, constitution, comparative studies
- Further understanding on progressive interpretation of Islam, gender and law
- Experience-Sharing
- Comparative Analysis of other Muslim countries and laws

Part E: Resources

Aurat Publication and Information Service Foundation (AF) is a civil society organisation committed to women's empowerment through enabling their active participation in governance at all levels. For this purpose, the Foundation has defined its niche as a source of information to women and to undertake advocacy on their behalf with the state and society. The Foundation further believes that an enabling environment for enhancing this shift towards women's greater role in governance is an influential support network at the

local level for addressing women's immediate concerns, and a larger social and political framework that facilitates a more active role for citizens in the affairs of the country. Therefore, the Foundation also works with citizens' organisations and groups to strengthen their capacity to take initiatives to resolve women's problems at the local level and to play a role in promoting more accountable governance and participatory democracy in the country. It has emerged as a major support organisation for civil society organisations, governments and political parties, among other public and private institutions, and presently it has one of the largest citizens' networks in the country, with an outreach extending to all 110 districts of Pakistan and three districts of AJK. It is also a founding member of national and regional coalitions of NGOs, including ⁹PNF & CORIN, and civil society forums, like WAF and JAC, is continuing to represent common concerns and shared vision of civil society organisations on crucial development and human rights issues.

Due to its commitment to ideology of women's empowerment continues to provide inspiration to rank and file of the organisation, the AF has come to be recognised nationally and internationally as a major NGO in the country committed to working for women's rights with a broad vision, political consciousness and intellectual vigour. One of its biggest programmes has been working on legal rights of women. With this background, some of the resources AF could provide are summarized below:

Legal Expertise

AF has developed a great legal insight into the issues related to Muslim family laws due to this involvement in the reform process. This experience of participating in this process, along with the detailed analyses, especially keeping principles of gender equality in mind, has resulted in AF being considered a legal expert and the organisation taking the lead in legal reform.

Progressive Outlook

AF has always, and continues to have a progressive outlook on family matters e.g. its stance on polygamy, a woman's right of divorce, the legal age of marriage etc. Along with this outlook, AF has a huge resource of reports, discussions and information on these matters.

Resource Persons

Through its continued involvement in legal analyses and reform, AF has worked with a large panel of lawyers, legal experts, jurists, as well as Islamic scholars and Islamic legal scholars on issues of law and religion. Along with the members of the organization, members of these panels are constantly part of all AF work and are part of its resources.

Experience on working with Governments

⁹ - Pakistan NGO Forum, Coalition of Rawalpindi Islamabad NGOs, Women Action Forum, Joint Action Committee

AF has been in existence since 1986 and has continuously worked with the Government of the day, whether democratic or military, striving to make actual amendments in the discriminatory laws. Some of its 'successes' include, as mentioned above, the promulgation of the Criminal Law Amendment Act 2004, making 'honour killings' illegal, the Protection of Women Act 2007, amending the Hudood Ordinances, the reserved seats for women in the local government (33%) and federal government (17%) and the formation of the National Commission on the Status of Women (NCSW). These have been the result of years of advocacy, lobbying, building linkages with the Governments, opposition members and government bodies and personnel. Although civil society does not regard these as 'full' successes as there remain a number of lacunas in the law, the fact that remain that in terms of out-look and progress, these are huge steps and successes. The AF, along with the rest of civil society continues to work with today's PPP government on these initiatives and others, including the promulgation of a Domestic Violence Bill (DVB). This long-standing involvement with the Government has placed AF in a strong position when working with the Government, which has proved to be extremely useful. The AF's work at creating this linkage will also be shared with partners in hope of furthering and replicating this relationship.

(Ends)