MUSLIM FAMILY LAWS

SHAUKAT MAHMOOD

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MUSLIM FAMILY LAWS ORDINANCE
CHILD MARRIAGE RESTRAINT ACT
DISSOLUTION OF MUSLIM MARRIAGES ACT
W.P. FAMILY COURTS ACT, 1964
DOWRY AND BRIDAL GIFTS (RESTRICTION) ACT, 1976
&
DOWRY AND BRIDAL GIFTS (RESTRICTION) RULES, 1976

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CONTENTS

Section		*Page*
	MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) ...	1
1.	Short title, extent, application and commencement ...	1
2.	Definitions ...	3
3.	Ordinance to override Laws, etc. ...	7
4.	Succession ...	9
5.	Registration of marriages ...	14
6.	Polygamy ...	18
7.	*Talaq* ...	22
8.	Dissolution of marriage otherwise than by *talaq* ...	36
9.	Maintenance ...	38
10.	Dower ...	45
11.	Power to make Rules ...	45
	West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 ...	46
	CAILD MARRIAGE RESTRAINT ACT (XIX OF 1929) ...	58
1.	Short title, extent and commencement ...	59
2.	Definitions ...	59
3.	Omitted ...	60
4	Punishment for male adult above twenty-one years of age marrying a child ...	60
5.	Punishment for solemnising child marriage ...	62
6.	Punishment for parent or guardian concerned in a child marriage ...	64
7.	Imprisonment not to be awarded for offence under section 3 ...	66
8.	Jurisdiction under this Act ...	66
9.	Mode of taking cognizance of offence ...	67
10.	Preliminary inquiries into offence under this Act ...	68
11.	Power to take security from complainant ...	69
12.	Power to issue injunction prohibiting marriage in contravention of this Act ...	69
	DISSOLUTION OF MUSLIM MARRIAGES ACT ...	71
1.	Short title and extent ...	72
2.	Grounds for decree for dissolution of marriage ...	72
3.	Notice to be served on heirs of the husband when the husband's whereabouts not known ...	92
4.	Effect of conversion to another faith ...	93
5.	Rights to dower not to be affected ...	93
6.	Repealed ...	93
	WEST PAKISTAN FAMILY COURTS ACT ...	94
1.	Short title, extent and commencement ...	94
2.	Definitions ...	95
3.	Establishment of Family Courts ...	98

Section		*Page*
4.	Qualifications of Judge ...	98
5.	Jurisdiction ...	99
6.	Place of sitting ...	106
7.	Institution of suits ...	107
8.	Intimation to defendants ...	108
9.	Written statement ...	110
10.	Pre-trial proceeding ...	111
11.	Recording of evidence ...	115
12.	Conclusion of trial ...	116
13.	Enforcement of decrees ...	116
14.	Appeals ...	118
15.	Power of Family Court to summon witness ...	121
16.	Contempt of Family Courts ...	122
17.	Provisions of Evidence Act and Code of Civil Procedure not to apply ...	124
18.	Appearance through agents ...	130
19.	Court-fees ...	131
20.	Investment of powers of Magistrates on Judges ...	131
21.	Provisions of Muslim Family Laws Ordinance to be applicable ...	138
22.	Bar on the issue of injunctions by Family Court ...	140
23.	Validity of marriages registered under the Muslim Family Laws Ordinance, 1961, not to be questioned by Family Courts ...	140
24.	Family Courts to inform Union Councils of cases not registered under the Muslim Family Laws Ordinance, 1961 ...	140
25.	Family Court deemed to be a District Court for purposes of Guardians and Wards Act, 1890 ...	141
25A.	Transfer of cases ...	143
25B.	Stay of proceedings by High Court and District Courts ...	147
26.	Power to make rules ...	148
	Schedule ...	148
	West Pakistan Family Court Rules, 1965 ...	148
	DOWRY AND BRIDAL GIFTS (RESTRICTION) ACT, 1976	156
1.	Short title, extent and commencement ...	156
2.	Definitions ...	156
3.	Restrictions on dower presents and bridal gifts ...	157
4.	Restrictions on presents ...	157
5.	Vesting of dowry, etc. in wife ...	157
6.	Expenditure on marriage ...	157
7.	Display of dowry, etc. ...	158
8.	Declaration regarding expenditure to be submitted to Registrar ...	158
8A.	Complaints against violation of the Act ...	158
9.	Penalty and procedure ...	158
10.	Power to make rules ...	159
11.	Omitted ...	159
	DOWRY AND BRIDAL GIFTS (RESTRICTION) RULES...	159
	Index ...	163

MUSLIM FAMILY LAWS ORDINANCE

(VIII OF 1961)

An Ordinance to give effect to certain recommendations of the Commission on Marriage and Family Laws.

Whereas it is expedient to give effect to certain recommendations of the commission on Marriage and Family Laws.

Now, therefore in pursuance of the proclamation of the seventh day of October 1958, and in exercise of all powers enabling him in this behalf, the President is pleased to make and promulgate the following Ordinance :—

1. *Short title, extent application and commencement.* (1) This Ordinance may be called the Muslim Family Laws Ordinance, 1961.

(2) It extends to whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be.

(3) It shall come into force on such date as the [1][Federal Government] may, by notification in the official Gazette, appoint in this behalf.

Synopsis

1. Applicability.
2. Muslim Law not covered by Ordinance remains unchanged.
3. Date of enforcement.
4. Writ Jurisdiction.

1. Applicability. Sub-section (2) of section 1 of the Ordinance makes it applicable to all Muslim citizens of Pakistan wherever they may be, whether in Pakistan or at any place outside Pakistan.[2] This interpretation would not be against the well-recognised principles of law because Private International Law regarding divorce is that the law of the domicile of the husband, which is to be presumed to be the law of domicile of the wife, is applicable to a divorce.[3]

Non-Muslim wife—applicability. In a Full Bench case the High Court observed that the section did not apply where the wife of a

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1. Subs. by P O. 4 of 1975.
2. PLJ 1982 Rawalpindi 638 (DB)+PLD 1961 S.C. 430+PLD 1963 S.C. 51=1963 (1) P.S.C.R 356=15 DLR S.C. 9.
3. PLD 1962 (W.P.) Lahore 558.

Muslim national was a foreigner and he divorced her under Muslim Law.[4] But it is respectfully submitted that the view does not lay down correct law because in appeal against that decision the Supreme Court observed that to hold that the Ordinance could not be pressed into service except in cases where both spouses were Muslim citizens, would lead to the result that a male Muslim citizen, could, with impunity, have more than one wife without recourse to the provisions of the Ordinance, provided that he confines himself to non-citizen Muslim ladies for marriage. On this interpretation, if a Muslim male citizen of Pakistan in already married to a Muslim non-citizen, he could marry another wife whether a Muslim citizen or not, without incurring any penalty under the Ordinance. Similarly, he could go on divorcing non-citizen Muslim ladies, without limit, if he was so minded. Such absurd results would apparently rob the Ordinance of almost all its utility and the narrow interpretation which leads to such results, would not, in all probability, be in consonance with the intention of the Legislature.[5]

Ordinance applies to all sects. The Ordinance applies to all Muslim citizens, *i.e.* Sunis, Shias, etc. without any distinction of sect. But in view of the scope of the Ordinance as outlined in sub-section (2) of section 1 thereof, it is clear that its application is restricted to Muslim nationals of Pakistan. To that extent, therefore, the position seems to be that it is not necessary that all Muslims residing in Pakistan, irrespective of their nationality, should be governed by this Ordinance; on the contrary the presumption would be that they would be governed by the ordinary Muslim law of inheritance; as that is the law of the land in Pakistan in so far as the general body of Muslims is concerned.[6]

Foreign heirs of Muslim citizen. The expression "All Muslim citizens of Pakistan" in this sub-section, in the context of section 4, refers to the propositus only, and not to the persons to whom the benefit of succession is extended by section 4. Therefore section 1 (2) and section 4 of the Ordinance mean that if a citizen of Pakistan, wherever he may be, dies after the promulgation of the Ordinance, then his succession opens not only for persons who are heirs according to the ordinary rules of Muslim Law relating to inheritance and succession, but also for the benefit of the children of his pre-deceased son or daughter. The Muslim Family Laws Ordinance would not, therefore, exclude foreigners from the benefit of succession under section 4.[7]

Non-Muslims. The Ordinance does not apply to non-Muslim citizens of Pakistan, and therefore they cannot claim any relief under it.[8]

Family Courts. West Pakistan Family Courts Act does not affect the provisions of sections 7, 8, 9, 10 of the Ordinance, and these provisions will apply to any decree passed by a Family Court for the dissolution of marriage, maintenance, or dower when a marriage is

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4. PLD 1963 Lahore 141 (FB).
5. PLD 1963 Supreme Court 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
6. PLD 1968 Lahore 520.
7. PLD 1968 Karachi 480.
8. PLD 1976 Lah. 290 (DB).

solemnized under Muslim Law,[9] and a family Court shall have no jurisdiction to issue an injunction or stay any proceedings before a Chairman or Arbitration Council.[10]

It is to be noted that the Ordinance applies even to excluded areas.

2. **Muslim Law not covered by Ordinance remains unchanged.** Muslim Law not covered by the Ordinance remains unchanged, and all remedies open to Muslims under their personal law continue to be in force unless they are specifically and expressly barred by the Ordinance. The Ordinance extends to the whole of Pakistan and applies to Pakistan nationals even when they are residing outside the country. This is further clarified by the fact that under West Pakistan Rules made under it, a citizen of Pakistan whose marriage is solemnized outside Pakistan has to fill in form II and send it to the Marriage Registrar appointed under the Ordinance,[11] This fact gives extra territorial effect to the Ordinance.

3. **Date of enforcement.** The Ordinance came into force on the 14th July 1961.[12]

4. **Writ Jurisdiction.** *See* Note 6 under section 6.

2. *Definition.* In this Ordinance, unless there is any other thing repugnant in the subject or context :—

(*a*) **"Arbitration Council"** means a body consisting of the Chairman [13]* * * * and a representative of each of the parties to a matter dealt with in this Ordinance :

[14][Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.]

[15][(*b*) **"Chairman"** means the Chairman of the Union Council or a person appointed by the [16][Federal Government] in the Cantonment areas or by the Provincial Government in other areas] or by an Officer authorised in that behalf by any such

9. W.P. Family Courts Act, 1964, S. 21 (1).

10. W.P. Family Courts Act, 1964, S. 22.

11. West Pakistan Rules, Rule 12.

12. Government of Pakistan Notification No. S.R.O. 56(R) dated 15th July 1961, published in the Gazette of Pakistan, Extraordinary, dated 13th July 1961.

13. Words "of the Union Council" deleted by Ord., 21 of 1961.

14. Ins. by S. 2 (1) of Ordinance, 21 of 1961.

15. Substituted by S. 2 (2) of Ordinance 21 of 1961.

16. Subs. by P.O. 1 of 1964, S. 2 and Sch.

17. Subs. by P.O. 4 of 1975.

Government to discharge the functions of chairman under this Ordinance :

Provided that where the Chairman of the Union Council is a non-Muslim, or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason, unable to discharge the functions of Chairman, the Council shall elect one of its Muslim members as Chairman for the purposes of this Ordinance.]

Baluchistan. In Baluchistan the Government has appointed the following Councillors to discharge the functions of a Chairman of an arbitration council under this Ordinance, namely :—

1. Chairman of Union Council within the local area of a Union.

2. The Chairman of a Town or Municipal Committee within the local area of a Town or a Municipality ; and

3. A member of an electoral unit of Municipal Corporation, to be nominated by the Municipal Corporation, in a duly convened special meeting, in the limits of an Electoral Unit or Electoral Units within the local area of a City. It has been further stated that the terms "Union", "Town", "Municipality" and "City" used in this notification shall have the same meaning as assigned to them in the Baluchistan Local Government Ordinance, 1980 (II of 1980).[18]

(*c*) "**Prescribed**" means prescribed by rules made under Schedule II,

(*d*) "**Union Council**" means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959[19] and [20][having jurisdiction in the matter as prescribed.]

1. Chairman and Union Committee—Distinction. Rule 21 of West Pakistan Rules under the Muslim Family Laws Ordinance, 1961, stated that "no Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the Union Council, stating the fact constituting the offence. Chairman and Union Council have been defined separately in the Ordinance and not used synonymously. The word Chairman cannot include Union Council. They have separate entities. In view of the fact that the complaint had been filed by the Chairman, the proceedings are liable to be quashed

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18. Baluchistan Gazette Notification No. 8-79/80 (PLGB) AO-I dated 25-6-1981.
19. P.O. No. 18 of 1959.
20. Substituted by S. 2 (3) of Ord. 21 of 1961.

as the Magistrate could take cognizance only if the complaint had been filed by the Union Council.[21]

(*e*) "**Ward**" means a ward within a Union or Town as defined in the aforesaid Order.

Synopsis

1. Arbitration Council—Clause (*a*).
2. Substitution or replacement of representative.
3. Chairman appointed by Government—Clause (*b*).
4. Non-Muslim Chairman.
5. Inability of Chairman to act.
6. Prejudiced or interested Chairman.
7. Union Council—Clause (*d*).
8. Ward—Clause (*e*).

1. Arbitration Council—Clause (a). To settle all disputes referred to in the Ordinance, an Arbitration Council is to be convened by the Chairman. It shall consist of the Chairman and one representative of the husband and another of the wife, who are parties to the dispute. The Ordinance does not limit the powers of the Council, in a case in which a party fails to nominate its representatives to the Council. On receiving a complaint the Chairman of the Council, has to call upon the parties to nominate their representative within seven days of receiving of the notice. If they do not do so within this period the Council starts proceedings without the representative of the party which has failed to appoint a representative.[22] This provision is a safeguard against the delaying tactics which might be used by one of the parties who is not willing to bring the matter before the Council.

Representative of party, position of, in Arbitration Council. A representative of a party is the spokesman of the parry represented by him and one can understand that the Ordinance fully recognized that the representative has to identify himself fully with the cause of the party he represents. The representative walks into the shoes of the party himself and it would be within his normal functions as a representative to make a statement on behalf of his principal. The fact that he makes the statement on oath or otherwise, as a witness or in any other capacity, favouring his party would not, in any manner, affect his capacity, to sit on the Arbitration Council and to arbitrate in the matter, his position in the Council being that of a representative of his party throughout, although he has to act also as an arbitrator. It is easily understandable that as a representative of one party he cannot be expected to speak for the other party at any stage of the proceedings and in conceding to him the status of a member of the Arbitration Council, the Ordinance must be deemed to have taken into account his dual capacity as a representative and as a member of the Arbitration Council. Therefore a representative is not disqualified to remain on the Arbitration Council as its member by the fact that he has made a statement in favour of the party whom he represents, which does not

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21. 1977 P. Cr. L.J. 107.
22. W.P. Rules, R. 6 (1).

in any way, impair the constitution of the Arbitration Council, nor the decision that has been given by it in favour of the party represented.[23]

2. **Substitution or replacement of representative.** Where a nomination has been made but the representative nominated by a party is unable to attend on account of illness, or some other reason or has lost confidence of the party; or wilfully absents himself from the meeting of the Council, the Chairman may permit the party to revoke the nomination and may give him further time for making a fresh nomination.[24] This provision has been included to give an opportunity to a party to appoint another representative when the first one, appointed *bona fide* does not perform his duties due to some cause beyond the control of the party to the proceedings. It is to be noted that where the party does not nominate his representative no further opportunity is to be given to him or her to do so. Time is granted for the nomination of a representative only in a case where the party is not at fault and has not tried to delay or obstruct the proceeding of the Council. As a further safeguard the rules provide that in case of a new nomination the proceedings before the Council shall not commence *de novo*. Thus the proceedings shall continue after the appointment of the new representative from the points where the previous one left the Council. Only in exceptional cases the Chairman is empowered to permit *de novo* proceedings. In such cases he has to record his reasons in writing for doing so.[1]

3. **Chairman appointed by Government—Clause (b)** The Government has appointed Councillars elected under the Provincial Local Government Ordinance to act as chairmen under the Ordinance.

4. **Non-Muslim Chairman.** Where a non-Muslim has been appointed Chairman of the Union Council, the Ordinance provides that the Council shall elect a Muslim as its Chairman for the purpose of the Ordinance. This has not to be done for each of the disputes which come before the Arbitration Council. On the other hand the Chairman is appointed almost like any other Chairman with the difference that he acts only in matters which fall under the Ordinance. His tenure of office is during the terms of his membership of the Council.[2] In view of the suppresession of all Union Councils this provision for election of a Muslim Chairman has become redundant and the legislature should make appropriate provision for his appointment when the Chairman of the Council happens to be a non-Muslim.

5. **Inability of Chairman to act.** Even a Muslim Chairman may be unable to act on account of several reasons such as: (*a*) When he himself wishes to make an application to the Arbitration Council. (*b*) On account of illness. (*c*) For many other reasons.

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23. PLD 1968 Lahore 93 (DB).

24. W.P. Rules, Rule 6 (2).

1. W.P. Rules Rule, R. 6 (3).

2. W.P. Rules, R. 4.

In such a case the Council has to elect a Muslim member as its Chairman for the purpose of the proceedings under the Ordinance. But the difference between this election and the election in case of a non-Muslim Chairman is that in the former case the Chairman under the Ordinance acts only during the inability of the regular Chairman to act on the Council, whereas in the latter case the Chairman continues to act during the whole terms of his office or so long as a non-Muslim Chairman remains in office. As the Union Councils are no more in existence, some other mode of appointment should be provided in this case.

6. Prejudiced or interested Chairman. It has been specifically stated in Rule 6-A that if any party to the proceedings considers the Chairman to be interested in favour of the other party, he may apply to the Collector for the appointment of a different chairman to hear the dispute. On receiving such an application the Collector shall stay the proceedings before the Arbitration Council till the disposal of the application. If he deems it fit he may appoint another Chairman for the purpose of the dispute. It is to be noted that the Chairman so appointed acts only in the matter of that particular dispute.

7. Union Council—Clause (d). The definition of the Union Council in the Ordinance differs from its definition in the Basic Democracies Order, 1959. In the Ordinance it has been used in a more comprehensive sense including the Town or Union Committee constituted under the Basic Democracies Order, 1959.

Chairman and Union Council. "Chairman" and "Union Council" are not synonymous and are different entities. The Union Council includes a Chairman, but a Chairman does not include a Union Council.[3]

8. Ward—Clause (e). Ward has been defined in para 17 of the Basic Democracies Order, 1959. The definition applies to the Ordinance as well.

3. *Ordinance to override other Laws, etc.* (1) The provisions of this Ordinance shall have effect notwithstanding any law, customs or usage and the registration of Muslim marriages shall take place only in accordance with those provisions.

(2) For the removal of doubt, it is hereby declared that the provisions of the Arbitration Act, 1940 (X of 1940), the Code of Civil Procedure, 1908 (Act V of 1908) and any other law regulating the procedure of Courts, shall not apply to any Arbitration Council.

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3. PLD 1967 Pesh. 201.

Synopsis

1. Repeals.
2. Registration of marriages.
3. Procedure.
4. Expeditious disposal.
5. *In camera* proceedings.

1. Repeals. The Ordinance overrides all other laws, custom or usage which may be in conflict with it. Thus no provision of the Ordinance can be invalidated on the ground that it is in conflict with Muslim Law as it was applicable prior to the enforcement of the Ordinance.

2. Registration of marriages. Registration of Muslim marriages shall take place only under the Ordinance. Since the provisions of the Muslim Family Laws Ordinance of 1961 apply be reason of the provisions of section 5 thereof notwithstanding any law, custom or usage and under section 5 thereof all marriages have to by registered by persons licensed to act as Nikah Registrars under the Ordinance, it cannot be said that they continued either to act as Marriage Registrars or to retain their status of a Marriage Registrar under any previous statute if they were so appointed under it. The provisions of the Ordinance prevailed notwithstanding the provisions of the prior statute and to that extent the provisions of the Act stood impliedly repealed.[4]

3. Procedure. The language of section 3, which is unambiguous, excludes the application of Criminal Procedure Code to proceedings under the Ordinance.[5] The procedure for Arbitration laid down in Arbitration Act, 1940 and the Code of Civil Procedure, 1908 also does not apply to the Arbitration Council. The procedure for the Council has been laid down in the Ordinance itself. It has been done to expedite the decision of matters dealt with in the Ordinance. The procedure laid down is as follows:—

Within seven days of receiving an application or notice, the Chairman shall by order in writing call upon the parties to nominate within a period of seven days one representative each to the Arbitration Council. If the nomination is not made within the prescribed time the Council shall begin the proceedings without the representative of the party who fails to nominate one.

Where the representative is unable to act and the party appointing him is not guilty of bad faith in appointing him, the Chairman may give it a further opportunity to make another nomination and time may be granted for the purpose.

In case of such fresh nomination the proceedings of the Council are not held *de novo* unless there is some special reason to do so. The Chairman must give that reason in writing.[6]

The parties to the proceedings cannot be members of Arbitration Council.[7]

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4. PLD 1969 Supreme Court 435=21 DLR (SC) 330.
5. 1971 P. Cr. L.J. 148=Law Notes 1970 Lah. 880.
6. W.P. Rules, R. 5.
7. W.P. Rules, R. 5 (5).

All decisions of the Arbitration Council are to be taken by majority and where that is not possible the decision of the Chairman shall be the decision of the Council.[8]

4. **Expeditious disposal.** The Chairman has been directed to dispose of proceedings before the Council as expeditiously as possible.[9]

5. **'In camera' proceedings.** The proceedings of the Arbitration Council are to be held *in camera* unless the Chairman otherwise directs with the consent of all the parties.[10]

4. *Succession.* 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 stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive.

Synopsis

1. Validity.
2. Principles of inheritance.
3. Property outside Pakistan.
4. Propositus domiciled out of Pakistan.
5. Foreign heirs of Muslim citizen.
6. Propositus not national of Pakistan.
7. *Per stripes* distribution.
8. Opening of succession.
9. Termination of limited interest.

1. **Validity.** The validity of this section cannot be challenged in the Shariat Courts because in view of Article 203-B of the Constitution its scrutiny is outside the jurisdiction of those Courts. It can only be remedied by the Council of Islamic Ideology.[11]

2. **Principles of inheritance.** The Ordinance has with one stroke of pen demolished the rule that Muslim Law does not recognise the principle of representation.[12]

The Ordinance aims at alleviating the sufferings of the children whose unfortunate lot it is to lose their father or mother during the lifetime of their grandfather, or grandmother as the case my be. In this section the words "in the event of" refer only to the death of the son or daughter of the propositus occurring before succession opens. These words would bring within their compass the sons and daughters dying before, as well as after the Ordinance came into force. The only condition is that the death should occur before the succession has opened, and

8. W.P. Rules, R. 5 (6).
9. W.P. Rules, R. 5 (2).
10. W.P. Rules, R. 5 (1).
11. PLD 1981 S.C. (Shariat Bench) 120 (*Overruled* PLJ 1980 Pesh 32=NLR 1980 Civ. 392=PLD 1980 Pesh 47 (Sh. B)+1980 P. Cr. L.J. 122=NLR 1980 Cr. 381.
12. 11 Calcutta 597.

if the succession opens after the promulgation of the Ordinance, S. 4 would apply with full force, and the children of the predeceased son or daughter of the propositus would be entitled to be included in the succession to the estate of the propositus.[13]

3. **Property outside Pakistan.** If a Muslim citizen dies domiciled in Pakistan and leaves property, both immovable and movable, in foreign jurisdiction, the succession to his estate will be according to the rule of Muslim law as modified by section 4 of the Ordinance. The Courts in Pakistan, in matters of succession to the estate of a Muslim citizen, can apply only his personal law, irrespective of the rules of *lex domicili* or *lex situs*. The only limitation on the jurisdiction of the Courts to regulate succession according to the personal law of the propositus, is the effectiveness of their judgments. Where, however, the Court has jurisdiction under section 20 of the C.P.C. and its judgment can be enforced by securing the personal obedience of the defendant, the Courts in Pakistan will not hesitate to apply his personal law.[14]

4. **Propositus domiciled out of Pakistan.** The rule of succession laid down in the Ordinance would apply to every propositus, irrespective of his domicile or the place of his ordinary residence. In this respect, the Ordinance makes more definite the rule of Islamic Law that succession to a Muslim is governed by his personal law. Even if such was not the rule of Islamic Jurisprudence, by the use of the words "wherever they may be", the Ordinance requires that in matters of succession under section 4, the domicile of the propositus should not be taken into account, and this leads to the further inference that with regard to immovables even *lex situs* has to be disregarded. If a Muslim citizen of Pakistan dies domiciled in a foreign country, the law of his domicile cannot, by the force of the words used in sections 1 (2) and 4 of the Ordinance, be applied to his estate in Pakistan.[15]

5. **Foreign heirs of Muslim citizen.** The language of section 1 (2) and section 4 of the Ordinance does not suggest that it was intended to exclude foreigners from succession under the Ordinance. Moreover, the Islamic Law, as administered in this country, does not exclude foreigners from succession to a deceased Muslim citizen of Pakistan, and the Muslim Family Laws Ordinance, in matters of succession, does not make any departure from this rule.[16]

6. **Propositus not national of Pakistan.** In view of the scope of the Ordinance as outlined in sub-section (2) of section 1 thereof it is clear that its application is resricted to Muslim nationals of Pakistan. To that extent, therefore, the position seems to be that it is not necessary that all Muslims residing in Pakistan, irrespective of their nationality, should be governed by this Ordinance ; on the contrary the presumption would be that they would be governed by the ordinary Muslim law of

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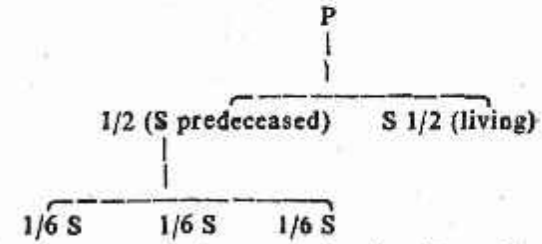
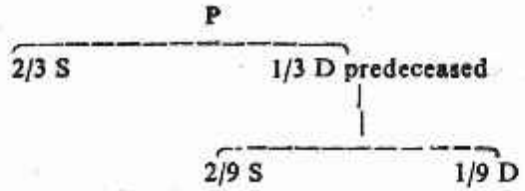
13. NLR 1979 Civ 29 (SC)+PLD 1968 Karachi 480.
14. PLD 1968 Karachi 480.
15. PLD 1968 Karachi 480.
16. PLD 1968 Karachi 480.

inheritance, as that is the law of the land in Pakistan in so far as the general body of Muslims is concerned.[17]

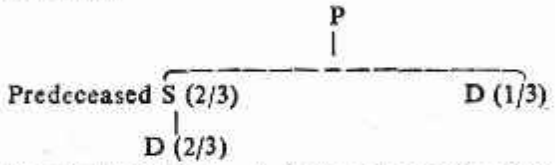
7. **'Per stripes' distribution.** The Orninance has adopted the principle of *per stripes* distribution of inheritance. This principle is recognised by Shia Law. According to it the heirs of predeceased children inherit what their father or mother would have inherited if he or she were alive at the time when the inheritance opened.[18] They do not inherit the share *per capita* as is provided under Hanfi Law. Thus if a man left a son and three sons of a predeceased son, under Hanfi law prior to the Ordinance the sons of the predeceased son would have been excluded from inheritance. Under the Ordinance the living son will take ½ of the property and ½ share of the predeceased son will be distributed among the sons of the predeceased son ; each getting $1/2 \times 1/3 = 1/6$.



Where the deceased leaves a son, and a son and a daughter of a predeceased daughter, the shares will be distributed as follows :



Where the deceased P left a daughter and a daughter of a predeceased son the daughter of predeceased son will inherit the share of her father (2/3) and the daughter of the prepositus will inherit her own share (1/3).[19]



Change in Hanfi Law. A further change in Hanfi Law in this respect is effected in the following cases.

According to Hanfi Law :

(*a*) When there is no son but a daughter and son's daughter, son's daughter takes 1/6 and daughter takes 1/2.

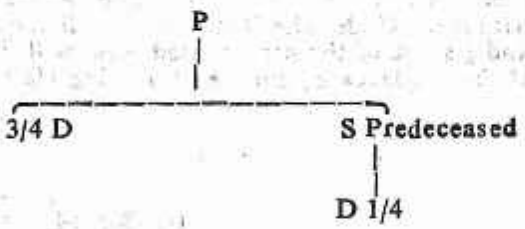
17. PLD 1968 Lahore 520.
18. PLD 1975 Pesh 252=PLJ 1976 Pesh 26=LN 1975 Pesh 722.
19. PLD 1975 Pesh 252=PLJ 1976 Pesh 26=LN 1975 Pesh 722.

(*b*) The female descendants lower than a child of the deceased take the residue with a lower son's son in the proportion of 1 and 2.

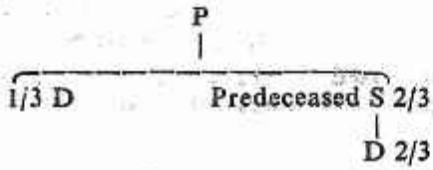
The change brought about by the Ordinance is indicated in the following illustration.

(a) Illustration

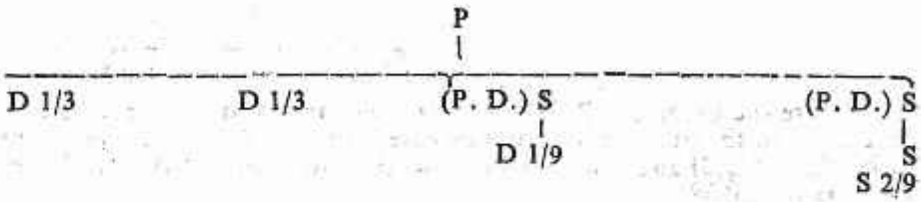
Hanfi Law.



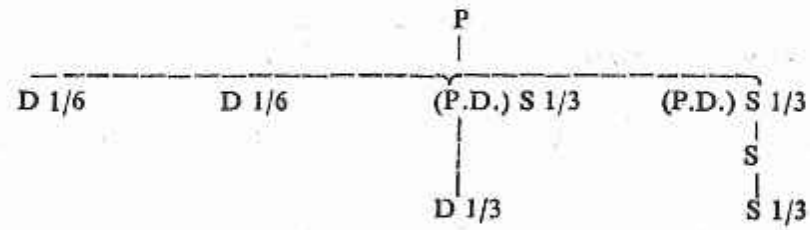
Under the Ordinance.



Hanfi Law.



Under the Ordinance.



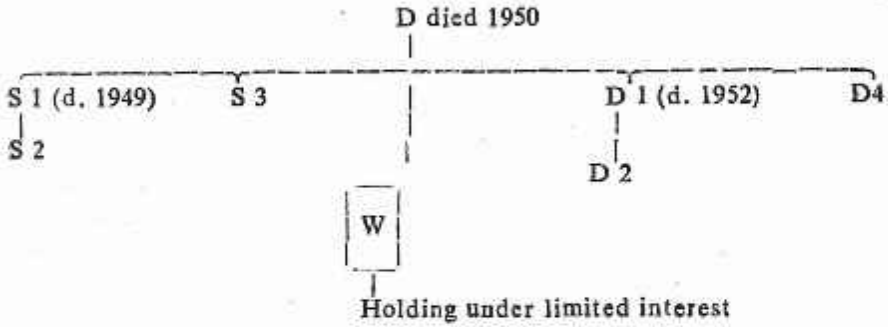
8. **Opening of succession.** The meanings of the words "opening of succession" may be understood with reference to the West Punjab Muslim Personal Law (Shariat) Application Act, 1962. In the context of that Act it is clear that the inheritance not only opens on the death of a full owner but would also be deemed to have opened on the

termination of a limited interest in the property, as if the last full owner had died at the time of such termination of limited interest.[20] Thus where an heir of the propositus (*p*) has died before his (*p's*) death, his son or daughter will take the shares which they would have inherited if he had been alive at the time of the death of the propositus. But where on the death of the propositus a limited interest came into existence, and the heir of the propositus under Muslim Law died after the death of the propositus but before the opening of succession on the termination of the limited interest, the heir would inherit the share that he would have inherited if he had died before the propositus died. Thus the word "opening of succession" has also brought within the mischief of the Ordinance, the heirs of the propositus who died after him but before the termination of the limited interest which was created on the death of the propositus.

9. **Termination of limited interest.** Under Shariat Act limited estates in respect of immovable property held by a Muslim female under the customary law have been terminated[21] and on such termination succession opens under Ordinance VIII of 1961 so that even the children of the predeceased son or daughter of the propositus inherit what the latter would have inherited if they were alive.[22]

Illustration

D died in 1950 and W, his wife got a life interest in the property. One of the sons of D (S 1) had died during his lifetime in 1949 leaving behind a son (S 7). A daughter of D (D 1) had died during the continuance of the life interest in 1952 but after the death of D, leaving behind a daughter D 2; S 3 and D 4 a son and a daughter of D were still living when the life interest of W was terminated by Act V of 1962. From the section it appears that on the termination of the limited interest not only S 3 and D 3 but also S 1 and D 1 will be given their share as if they were alive and their shares will pass on to their heirs S 2 and D 2.



20. PLJ 1980 Lah. 169=1980 CLC 1006+PLD 1952 Lahore 1+PLD 1955 Lahore 410.

21. S. 3 of W.P. Muslim Personal Law (Shariat) Application Act, 1962.

22. PLJ 1980 Lah. 169=1980 CLC 1006.

5. *Registration of marriages.* (1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licence to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar 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 provisions 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 Registrar, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of *nikahnama* shall be supplied to the parties, and the fees to be charged therefor, 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 preserved under sub-section (5), or obtain a copy of any entry therein.

Synopsis

1. Registration of marriage.
2. Effect of registration of marriage.
3. Marriage of national of Pakistan in foreign country.
4. Marriage not solemnized by Nikah Registrar.
5. Marriage solemnized by foreign national.
6. Appointment and removal of Nikah Registrar.
7. Prosecution of Nikah Registrar.
8. Registers for Nikah.
9. Fees for Registration.
10. Fees for inspection of copies of register.

1. Registration of marriage. Section 5 of the Ordinance provides that every marriage solemnized under Muslim Law, shall be registered, in accordance with the provisions of the Ordinance,[23] and for this purpose, the Union Council is authorized to grant licences to one or more persons, to be called Nikah Registrars. Every marriage not

23. PLD 1969 Dacca 47=21 DLR 213.

solemnized by the Nikah Registrar, is required to be reported to him for the purpose of registration by the person officiating at the marriage. Contravention of this provision is made punishable with simple imprisonment for a term which may extend to three months, or with fine up to one thousand rupees, or with both.[24]

Non-registration of marriage—effect. Under Muslim Law, *nikah* can be performed orally and such a *nikah* is not invalid merely because it is not registered according to provisions of the Muslim Family Laws Ordinance, 1961. A marriage which has not been registered under section 5 or which has been contracted in contravention of the provisions of section 6 would not be invalid ; and the relationship of husband and wife created by it would subsist though the husband would be liable to penal action for contravening the provisions of the Ordinance.[25] However, where a Muslim marriage takes place after the promulgation of the Ordinance, this section makes it absolutely necessary that it should be registered. Therefore the non-registration of the marriage causes a doubt on the solemnization of the marriage itself.[26] Where a marriage is not registered, the mere allegation of marriage in the absence of very strong proof, would not be sufficient for holding that the marriage has been duly solemnized.[1]

'Kabeennama' drawn up before 'nikah' ceremony. Where the genuineness of the *nikah* was challenged on the ground that the *kabeennama* was drawn up at 8 or 9 a.m. whereas the *nikah* ceremony was held at 8 or 9 p. m. It was held that it was not uncommon that marriage documents are drafted before the marriage ceremonies take place but they are actually signed at the time when the ceremonies are held or thereafter. Therefore, the mere fact that the *kabeennama* was drafted before the *nikah* ceremony does not, by itself justify a conclusion that it is not a genuine document.[2]

No Registration necessary under other laws. Since the provisions of the Muslim Family Laws Ordinance of 1961 applied by reason of the provisions of section 3 thereof notwithstanding any law, custom or usage and under section 5 thereof all marriages had to be registered by persons licensed to act as Nikah Registrars under the Ordinance, it cannot be said that they continued either to act as Marriage Registrars or to retain their status of a Marriage Registrar under any other law if they were so appointed under it. The provisions of the Ordinance prevailed notwithstanding the provisions of the Act and to that extent the provisions of the Act stood impliedly repealed.[3]

Report of non-registration of marriage by Family Court. If in any proceedings before a Family Court it is brought to the notice of the Court that a marriage solemnized under the Muslim Law after the coming into force of the Muslim Family Laws Ordinance, 1961, has not

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24. PLD 1963 Supreme Court 51=1963 (1) P.S.C R. 356=15 DLR S.C. 9.
25. 1981 CLC 165=1981 Law Notes 581=PLJ 1981 Lah. 463.
26. PLD 1969 Dacca 47=21 DLR 213.
1. PLD 1969 Dacca 47=21 DLR 213+PLD 1968 Lah. 841 (DB).
2. 1981 CLC 1651=PLJ 1981 Lah. 463=1981 Law Notes 581.
3. PLD 1969 S C 435=21 DLR (SC) 330+PLD 1968 P. Cr. L.J. 290 (DB).

been registered in accordance with the provisions of the said Ordinance and the rules framed thereunder, the Court shall communicate such fact in writing to the Union Council for the area where the marriage was solemnized.[4]

2. **Effect of registration of marriage.** The validity of a marriage registered und this section shall not be questioned by any Family Court nor shall any evidence in regard thereto be admissible before such Court.[5] It is submitted that this would cause great hardship to a party who seeks to challenge a marriage on the ground of fraud, as where a marriage is registered and the name of a woman is mentioned by the party as the bride, although she is not a party to the marriage or where the marriage is challenged on the ground that the woman did not give free consent to it, or on the ground that the marriage is *fasid*, as being opposed to Muslim Law, etc. It would have been better if the registration had been treated only as *prima facie* evidence of marriage rebuttable by evidence, and the validity of the marriage should not have been determined on the basis of registration alone.

3. **Marriage of national of Pakistan in foreign country.** Subsection (2) of section 1 of the Ordinance makes it applicable to all Muslim citizens of Pakistan wherever they may be.[6]

4. **Marriage not solemnized by Nikah Registrar.** Where the marriage is solemnized in Pakistan by a person other than the Nikah Registrar, such person shall fill in Form II and shall send it to the Nikah Registrar with Registration fee. The Nikah Registrar shall then proceed to register the marriage as if he had performed it.[7]

5. **Marriage solemnized by foreign national.** If a marriage is solemnized by a person who is not a citizen of Pakistan ; the duty of filling in and despatching Form II falls on the bridegroom, and if he is not a citizen of Pakistan, on the bride.[8]

6. **Appointment and removal of Nikah Registrar.** The law permits the appointment of more than one Nikah Registrar. What the second part of sub-section (2) of section 5 of the Ordinance indicates is that where more than one Nikah Registrar are appointed in one Union Council the work should be divided ward-wise so that two Nikah Registrars may not be allotted the same ward.[9]

The grant of licences for registration of marriage is governed by W. P. Rules, R. 7. This licence is revocable if the Registrar does not perform his functions as required by the rules. Then sub-rule (4) of Rule 7 of the Muslim Family Laws Ordinance provides that "if any per-

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4. W.P. Family Courts Act, 1964, S. 24.
5. W.P. Family Courts Act, 1964, S. 23.
6. PLD 1963 Supreme Court 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
7. W.P. Rules, R. 11.
8. W.P. Rules, R. 12 (2).
9. 22 DLR 513 (DB).

son to whom a licence has been granted under this rule contravenes any of the conditions of such licence, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both". It is, therefore, plain that if the Registrar acts in contravention of the rules, the Union Council has the power to revoke his licence and also to prosecute him.[10]

7. **Prosecution of Nikah Registrar.** A Nikah Registrar under the Muslim Family Law Ordinance is a public servant within the meaning of section 21 of the Pakistan Penal Code. The mere fact that he has under Rule 9 of the rules framed under the Ordinance to receive remuneration by the fees received from the parties does not prevent his becoming a public servant, if he is otherwise discharging a public duty. Therefore he cannot be prosecuted for an offence under section 476/34, Penal Code without the previous sanction of the appropriate Government. Moreover he can only be tried by a special judge appointed to try public servants.[11]

8. **Registers for Nikah.** The rules regarding the supply of registers and payment for them are given in W. P. Rules, R. 8.

Interpolation in Registers. Where there is an allegation that a Nikah Registrar is guilty of interpolation in the entries in the Nikah Register, the Union Council may revoke his licence and may prosecute him. But the power to correct the entry vests in the Civil Court alone. Neither the Union Council, nor the Deputy Commissioner as controlling authority can correct it.[12]

9. **Fees for Registration.** The fee for registration of marriage is to be paid to the Nikah Registrar by the bridegroom. It is Rs. 2 when the dower does not exceed Rs. 2,000 and Re. 1 for every one thousand of dower when it exceeds Rs. 2,000. The maximum fee payable is Rs. 20.[13] Where the dower consists of property other than money or partly of such property and partly of money, the fee will be paid on the valuation settled on such property between the parties to the marriage.[14]

10. **Fees for inspection and copies of register.** The following fees have been prescribed under the sub-section.

The fee for inspection of index for register shall be 50 paisa.

The fee for a certified copy of all or any of the entries relating to a marriage shall be :—

(*a*) for those in an index, 50 paisa.

(*b*) for those in a register, Rs. 2.

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10. PLD 1967 (Karachi) 165.
11. PLD 1969 S.C. 435=21 DLR (SC) 330 (1968 P. Cr. L.J. 290 *Overruled*).
12. PLD 1967 Kar. 165 (DB).
13. W.P. Rules, R. 9 (1).
14. W.P. Rules, R. 9 (3).

6. *Polygamy.* (1) No man, during the subsistance 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 the 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 (2) the 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 conditions, 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, [15][to the Collector] 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.

Synopsis

1. Scope.
2. "Existing marriage."
3. Application for permission for second marriage.

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15. Subs. by P.O., 4 of 1975.

4. Grounds for permission.
5. Revision petition.
6. Bar to jurisdiction of Civil Courts.
7. Constitution of Arbitration Council.
8. Jurisdiction of Courts under sub-section (5).
9. Complaint who may file.
10. Recovery of dower.

1. Scope. Polygamy was permitted by Islam on account of the socio-political needs of the early period of Islam. The passage in Quran which is said to allow polygamy is more in the nature of a prohibition than permission. It is stated in the Holy Quran : "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four ; but if you fear that you will not do justice (between them) then (marry) only one (Surah 4 : 3). Evidently polygamy is not permitted in all circumstances. It was permitted only to safeguard the rights of orphans. Moreover in case of more than one marriage there should be complete equality between the wives. As absolute justice in the matter of feelings of love and affection is clearly impossible therefore the proviso to the permission transforms it into prohibition.[16] The section restricts the practice of polygamy and permits it only in cases where it appears to be reasonable to the Arbitration Council.[17]

It is to be noted that the Ordinance does not prohibits polygamy. It only provides that a man may contract another marriage during the subsistence of an existing marriage, only with the permission of the Arbitration Council. In case he does so without the permission of the Arbitration Council the marriage is not void. The Ordinance only penalises a person for a marriage, celebrated in contravention of the provisions of the Ordinance by making him liable to imprisonment or fine or both but does not invalidate the marriage itself.[18]

2. "Existing marriage." The expression "existing marriage" stands unqualified and would obviously cover the marriage of a Pakistani Muslim male with a Muslim non-citizen or even a non-Muslim lady, if it is recognised as valid by the laws of Pakistan. The expression "another marriage" occurring subsequently in this sub-section, should *prima facie* have the same connotation. The generality of the words cannot be cut down by importing into this sub-section any extraneous considerations.[19]

3. Application for permission for second marriage. The fee prescribed for an application for a second marriage is Rs. 100.[20]

The jurisdiction to entertain an application under section 6 (2) of the Ordinance vests in the Union Council at the place where the existing

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16. The Spirit of Islam by Amir Ali, 229.
17. PLD 1963 S.C. 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
18. 1981 CLC 1651=PLJ 1981 Lah. 463=1981 LN 581+PLD 1971 Lah. 139+23 DLR 118 (DB)+PLD 1963 S C 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
19. PLD 1967 S.C. 580+PLD 1961 S C. 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9
20. W.P. Rules, R. 15.

wife of the applicant resides ; and if he has more than one wife, where the wife whom he has married last, resides at the time of the making of the application.[21] Therefore permission granted by the Union Council where the husband resides is ineffective and does not save the person contracting a second marriage on the strength of such permission from penal consequences detailed in this section.[22]

It has been provided that where the wife is not residing in any part of Pakistan, the Union Council at the place where the wife last resided with the applicant shall have jurisdiction. In other cases, *i. e.* where the wife did not reside with the applicant in any part of Pakistan, which can be the case where the marriage took place in a foreign country and the wife never came and lived with the "husband in Pakistan or where the marriage took place in West Pakistan and there is no '*rukhsati*' and later on at the time of the application, the wife is not resident in West Pakistan ; the Union Council where the applicant is permanently residing in West Pakistan shall have jurisdiction in the matter.[23]

4. Grounds for permission. The Arbitration Council is given wide discretion to judge for itself if the proposed marriage should be permitted or not. However, they have been advised under the rules to look to the following things in particular while considering the question.

Sterility, physical infirmity, physical fitness, unfitness for conjugal relations, wilful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife.[24] But these or any other considerations are not binding on the Arbitration Council. They have to decide the matter according to their own reason and wisdom.

5. Revision petition. Parties are competent to file a revision against the orders of the Council within 30 days of the decision by the Arbitration Council. The revision petition is stamped with a non-judicial stamp of Rs. 2.[25]

Form of revision petition. The revision petition shall be in writing. The grounds on which the decision is being challenged shall be stated in it, and it shall bear the signature of the applicant.[1]

6. Bar to jurisdiction of Civil Courts. The decision given by the revisional authority is final and it cannot be questioned in any other Court of law. However, if such agencies exercise jurisdiction, beyond the sphere allocated to them in law, the Civil Court may rightly step in.[2]

Constitutional jurisdiction. The Ordinance is only a sub-constitutional enactment and therefore it cannot bar the constitutional

21. W.P. Rules, R. 3 (*a*).
22. 1971 P. Cr. L.J. 148.
23. West Pakistan Rule 3 as amended in 1965.
24. W.P. Rules, R. 14.
25. W.P. Rules, R. 16 (1) and Rule 20.
1. W.P Rules, R. 16 (2).
2. PLJ 1981 Rawalpindi 638 (DB).

jurisdiction of the High Court which is expressly conferred on that Court by the Constitution.[3] Under that jurisdiction an order of *certiorari* may be issued :

(1) for correcting errors of jurisdiction as when an inferior Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise it ; or

(2) when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction as when it decides a matter without giving an opportunity to the parties, to be heard, or violates the principles of natural justice.[4] Where the Authority has made an illegal order as where he was not competent to make it or when on the facts found whether subjectively, or objectively the order in question could not have been made or an order should have been but has not been made or where the Authority suffers from want of jurisdiction, the order is liable to review by a Superior Court in constitutional jurisdiction, provided it has affected any right of the petitioner. What has to be seen in all such cases is the provision of the statute under which the action was taken and it is on a true construction of that provision in the context of the statute that the answer to the question under discussion will primarily depend.[5] Where however the Authority acts within his jurisdiction, writ jurisdiction, would not be exercised unless there is an error apparent on the face of the record.[6] Once it is found that the impugned order is vitiated by an error of law, the apparency of which is patent on the order itself, or it is vitiated by disregard of the principles of natural justice, it must be quashed.[7] But in this respect it is to be noted that where a superior Court calls for the records of judicial or *quasi*-judicial authorities or Tribunals, which are not subject to its appellate jurisdiction, the superior Court no doubt has the full power to do justice but does not as a rule, even in a case where it does interfere, substitute its own decision for the decisions of the inferior authority or Tribunal. Where it is felt that questions have been left undecided by such Tribunal or Authority or a question has to be decided after taking fresh evidence, it is more appropriate to return the case to the Authority or Tribunal concerned for a decision in accordance with law, after quashing the order complained against.[8]

7. **Constitution of Arbitration Council.** Arbitration Council for the purposes of this provision is constituted by the Chairman with himself as its Chairman and one representative each of both the parties. Where a party to the dispute is residing outside Pakistan, the order of the Chairman calling upon him to nominate his representative on the

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3. PLR 1962 S C 42=14 DLR S.C. 41=1962 (1) P.S.C.R. 292.
4. PLD 1959 Dacca 738 (DB)+PLD 1956 S C. (Ind) 1+(1879) 4 A.C. 30+PLD 1959 Kar. 669 (FB)+PLD 1957 Kar. 194 (DB).
5. PLD 1958 S C 437=11 DLR (S.C.) 140=1958 (2) P.S.C.R. 71.
6. PLD 1958 S.C. 437=11 DLR (S C.) 140=1958 (2) P.S.C.R. 151+PLD 1961 Dacca 155=12 DLR 615 (DB).
7. PLD 1960 Dacca 805 (DB)+12 DLR 342=PLD 1958 Dacca 1140.
8. PLD 1964 Supreme Court 266=16 DLR (S.C.) 298.

Arbitration Council shall be served on such party through the Counsellor Officer of Pakistan in or for the country where such party is residing.[9]

8. **Jurisdiction of Courts under sub-section (5).** Where a Chairman of a Union Council forwards a complaint to the controlling authority and he forwards the complaint to a Magistrate, the complaint is properly made and the Magistrate is thereby clothed with jurisdiction to try the accused.[10] But a Magistrate has no jurisdiction and power to pass an order on the man contracting another marriage without the permission of Arbitration Council to "pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives as provided in clause (*a*) of sub-section (5) of section 6 of the Ordinance. The forum and procedure for determination of the amount of dower and questions incidental thereto not having been provided in the Ordinance itself or the Rules framed thereunder and the Criminal Courts set up under the Criminal Procedure Code not having power to determine these matters and pass appropriate orders, a Magistrate has no jurisdiction to deal with the matter for immediate payment of the entire amount of dower.[11]

9. **Complaint, who may file.** After the amendment of Rule 21 under the Muslim Family Laws Rules, an existing wife, who is an aggrieved party, may file a complaint against her husband under this section for having contracted a second marriage without the requisite permission.[12]

10. **Recovery of dower.** No person can straightaway approach the Collector or any other revenue authority on the basis of *nikahnama* or any other agreement between the parties that since the husband has contracted a second marriage without the permission of the Arbitration Council, therefore, unpaid amount of dower may be realised as arrears of land revenue. The services of the Collector or any other revenue authority may be utilised for the purpose of realisation of unpaid amount in such manner as directed by the Family Court under the relevant provisions of Family Courts Act, 1964. Unless a matter is properly and legally adjudicated upon as to how much amount is due to the wife whether the agreement or *nikahnama* on the basis of which the said amount is claimed is valid and a decree is passed by a competent Court, no proceedings under sub-section (5) of section 6 can be held. Further such matters cannot be decided by revenue authority as no jurisdiction has been conferred upon it by any provision of Muslim Family Laws Ordinance. It may be decided by a Family Court as envisaged by Family Courts Act, 1964.[13]

7. "*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 notice in writing of his having done so, and shall supply a copy thereof to the wife.

9. West Pakistan Rule 6 (2) as amended in 1965.

10. PLD 1967 Peshawar 201.

11. 18 DLR 230 (DB).

12. NLR 1980 Cr. 381=1980 P. Cr. L.J. 122.

13. PLJ 1981 Lah. 174=PLD 1981 Lah. 232.

(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 five thousand rupees or with both.

(3) Save as provided in sub-section (5), a *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 be 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.

Synopsis

1. Scope.
2. Validity of section.
3. Validity of *talaq*.
4. Pronouncement of *talaq*.
5. *Talaq* in writing.
6. Object of section.
7. Protection of proceedings before Council.
8. Form of *talaq*.
9. Revocation of *talaq*.
10. When *talaq* becomes effective.
11. Notice to Chairman.
12. When notice may be given.
13. Arbitration Council.
14. Failure of conciliation.
15. Pregnant woman.
16. Muslim male married to Christian woman.
17. Re-marriage of the same parties after divorce.
18. Recognition of *talaq* in England.

1. Scope. There is no reason to confine the applicability of section 7 only to the divorce of a person with whom the marriage has been consummated. It is applicable as much to the divorce pronounced before the consummation of marriage.[14]

2. Validity of section. Section 7 (3) of the Muslim Family Laws

14. PLD 1982 F.S.C. 156.

Ordinance, 1961, by providing a period of ninety days for the purpose of bringing about a reconciliation introduces into the *Talaq-ul-Bidat* or *Talaq-i-Badai* the provisions of *Talaq Ahsan* referred to in *Sura Al-Talaq* of the Holy Qur'an. Section 7 (3) of the 1961 Ordinance is, therefore, not repugnant to the injunctions of Islam as laid down in the Holy Qur'an or the Sunnah of the Holy Prophet so as to invite any special examination under Article 203-B of the Constitution of Pakistan. Even otherwise, under the Explanation to Article 203-B of the Constitution, Muslim Personal Law is exempt from any such examination and a provision which makes a material amendment to any particular branch of Muslim Personal Law is as much a part of the Explanation. The amendment is a beneficial amendment and brings the provisions of *talaq* more in conformity with the principle of *Talaq Ahsan* and therefore, deserves the greatest respect. Being nearest to the Injunction of the Qur'an and the Sunnah of the Holy Prophet, its sanctity is all the more enhanced [15]

The Federal Shariat Court has even otherwise no jurisdiction to declare this section to be repugnant to the injunctions of the Holy Qur'an.[16]

3. **Validity of 'talaq'.** The section envisages only a *talaq* valid under Muslim Law. There is no provision either in the Ordinance or the Rules, requiring the Chairman or the Arbitration Council to give a decision on the question of validity or otherwise of the *talaq* under the relevant law applicable to the parties or even to issue a certificate, to make the divorce effective. The certificate issued by the Chairman in this behalf would have no legal effect, if otherwise under the substantive law applicable to the parties the *talaq* was not valid.[17]

4. **Pronouncement of talaq.** The 'pronouncemant' of *talaq* must be a conscious and independent act. The term "pronouncement" has not been defined in the Ordinance, therefore, the ordinary Muslim Law on pronouncement of a divorce shall continue to apply notwithstanding the provisions of Muslim Family Laws Ordinance. For example, if a wife denies or disproves the two essential requirements; one, pronouncement of *talaq* and two, the receipt of copy of the notice by her; then notwithstanding the fact that the husband is able to prove the third requirement namely that he gave the Chairman "a notice in writing of his having done so" (*i.e.* pronounced the *talaq*), the mandatory provisions of sub-section (1) of section 7 would not be deemed to have been complied with.[18] Hanfi Law does not prescribe any particular form for the pronouncement of *talaq*,[19] But the *talaq* must be pronounced only during the period between two *tuhrs* (menstrual periods). Where *talaq* is pronounced on a wife who has passed the age for period menstruation, the condition that oral declaration of divorce should be made between two periods of *tuhr* would not be applicable, because it would be physically impossible to have any such periods

15. 1980 P. Cr. L.J. 122=NLR 1980 Cri. 381 (Lah).
16. PLD 1982 F.S.C. 156.
17. PLD 1975 Lah. 147=PLJ 1974 Lah. 543=Law Notes 1974 Lah. 562.
18. PLD 1977 Lah. 363=PLJ 1977 Lah. 69.
19. 36 All 48=25 I.C. 387.

between which such a declaration could be made.[20] The words employed may be either express (customary) or implied. If they are express no proof of intention is required, but if the words are ambiguous, intention to divorce[21] and the fact that the words should expressly refer to the wife must be proved.[22] Where the words used are ambiguous the husband is entitled to say whether he intended to pronounce divorce or not.[23]

Express or ambiguous words. When the words used are "Thou art divorced", "I have divorced thee" or "I divorce my wife for ever and render her '*haram*' for me"; it was held that the words were expressed and there was no need of proving the intention.[24] But the following words were held to be ambiguous. "Thou art my cousin, the daughter of my uncle if thou goest",[25] and "I give up all relations and would have no connection of any sort with you."[1] The real difference between *marsumah* (customary) and *ghair marsumah* (which are not customary or ambiguous) forms of *talaq* is that in the former case *talaq* is effected even when there is no intention to divorce,[2] whereas in the latter case the intention to divorce must be proved.[3] When the pronouncement is clear and the words are express under Hanafi Law the divorce is valid even if it is pronounced under compulsion.[4] But this is opposed to the views of Imam Malik, Shafie and Hanbal.[5] A divorce pronounced in jest[6] or in a state of self-induced intoxication would be valid.[7]

Presence of wife. Presence of wife is not necessary for the divorce to be effective. Thus a *talaq* pronounced in her absence would be a valid divorce.[8] The divorce may be addressed to the wife or to any of her relations but the words should clearly refer to her.[9] The knowledge of the wife is necessary for certain other collateral purposes but communication is not necessary for the validity of *talaq*.[10] The collateral matters are maintenance, to which she is entitled till she comes to know of the *talaq*[11] and limitation for a suit for deferred dower, which begins

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20. AIR 1961 Bombay 121.
21. AIR 1927 P.C. 15=100 I.C. 1.
22. 33 Mad. 22=3 I.C. 730+AIR 1932 P.C. 25=135 I.C. 762.
23. Abdur Rahim: Islamic Jurisprudence, page 339.
24. 59 I.A. 21.
25. 2 All 71.
1. AIR 1952 Oudh 34=136 I.C. 209.
2. PLD 1962 Dacca 630=13 DLR 533.
3. PLD 1951 Lah. 467.
4. 54 All 45=135 I.C. 762=AIR 1932 P.C. 25.
5. Abdur Rahim, Islamic Jurisprudence, page 337.
6. Abdur Rahim, Islamic Jurisprudence, page 337.
7. 54 All 45=135 I.C. 762=AIR 1932 P.C. 25.
8. 30 Bom. 537=59 Cal. 833.
9. 33 Mad. 22=3 I.C. 730.
10. PLD 1971 Lah. 467.
11. 59 Cal. 833.

to run from the time when the divorce comes to her notice.[12]

Shia Law. Shia Law prescribes a particular formula for the pronouncement of divorce. If that is not employed divorce would be ineffective.[13] According to Shia doctors, the *talaq* must be orally pronounced by the husband, in the presence of two witnesses and the wife, in a set form of Arabic words except where it is established that the husband was incapable of pronouncing the *talaq* in the manner mentioned above.[14] It will be noticed that it is not with regard to proof of divorce that the Shia law insists on two witnesses but to the very act of divorce and therefore the matter does not relate to proof only. It is a part of substantive law.[15] A woman cannot serve as a witness in this case.[16]

According to Shia law a divorce under compulsion is not valid.[17] There should be a clear intention to divorce otherwise divorce would not be effective.[18]

5. 'Talaq' in writing. Divorce in writing has been recognised by all Muslim jurists of the Hanafi school as one of the forms of *talaq-i-bidaat* (irrevocable divorce).[19] The condition that declaration of divorce should be made between two periods of menstruasion which applies to an oral divorce does not apply to a divorce in writing.[20]

Kinds of writing. Writings are of two kinds, *marsoom* or customary and *ghair marsoom* or unusual.[21] The real difference between *marsumah* and *ghair marsumah* forms of writing is that in the former case the writing operates as *talaq* even though there is no intention to divorce but in the latter case it takes effect if the intention is manifest and not otherwise. But in neither case the validity of *talaq* is made dependent on the knowledge of the wife. When the husband executed the document with the intention to divorce his wife ; it was held that the divorce took effect as immediate and irrevocable even when the *talaqnama* was in the non-customary form of writing.[22] Where *talaqnama* was not in a customary form it was not effective unless the intention to divorce was proved.[23] But communication of the *talaqnama* would be necessary for some collateral matters like dower, maintenance and her right to pledge her husband's credit for means of subsistence.[24]

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12. AIR 1931 Mad. 647=133 I.C. 375.
13. Baillie ii, 113.
14. PLD 1963 S.C. 58=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
15. PLD 1962 (W.P.) Lahore 558+PLD 1965 Kar. 185.
16. Baillie ii, 118.
17. Baillie ii, 108.
18. Baillie ii, 108, 109.
19. PLD 1951 Lah. 467.
20. AIR 1961 Bombay 121.
21. Amir Ali, i, 233.
22. PLD 1951 Lah. 467.
23. AIR 1932 Lah. 498=138 I.C. 134.
24. AIR 1933 Cal. 27=141 I.C. 869.

When talaq in writing becomes effective. *Talaq* in writing becomes operative from the time of writing and not from the time when it is received by the wife.[25] But under Muslim Family Law Ordinance *talaq*, in whatever form pronounced, would become effective on the expiry of 50 days after notice of it is given to the Chairman. If no notice is given to the Chairman, the *talaq* would not become effective, because, according to clause (3) of section 7 the period is to be calculated from the date of the notice to the Chairman and not from the date of the pronouncement of the *talaq*.[1] During the period between the pronouncement and its becoming effective, it cannot be said that the marital status of the parties in any way undergoes a change. They still continue in law to be husband and wife.[2]

Shia law. If the husband can pronounce the formula of *talaq* he cannot give a *talaq* in writing.[3]

6. **Object of section.** The object of section 7 is to prevent hasty dissolution of marriages by *talaq* pronounced by the husband unilaterally, without an attempt being made to prevent disruption of the matrimonial status.[4] The machinery for reconciliation is provided by Islam where the wife asks for *khula* but no such machinery is provided in a case where the husband divorces his wife. "Imam Shafei has reported a tradition from Hazrat Ali and that has been reported by Ibn Sirin from Ubaida. It is to the effect that a man and woman came to Hazrat Ali and each one of them was accompanied by a number of persons. Hazrat Ali ordered that one *hakam* should be appointed from the man's family and one from the family of the wife, and addressing the *hukma*, he said ; "Do you know what your duties are ? Your duty is to unite the couple if they can be united, and if you decide to separate, separate them.[5] Now under the Ordinance the position of the *hukma* has been taken by the Arbitration Council, and the procedure for reconciliation has been made obligatory. This goes to show that nothing new has been introduced in Muslim Law by the section. It has only extended an existing principle to cover an aspect of the question of family relations.

7. **Protection of proceedings before Council.** Where the opposite party in the arbitration proceedings made a statement in due course of law before an authority created by the statute for that particular purpose. Witnesses appeared in support of the statement of the opposite party. An arbitrator was appointed by complainant but there was no refutation of the factual allegation made. This would show acquiescence on his part. So far as the Chairman is concerned, he did not give any finding on this aspect of the case. The order purported to be on behalf of the Arbitration Council. It was within its powers to reproduce the

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25 Baillie 234+30 Bom. 537+AIR 1937 Lah. 270.

1. PLD 1964 Kar. 306=16 DLR (W.P.) 104+PLD 1963 S.C. 51=15 DLR S.C. 9.
2. PLD 1963 Supreme Court 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
3. PLD 1963 S.C. 51=15 DLR S.C. 9+PLD 1965 Kar. 185+PLD 1962 Lah. 558+ Baillie ii, 113, 114.
4. PLD 1963 S.C. 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
5. Tafseer-i-Kabir, P. 129+PLD 1959 (W.P.) Lah. 566=11 DLR Lahore 193 (FB).

submissions made to it. Therefore the maker of the statement as well as the Chairman who reproduced it were protected from prosecution.[6]

8. Form of talaq. The section embraces all forms of *talaq* envisaged by Muslim Law or prevalent among the Muslims of Pakistan.[7] The 'pronouncements' of *talaq* after the enactment of the Ordinance, could be "in any form whatsoever". The intention of the law makers it appears, was that even if the *talaq* is in any particular form including *biddat*, it will have effect in accordance with the provisions contained in section 7. The special consequences of *talaq-i-iddat* would be removed and the *talaq* (simpliciter) in question, in this case, would become effective on the expiry of 90 days after the receipt of notice by the Chairman unless revoked earlier.[8] Under the Muslim Personal Law as well as Muslim Family Law Ordinance, 1961 no mode is prescribed for pronouncement of divorce. It is established that a Muslim can pronounce a divorce orally or make the divorce in writing. In fact, under the Muslim Personal Law a divorce in writing became irrevocable as soon as the same was written but the Ordinance has made inroads into Muslim Personal Law by providing a machinery and procedure for confirmation of the divorce and postponement of its effect for 90 days.[9] In other words if *talaq* is otherwise valid (*i. e.* if under the Personal Law of the parties the *talaq* is valid) it would become effective under that law ; but the only clog thereon is that the effectiveness would be postponed for ninety days under sub-section (3) of section 7 of the Ordinance.[10]

There are two approved forms of divorce *talaq'us Sunna* known as *talaq ahsan* or *talaq hasan*, and an unapproved form known as *talaq bidaat*.

'*Talaq ahsan.*' *Talaq ahsan* is effected when the husband pronounces one divorce during a *tuhr* in which cohabitation has not taken place between that parties, and then abstains from cohabitation during her *iddat*. The *talaq* becomes irrevocable at the end of the period of *iddat*. But during the period the husband can take back his wife at any time. When the woman is not subject to courses *talaq* can be pronounced even after cohabitation. The divorce becomes irrevocable only on the completion of *iddat* which is three periods, and when the woman is not subject to periods it is three months. When the woman is pregnant the *iddat* comes to an end on the delivery of the child or three months, whichever is later [11]

'*Talaq hasan.*' *Talaq-i-hasan* is effected when the husband repudiates his wife during a *tuhr* in which he has not had carnal connection with her, and then repeats the repudiation during the next two *tuhrs*. The

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6. 1970 P. Cr. L J. 999 (Lah).
7. 1980 P. Cr. L.J. 122=NLR 1980 Cr. 381+PLD 1975 Lah. 147.
8. PLD 1977 Lah. 363=PLJ 1977 Lah. 69.
9. PLD 1976 Kar. 416 (DB).
10. PLD 1975 Lah. 147=PLJ 1974 Lah. 543=Law Notes 1974 Lah. 562.
11. Hedaya, 27 ; Baillie, 206.

third repudiation or pronouncement makes the divorce final and irrevocable.

Imam Malik does not consider it a *talaq-us-sunna*.[12]

'Talaq-i-bidaat. Talaq-i-bidaat is effected by pronouncing *talaq* thrice during the same *tuhr*, or in pronouncing the formula of *talaq* once with the condition that it should be considered to have been said thrice. As when the husband says "I divorce the thrice."[13] Where a single irrevocable divorce is pronounced, it is a *talaq-i-bidaat*.[14] It is immediately effective and irrevocable.[15]

Talaq-i-bidaat is the most common and prevalent mode of divorce in India and Pakistan.[16] It is not prohibited even during the woman's courses.[17] But it is not recognised by Shia law.[18]

From a comparison of these forms it appears that the Ordinance has enforced in Pakistan a kind of *talaq* which is in consonance with *talaq-i-ahsan* and *talaq-i-hasan*. In the case of *talaq-i-ahsan* the divorce becomes irrevocable after the period of *iddat*, and in case of *talaq-i-hasan* it become irrevocable on pronouncement for the third time in the third *tuhr* after the first pronouncement. Thus the least period after which a *talaq* becomes irrevocable according to *talaq-us-Sunna*, *i.e.* approved form of divorce, is approximately 90 days. In this sense no change has been effected in Muslim Law by the section. On the other hand it has been consolidated and enforced by statutory law. The only form affected by the Ordinance is the *Bedat* form which becomes effective immediately after it is either uttered orally or written down on a piece of paper or on something else from which it can be deciphered.[19] Now even a *talaq* in that form will become effective after the expiry of 90 days.

9. Revocation of 'talaq'. The word "revocation" has not been defined in the Ordinance nor any procedure has been prescribed as to how the *talaq* could be revoked. Applying the same reasoning *qua* "pronouncement" of *talaq* to "revocation" thereof, it was held that the general Muslim Law would govern all aspects of revocation—procedural and substantive.[20]

10. When 'talaq' becomes effective. The pronouncement of divorce does not operate as divorce. It is merely a manifestation of a wish to divorce.[21] A *talaq* unless revoked earlier, expressly or otherwise becomes

12. Hedaya, 72; Baillie, 206.
13. (1838) 7 Bom. 180, 39 I.C. 513, (1917) 39 All. 371.
14. (1905) 33 Bom. 537+AIR 1929 Pat. 81+151 I.C. 546.
15. PLD 1962 Dacca 360=13 DLR 533+AIR 1932 P.C. 25=135 I.C. 762.
16. (1971) 39 All 371=39 I.C. 513.
17. AIR 1929 Patna 81.
18. Baillie, II, 118.
19. PLD 1962 Dacca 630=13 DLR 533.
20. PLD 1977 Lah. 363=PLJ 1977 Lah. 69.
21. PLD 1979 B J 36.

effective on the expiry of 90 days after notice of it is given to the Chairman.[22] Therefore where a man divorced his wife and within ninety days of pronouncing the divorce entered into marriage with another lady, he was guilty under section 6 because his first marriage subsisted till then.[23] However it must be noted that there are three important requirements under sub-section (*i*) of section 7 : (1) pronouncement of *talaq* in accordance with Muslim law, (*ii*) service of the notice on the Chairman ; and (*iii*) service of copy of the notice on the wife. If any one of these conditions is not satisfied, the *talaq* would not become effective even after ninety days.[24]

If no notice is given to the Chairman, the *talaq* would not become effective, because according to clause (3) the period is to be calculated from the date of notice to the Chairman and not from the date of the pronouncement of the *talaq*.[25] Similarly where the Chairman does not constitute an Arbitration Council on receipt of notice or does not call upon the parties to nominate their representative or in any other manner fails to perform his statutory functions, the *talaq* will become effective on expiry of ninety days from the date of pronouncement notwithstanding such failure in performance of statutory duties.[1] During the period between the pronouncement and its becoming effective, the marital status of the parties does not in any way undergo a change. They still continue in law to be husband and wife.[2]

Where the wife admitted that she was divorced on a certain date, the divorce was held to be effective from such date.[3]

Notice to wife. It is obligatory on the husband to give a copy of the notice given to the Chairman, to the wife, and if he does not do so he will be liable to prosecution under sub-section (2). But otherwise the notice has no effect on the validity of the *talaq* or the date on which the *talaq* has to become effective.[4] But the Lahore High Court has held that in case a copy of *talaq* is not supplied to the wife, the *talaq* would not become effective after ninety days of the giving of the notice of *talaq* to the Chairman.[5] Where the whereabouts of the wife are not known and cannot be ascertained by the husband with due diligence, it has been provided in the Rules that notice may be served on her with the permission of the Chairman through her father, mother, adult brother or adult sister. But if she has no such relation or where

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22. PLD 1982 F.S.C. 156+NLR 1980 Civ (Foreign) 220+NLR 1980 Cr. 381=1980 P. Cr. L.J. 122+NLR 1980 Civ. 205+PLD 1975 Lah. 147=PLJ 1974 Lah. 543=LN 1974 Lah. 562.
23. NLR 1980 Cr. 381=1980 P. Cr. L J. 122.
24. PLD 1976 Lah. 1466.
25. PLD 1973 BJ 36=PLD 1972 Lah. 694=LN 1972 Lah. 291=PLD 1964 Kar. 306=16 DLR (W.P.) 104+PLD 1963 S.C. 51=15 DLR S.C. 9.
1. 1969 DLC 586=21 DLC 933.
2. PLD 1963 Supreme Court 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
3. PLD 1976 Lah. 1466.
4. PLD 1976 Kar. 416 (DB).
5. PLD 1976 Lah. 1466.

their addresses cannot be ascertained with due diligence, the husband may, with the permission of the Chairman, serve a notice of *talaq* on her by publication in a newspaper, approved by the Chairman. It is however, necessary that the newspaper should have circulation at the place where he last resided with the wife.[6] It is to be noted that prior to the Ordinance no notice of *talaq* was required to be given to the wife and in the case of a written *talaq*, the *talaq* became operative from the time of writing and not from the time when it was received by the wife.[7] That could obviously cause grave injustice where the husband executed a *talaqnama* but did not communicate it to his estranged wife. All this has now been remedied.

Option of puberty, dissolution of marriage by. A suit for dissolution of marriage brought on the ground of *Khair-ul-Baloogh* is not hit by the provisions contained in section 8 of the Ordinance making it incumbent on the party seeking dissolution to have recourse to procedure contained in section 7. Having once repudiated the marriage by a proper exercise of option of puberty a Muslim woman is under no obligation to wait for the decree of the Court for contracting a second marriage and instances are not wanting where before the matter has come up before the Court the woman has already gone in for a second marriage and has even borne children in the subsequent wedlock. Obviously the object of having recourse to the procedure laid down in section 8 of the Ordinance, namely, to bring about reconciliation having already been irretrievably defeated there would be no question of invoking that procedure.[8]

11. Notice to Chairman. Notice of *talaq* has to be given to the Chairman. If the husband himself thinks better of the pronouncement of *talaq* and abstains from giving a notice to the Chairman, he would be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife.[9] *Talaq* will not become effective where no notice is proved to have been given to the Chairman by the husband.[10] Even where a notice has been given there is no bar in law for the husband to contest the genuineness or validity of the notice under section 7. If it is proved that the husband did not give the notice, the entire proceedings based on it before the Chairman, would be a nullity in the eye of law. However, in the event of the wife successfully proving that the notice was, in fact, sent by him or that when he appeared before the Chairman he did not dispute the notice, the divorce will become effective unless he is able to establish that he revoked the divorce before the expiry of ninety days.[11]

A notice under S. 7 (1) is to be given to the Chairman of the Union Council of the place where the wife to whom divorce has been

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6. West Pakistan Rules, R. 3 (*a*) substituted in 1965.
7. PLD 1964 Dacca 377+PLD 1951 Lah. 467+PLR 1951 Lah. 719+AIR 1936 Lah. 611+(1905) 30 Bom. 537+1937 Lah. 270+Baillie 234.
8. PLD 1970 Lah. 475.
9. PLD 1963 S.C. 51=1963 (1) P.S.C.R. 356=15 DLR (S.C.) 9.
10. PLD 1981 S.C. 460=PLJ 1981 S.C. 812+NLR 1981 AC 522+1970 SCMR 845+1968 P. Cr. L.J. 1071 (NLR 1981 Cr. 164 does not lay down correct law).
11. PLD 1972 Lah. 694=Law Notes 1972 Lah. 291.

pronounced was residing at the time of its pronouncement. Thus the jurisdiction is given by the residence of the wife and not, as under the ordinary law, by the place where the marriage was contracted or where the couple last resided together. It is not even the permanent residence of the wife.[12]

Where at the time of pronouncing *talaq* the wife was not residing in any part of Pakistan, the Chairman of the Union Council at the place where the wife had last resided with the husband shall be given notice under section 7 (*i*). Where the husband and wife have lived together in the house of the former, may be for a couple of days before the husband left for U. S. A. It was held that where a person has a permanent or *quasi*-permanent abode, howsoever short his stay therein may be, that would constitute residence for the purposes of sub-clause (*i*) of Rule 3[13] and notice may be given to the Chairman of the place where the wife lived with the husband. Where they have not at all resided together in Pakistan and the wife is not in Pakistan when the *talaq* is pronounced, the notice shall be given to the Chairman of the Union Council at the place where the husband is permanently residing.[14]

Notice to unauthorized person. Where no Chairman of a Union Council was in office and a notice was therefore sent to the Secretary of the Union Council who notified that as there was no Chairman who could constitute an Arbitration Council and as 90 days had passed after the notice was given, the *talaq* had become effective. It was held that the Secretary had no authority to pass such an order therefore the *talaq* had not become effective.[15]

Dissolution of marriage by Family Court. A Family Court may give a decree for dissolution of marriage.[16] Where a marriage is dissolved by a decree of the Family Court, the Court shall send by Registered post, within seven days of the passing of the decree, a certified copy of the same to the appropriate Chairman, and upon the receipt of such copy, the Chairman shall proceed as if he had received an intimation of *talaq* required to be given under this Ordinance and the *talaq* will be effective after 90 days of such intimation.[17] Where the decree for dissolution has been obtained by the wife on her suit, it is necessary for the wife to independently inform the Chairman, Union Council, about the decree and also to send a notice thereof to the husband in a formal manner.[18] Where notice of decree was sent to the Chairman and the Arbitration Council did make an attempt to secure the attendance of the respondent yet the attempt was not successful either because the respon-

12. W P. Rule 3 (*b*).
13. KLR 1982 S.C. 56+PLJ 1981 Rawalpindi 638 (DB).
14. West Pakistan Rule 3 as amended in 1965.
15. PLD 1979 Lah. 36=NLR 1978 Civ. 618.
16. PLD 1978 Lah. 328.
17. PLD 1975 Lah. 1118+PLD 1975 Lah. 766+PLJ 1975 Lah. 256 and W.P. Family Court Act, 1964, S. 21.
18. PLD 1975 Lah. 1118.

dent was out of Pakistan or was evading service. In the absence of reconciliation between the parties the decree for the dissolution of their marriage became effective on the expiry of 90 days in view of sub-section (3) of section 7 and sub-section (3) of section 21 of the W. P. Family Courts Act. It is only if there has been a reconciliation within the above period that the decree loses its effectiveness. It cannot therefore be said that the Chairman had not complied with the requirements of sub-section (4) of section 7 of the Ordinance. Moreover, neither section 7 of the Ordinance nor section 21 of the Act nor the proviso to rule 6 of the West Pakistan Rules under the Ordinance, provide a consequence in case of want of service of notice on one of the parties. Having regard to the above provisions the effectiveness of the decree after the expiry of 90 days is absolute.[19]

12. When notice may be given. Notice of *talaq* has to be given to the Chairman as soon as may be. But no time limit has been prescribed for giving notice to the Chairman and it need not be sent immediately.[20] This implies that any undue delay in the giving of notice after the pronouncement of *talaq* would be punishable under sub-section (2) of section 7. It appears from the scheme of the section that in case of *talaq-i-hasan* the notice has to be given after the first pronouncement of *talaq*. It is however to be noted that in case of a suit for dissolution of marriage no notice need be given by the wife to Chairman before institution of a suit.[21] The provision of section 7 of the Ordinance shall be fully satisfied if the notice of the decree is sent to the Chairman after the decree and not before or contemporaneous with the institution of the suit. The Family Courts would thus continue to follow the practice of sending a copy of the decree to the Chairman concerned.[22]

13. Arbitration Council. The Arbitration Council for the purposes of this provision is constituted by the Chairman with himself as its Chairman and one representative each of both the parties. Where a party to the dispute is residing outside Pakistan, the order of the Chairman calling upon him to nominate his representative on the Arbitration Council shall be served on such party through the Counsellor Officer of Pakistan in or for the country where such party is residing.[23]

Jurisdiction of. The Arbitration Council had no jurisdiction to grant a decree in favour of the respondent for money in lieu of her dowry. The proper course for the Council was to leave this matter to be decided by proper forums. The decree was set aside.[24]

14. Failure of conciliation. The Chairman is required to bring about reconciliation between the parties for which purpose he is to give

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19. NLR 1982 Civ. 92+PLD 1971 Kar. 118.
20. 1977 P. Cr. L J. 107.
21. PLD 1975 Lah. 766=PLJ 1975 Lah. 256.
22. PLD 1975 Lah. 1118+PLD 1975 Lah. 766=PLJ 1975 Lah. 256.
23. West Pakistan Rule 6 (2) as amended in 1965.
24. 1980 CLC 1635 (Lah).

notice to them to nominate their representatives in order to constitute an Arbitration Council. If any of the parties fails to appear before him, he cannot enforce his attendance nor a default of appearance on the part of any of the parties can be visited with any penal consequences. The divorce notwithstanding the conduct or attitude of any of the parties, shall become effective after the expiry of ninety days unless it is revoked earlier by the husband.[25] Therefore where a notice of divorce has been sent to the Chairman and the husband does not appear before the Chairman on being called upon to do so, the rule prescribes that the proceedings are to continue, whether one or both the parties come forward or not. Such a case cannot be placed on a footing different from the one where attempted reconciliation has failed due to the establishment of fault of one of the parties and the divorce will become effective on the expiry of ninety days from the date of notice to the Chairman.[26] Were the parties appear before the Chairman and an Arbitration Council is constituted, but reconciliation does not take place, the only thing the Council or the Chairman may do, is to record in writing that reconciliation has failed. There is no provision either in the Ordinance or the Rules requiring the Chairman or the Arbitration Council to give a decision or to issue a certificate to make the divorce effective.[1]

Presence of spouses not necessary. The presence of the spouses is not mandatory by virtue of the provisions of section 7 of the Ordinance. All that sub-section (4) of the said section postulates is the forming of the Arbitration Council by the Chairman for the purpose of bringing about a reconciliation between the parties, and the said Council shall take all steps necessary to bring about such reconciliation. Where an Arbitration Council was formed and the spouses had nominated their respective representatives. It is further clear from the record that in spite of several adjournments, reconciliation between the parties was not possible. Therefore, the divorce had to be confirmed.[2]

Khula or 'mubaraat'. Where a notice of dissolution of marriage by *khula* or *mubaraat* was sent to the Chairman, and both the parties were asked to nominate their representatives and were afforded opportunity of appearance which both of them availed of. They engaged counsel and represented their respective points of view before the Chairman. This all can be treated as in the nature of proceedings which are necessary to be conducted by the Arbitration Council. Thus the requirement of law that the provisions contained in section 7 would *mutatis mutandis* and so far as applicable apply, have been satisfied in this case.[3]

15. Pregnant woman. The principle laid down regarding the time when *talaq* becomes effective in the case of a pregnant woman is that followed in the case of *talaq-i-ahsan*. It is to be noted that *talaq-i-ahsan* becomes irrevocable at the end of the period of *iddat*. But during that period the husband can take back his wife at any time. When the

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25. PLD 1976 Kar. 416 (DB).
26. PLD 1977 Lah. 1173+PLJ 1974 Lah. 419.
1. PLD 1972 Lah. 694=LN 1972 Lah. 291+PLD 1976 Kar. 416 (DB).
2. PLD 1976 Kar 416 (DB).
3. NLR 1982 Civil 92=PLJ 1979 Lah. 54=PLD 1979 Lah. 241.

woman is not subject to courses, the *talaq* can be pronounced even after cohabitation. The divorce becomes irrevocable only on the completion of *iddat* which is three periods, and when the woman is not subject to periods it is three months. When the woman is pregnant the *iddat* comes to an end on the delivery of the child or three months, whichever is later.[4]

16. **Muslim male married to Christian woman.** Muslim Family Laws Ordinance, 1961, applies to all Muslim citizens in Pakistan wherever they may be. If a Muslim husband is married to a Christian woman in a form recognised by Muslim Law, or to a non-citizen Muslim woman, there is no reason why the provisions of section 7 of this Ordinance, should not apply, if he wants to divorce his wife by *talaq*. Even the latest judicial trend in England favours the principle that if the law of domicile permits a dissolution of marriage solemnized in England by the pronouncement of *talaq*, the divorce may be recognised as valid, under the rules of Private International law.[5]

17. **Re-marriage of the same parties after divorce.** The law previous to the enforcement of the Muslim Family Laws Ordinance made it obligatory for couples divorced by any mode of *talaq* other than *talaq-i-ahsan* not to marry each other again, unless the wife marries another man by a valid contract, and the latter dies or divorces her after actual consummation and she marries her first husband after the period of *iddat*.[6] Before remarriage the parties had to prove that the bar to their marriage was removed by an intermediate marriage, consummation, and dissolution. Otherwise their marriage was not considered valid.[7] It was held by the Privy Council that the children born of a re-marriage where a legal bar to the marriage has not been removed were illegitimate.[8] But as under the Ordinance the mode of *talaq* is almost the same as that of *talaq-i-ahsan* statutory provision has been made that couples whose *talaq* has become effective in the mode prescribed by section 7 may re-marry without any intervening marriage, except where they have been divorced thrice and the third divorce has become effective. In that case they cannot remarry without an intervening marriage.

Dissolution of marriage by 'khula'. *Halala* is not obligatory in case of *khula*. The marrying of another husband, before a woman can be lawful to her previous husband, is a condition which has been imposed only in the case of a divorce and not in that of *khula*. No such fetter has been placed on the reuniting of a woman who has obtained dissolution of her marriage in the *khula* form.[9]

18. **Recognition of 'talaq' in England.** A divorce by *talaq* given in Pakistan by a Pakistani Muslim to his Pakistani wife which is valid under Muslim Family Laws Ordinance is also valid under English Law and is recognized as such.[10]

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4. Hedaya 72 ; Baillie 206.
5. PLD 1967 S.C. 580.
6. Baillie 292, Hedaya 107.
7. (1967) 7 W.R. 268.
8. AIR 1932 P.C. 25.
9. PLD 1970 Lah. 1—PLR 1970 (2) W.P. 894—LN 1969 Lah. 387.
10. NLR 1980 Civ. (Foreign) 20 (House of Lords).

8. *Dissolution of marriage otherwise than by 'talaq'.* Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7 shall, *mutatis mutandis* and so far as applicable, apply.

Synopsis

1. Scope.
2. *Talaq-i-Tafviz.*
3. *Khula.*
4. *Mubaraat.*
5. Contingent divorce.
6. Option of puberty, dissolution by.

1. Scope. The sphere of attempted conciliation seems to be further extended by section 8 of the Ordinance to cases of "*Talaq-i-Tafviz*" and also to other forms of dissolution of marriage at the instance of either party, *mutatis mutandis*, and this throws further light on the object of the Ordinance.[11] It appears that the section applies to only those modes of dissolution in which the parties may dissolve the marriage by their own act without the intervention of the Court. In that case the parties may declare the dissolution of their marriage and as in the case of *talaq* the party dissolving the marriage must send a notice to the Chairman, who would try to effect reconciliation between the parties through the Arbitration Council. If the reconciliation fails, the dissolution will take place ninety days after the date of notice.

2. 'Talaq-i-Tafviz.' The previous view was that a husband may delegate to his wife the power to divorce herself because it is quite in the power of the parties to impose conditions upon which the marriage took place, provided the conditions or the contingencies on which the divorce can take place be reasonable and not opposed to the policy of Muslim Law. When such an agreement is made the wife may after the happening of any of the contingencies, repudiate herself to the same extent as if a *talaq* had been pronounced by the husband. The power so delegated to the wife is not revocable, she may exercise it even after the institution of a suit against her for restitution of conjugal rights.[12] Delegation of the right of divorce can be conditional or unconditional and that unconditional delegation of the right to divorce is legal.[13] There is nothing to indicate that delegated right of divorce for non-payment of prompt dower is unreasonable and opposed to public policy of Muslim Law. In such a case as the husband can exercise the right of divorce in the absence of the wife or in the absence of witnesses, the wife also in the absence of the husband or the witnesses can exercise the delegated right of divorce on the happening of specified contingencies. It is not necessary that she should exercise that right in the presence of the husband or in the presence of witnesses.[14]

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11. PLD 1963 S C. 51=1963 (1) P.S.C.R. 356=15 DLR S.C. 9.
12. PLD 1952 Dacca 385=PLR 1952 Dacca 728=4 DLR 613+AIR 1936 Lah. 716+161 I.C. 701+AIR 1964 All 270 (DB).
13. PLD 1963 Dacca 602.
14. PLD 1967 Dacca 421=17 DLR 623 (*Diss.* 53 CWN 302).

In the case of *talaq-l-tafviz* the notice must be given by the wife on the pronouncement of divorce by her.

3. **'Khula.'** A divorce by *Khula* is effected with the consent of the parties and at the instance of the wife when she gives or agrees to give consideration to the husband for her release and the husband accepts the offer.[15] A notice in this case is required to be given by the wife after the acceptance of her offer by the husband.[16] Where the parties have gone to Court to seek *khula*, the Court has jurisdiction to decree dissolution and that jurisdiction has not been ousted by the Ordinance.[17]

Notice to Chairman. Though a dissolution of marriage by way of *khula* or *mubaraat* is irrevocable yet it is necessary that a notice of the dissolution should be sent to the Chairman by virtue of the provisions contained in section 8 read with section 7 of the Ordinance. Because of use of the expressions "*mutatis mutandis* and so far as applicable" in section 8, the form of the notice would of course change and it might be different from the one in simple *talaq* which is to be sent by the husband under sub-section (1) of section 7 of the Ordinance.[18] However, the Chairman has no jurisdiction to take up proceedings for cancellation of *khula* and a certificate of cancellation issued by him was held to be without lawful authority.[19]

Suit for 'khula' filed before enforcement of Ordinance. The Muslim Family Laws Ordinance is not retrospective in operation Therefore where at the time when the suit was filed there was no statutory provision for invoking the aid of an arbitration council as provided in section 8 of the Muslim Family Laws Ordinance, 1961, the suit cannot be thrown out for want of such invocation.[20]

'Res judicata' in suit for 'khula'. Where the wife has failed in obtaining *khula* and the Court has dismissed her suit, she is not debarred from filing a fresh suit on fresh grounds that may have arisen subsequent to the dismissal of the first suit. These fresh grounds may in a case accentuate the grounds taken in the earlier suit.[21]

4. **'Mubaraat'.** When both husband and wife feel an aversion for each other, and they dissolve their marriage by agreement, it is called *mubaraat.*

Mubaraat like *khula* is a dissolution of marriage by agreement ; the difference between them is that when the aversion is on the side of the wife and she gives to the husband consideration for their separation, the transaction is called *Khula*; when the aversion is mutual and both

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15. PLD 1952 Lahore 113=PLR 1952 W.P. 82=4 DLR 134.
16. PLD 1969 B.J. 5.
17. PLD 1969 Lah. 512=21 DLR W.P. 253.
18. NLR 1982 Civil 92=PLD 1979 Lah. 241=PLJ 1979 Lah. 54.
19. PLD 1978 Lah. 328.
20. PLD 1969 Baghdad-ul-Judid 5.
21. PLD 1969 Kar. 476=PLJ 1976 Lah. 224=1979 LN 232.

parties desire separation the transaction is called *mubaraat*.[22] The offer of separation in *mubaraat* may proceed either from the wife or from the husband and as soon as it is accepted the dissolution is complete.[23] It is submitted that in this case the notice is to be given by the party from whom the offer of dissolution of marriage emanated, and if he does not do so, the other party may give notice to make the dissolution effective.

5. **Contingent divorce.** A man may stipulate that on the happening of a certain event his marriage with his wife shall *ipso facto* be dissolved.[24] In such a case the important thing is the intention of the person concerned and not the words he uses. If by taking an oath the party only wants to impress upon the other that a certain thing must be done and that if it is not done his wife would stand divorced to him, he does not in fact mean to sever permanently his connection with his wife in the event of his failure to do that thing, a *talaq* would not be effected by the happening of such event.[25]

Contingent divorce would be effective even when a man and woman are not married at the time when the divorce is pronounced, but are married at a later date. Thus if a man says to a woman that if she marries him, she is divorced, and they marry, the divorce would be effective and valid on their entering into the contract of marriage.[1] It is submitted that in so far as its effectiveness lay in its irrevocability this kind of divorce has been practically made obsolete by the section. Now that a notice of divorce would have to be given and the parties have a chance of reconciliation, the divorce is not resorted to, and if resorted to has no special value as compared to other forms of divorce.

6. **Option of puberty, dissolution by.** The expression "wishes to dissolve marriage otherwise than by *talaq*", includes dissolution sought no ground of *khairul baloogh*, and this section would apply to such dissolution of marriage.[2]

9. *Maintenance.* (1) If any husband fails to maintain his wife adequately or where there are more wives than one fails to maintain them equitably, the wife, or all or any of the wives may in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(2) A husband or wife may in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate,

22. PLD 1964 S.C. 456=16 DLR S.C 389.

23. PLD 1952 Lah. 111=PLR 1952 W.P. 12=4 DLR 134.

24. AIR 1931 Lah 134=32 I.C. 578+AIR 1936 All 387=168 I.C. 228.

25. PLD 1952 Pesh. 55.

1. Hedaya, page 94.

2. PLD 1970 Lah. 475+PLD 1969 Lahore 512=21 DLR W.P. 253.

[3][to the Collector], concerned and his decision shall be final and shall not be called in question in any Court.

(3) Any amount payable under sub-section (1) or (2) if not paid in due time shall be recoverable as arrears of land revenue.

PUNJAB AMENDMENT

In sub-section (2), the full-stop occurring at the end shall be replaced by a colon and thereafter the following proviso shall be added, namely :—

"Provided that the Commissioner of a Division may, on an application made in this behalf and for reasons to be recorded, transfer an application, for revision of the certificate from a Collector to any other Collector, or to a Director, Local Government, or to an Additional Commissioner in his Division."

Ord. 11 of 1975, S. 2

Synopsis

1. Scope.
2. Factum of marriage.
3. Divorce.
4. Right to maintenance.
5. Means of wife.
6. Quantum of maintenance.
7. Maintenance of children.
8. Recovery of maintenance.
9. Reconciliation after order of maintenance.
10. Notice to husband.
11. Forum of application.
12. Constitution of Arbitration Council.
13. Revision.

1. Scope. This section gives an additional remedy to a wife who is not being adequately maintained by her husband. Previous to the enforcement of the Ordinance, the wife could either make an application under section 488 of the Criminal Procedure Code, or bring a civil suit for recovery of maintenance. The underlying object in making this provision was to furnish a simpler, cheaper and more expedient remedy to neglected wives than the one which was already available to them under section 488 of the Code of Criminal Procedure. It certainly does not appear to have been the intention of the law giver to classify cases of maintenance into two different categories, *i.e.* those of total absence of maintenance and those of inadequate maintenance. Thus a case of inadequate maintenance also includes a case of total absence of maintenance and the new remedy now made available to a neglected wife under the Muslim Family Laws Ordinance is not alternate in nature, so as to be invoked by inadequately maintained wives only, but has been made available in addition to a similar remedy already in section 488, Cr. P. Code. The two remedies are available in all cases of want of maintenance whether adequate or inadequate, and there is no reason to hold that both relate to different kinds and categories of such cases.[4] Under the Ordinance a wife may move the Chairman in this behalf and the

3. Subs. by. P.O., 4 of 1975.

4. PLD 1966 Lahore 703 (DB).

Chairman has to constitute an Arbitration Council which may fix the amount of maintenance to be paid to her. This does not bar other remedies. A wife can have recourse to them if she likes.

Yet another new remedy has now been provided by the W. P. Family Courts Act, 1964 which has barred the remedy by way of civil suit in the Districts to which the Act has been applied.

The provision gives the wife, where there are more than one wives, a right to claim equitable maintenance. This obviously means that she can claim maintenance which may under the circumstances be reasonable when compared to the maintenance given to other wife or wives.

Non-Muslims, section does not apply to. No maintenance can be claimed under this section where the parties are non-Muslims.[5]

2. Factum of marriage. Before any certificate for maintenance can be granted under the section the *factum* of marriage must be ascertained by reference to the personal law of the parties.[6] If the factum of marriage is denied, it must be proved satisfactorily that there was a valid marriage,[7] and the onus of proving that lies on the wife.[8]

Where cessation of marriage is urged as a defence, the fact of such cessation is to be ascertained by reference to the personal law of the parties.[9]

3. Divorce. Where a plea of divorce is taken in defence it must be taken into consideration before passing an order under the section.[10] Where divorce is granted during the pendency of proceedings for maintenance, maintenance can only be granted upto the time of the completion of *iddat* and not beyond that.[11]

4. Right to maintenance. It is encumbent upon a husband to maintain his wife provided she is not too young for matrimonial intercourse,[12] subject to the following conditions:—

(*a*) *Conjugal relations.* She must be faithful to him and obey his reasonable orders; if she refuses herself to him, he is not bound to maintain her.[13]

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5. PLD 1976 Lah. 290 (DB).
6. AIR 1951 Cal. 293 (DB)+AIR 1939 Rang. 207+1937 Mad. W.N. 735+AIR 1925 Rang. 280 (FB)+AIR 1926 All 426.
7. AIR 1939 Lah. 24+AIR 1938 Mad. 66+16 Bom. 269.
8. AIR 1914 U.B. 30=15 Cri. L. Jour 484.
9. 1948 Bur. L.R. 101+14 Cal. 216+AIR 1953 Bom. 21+107 Bom. 180+AIR 1920 Bom. 101.
10. AIR 1955 A.P. 1=AIR 1928 Bom. 224+AIR 1921 Nag. 7.
11. PLD 1976 Lah. 1466+PLD 1977 Lah. 1173+PLD 1961 Kar. 12 (DB).
12. Baillie 441.
13. PLD 1952 Dacca 385=4 DLR 613+PLD 1957 Lah. 871=10 DLR W.P. 11+PLD 1952 Lah. 460=10 DLR 7 (*Diss* PLD 1950 Sind 36)+PLD 1953 Dacca 216=5 DLR 36+PLD 1958 Kar. 219 (DB)+Baillie 442.

(*b*) *Non-payment of dower*. The husband must maintain his wife when she refuses herself to him because her dower has not been paid. Her right to maintenance continues in this case even when she is not staying with him,[14] and even though she is living apart from him without any other reasonable cause.[15]

(*c*) *Refusal to live with husband*. A wife is not entitled to maintenance when she leaves her husband's house and resides at her parent's.[16] This is subject to clause (*b*) above.

Adequate maintenance necessary. Complete neglect or failure on the part of the husband to maintain the wife is not necessary to be established to attract the provision of this section. Even if it is proved that the wife is being maintained by the husband but the Arbitration Council comes to the conclusion that there is failure to maintain a single wife adequately or in case there is a plurality of wives one of the wives equitably, although the husband and wife are living together, the order of payment of maintenance can be passed.[17]

5. **Means of wife.** The means of the wife are not to be taken into consideration for determining whether she is entitled to maintenance. The fact that the husband has not maintained her is sufficient to create a right in her to ask for a certificate, because under Muslim Law the right of a wife to maintenance is recognized regardless of her own financial position,[18] her separate or independent means of support is not an element of consideration against her right of maintenance from the husband.[19] Similarly the fact that she has relations and friends to support her is irrelevant though these facts may be taken into consideration in fixing the quantum of maintenance to be paid to her.[20]

6. **Quantum of maintenance.** Section 9 authorises the issue of a certificate by the Arbitration Council, specifying the amount which shall be paid as maintenance by the husband on his failure to maintain his wife adequately or equitably with her co-wife if there is one, or co-wives, if there are more, on the determination of that matter when raised before the Council by the neglected wife or wives.[21] The duty of the husband to maintain his wife is only this that he is to give the wife food and clothing and a place for residence. Under ordinary circumstances, the food clothing and residence is to be provided at the house of the husband and there will be no failure to maintain unless the husband

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14. Baillie page 442+PLD 1957 Dacca 242+PLD 1960 Kar. 663+(1946) 228 I.C. 198.
15. PLD 1959 Lah. 470=11 DLR (W.P.) Lah. 124.
16. PLD 1963 Dacca 513=14 DLR 465+PLD 1961 Pesh. 66+AIR 1935 Lah. 902+PLD 1957 Lah. 871+PLD 1952 Lah. 460+10 DLR 7+PLD 1958 Kar. 219 (DB)+AIR 1947 All 3 (DB).
17. PLD 1974 Lah. 495=PLJ 1974 Lah. 471.
18. PLD 1958 Lahore 596=PLR 1959 (1) W.P. 1050.
19. AIR 1935 Lah. 24+1957 (1) Mad. L. Jour (Cri.) 622 (Income of wife can only be considered while fixing the quantum)+1887 All W.N. 107.
20. AIR 1919 Mad. 597+AIR 1947 Mad. 304=48 Cri. L. Jour 284.
21. PLD 1968 Lahore 93 (DB).

is not prepared or refuses to give her food and clothing at his own house. It is only in exceptional circumstances that there would be a duty cast on the husband to pay maintenance in cash. This will happen, for instance, where under his direction the wife is living separately.[22] Where cash maintenance is to be paid, the Arbitration Council has to take into consideration several factors, like the status of the family, the earnings and the commitments of the husband and what is required by the wife to maintain herself,[23] the husband's conduct in relation to his wife and the children born to them, his financial capacity to pay and other circumstances.[24]

In this matter the Council has to steer clear of two extremes, *viz.* it must not give maintenance which would keep her in luxury and would make judicial separation profitable and also impede any future reconciliation. It must also steer clear of the other extreme, *viz.* penuriousness.[25] In other words no luxury should be allowed ; but the necessaries should be provided for according to the status in life of the applicant and the means of the respondent.[1]

Means of husband. The rate of allowance cannot be fixed on the hypothetical and abstract thing known as the capacity to earn money. The capacity to earn money may only be taken into consideration in coming to a conclusion with regard to the means of the husband.[2] Visible assets are not necessary before the husband is made to pay maintenance to his wife. His capacity is sufficient. There must be a reasonable assessment of that capacity. There is no specific criteria to measure it. It is no use ignoring the realities of life. Therefore while capacity to earn is good ground for providing maintenance at a minimum rate, actual earning is necessary to provide for a comparatively decent rate.[3]

Second marriage. Where the husband married a second wife leaving his first wife with one son and one daughter born to them, it was a fit case for penalising such an irresponsible husband and the only correct course in such circumstances was to compel the husband to pay a heavy premium for the luxury of a second wife, and that punishment should be exemplary in order to have a deterrent effect on society.[4]

Past maintenance. The husband's obligation to maintain his wife commences simultaneously with the performance of marriage and being an obligation and not *ex gratia* grant by way of gratuity, it is enforceable even with respect to the past period of marital life, although it was not

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22. PLD 1959 Lah. 470=11 DLR (W.P.) Lah. 124.
23. AIR 1957 Mad. 693.
24. 25 Cut L. Tim 407.
25. AIR 1957 Mad. 693.
1. AIR 1941 Sind 214 (FB)+AIR 1954 All. 33+AIR 1954 Mys. 31+AIR 1944 Lah. 392+AIR 1947 Mad. 304+13 Cri. L Jour 55 (Upp Bur)+AIR 1930 Bom. 348.
2. AIR 1952 Him. Pra. 55+AIR 1958 Mys. 128 (Court should see that rate is not such as would compel wife to permanently live separately).
3. AIR 1958 Mys. 121=1LR 1958 Mys, 113=1958 Cri. L. Jour 1201.
4. 25 Cut. L Tim. 407.

promptly claimed during that period by the wife, subject to considerations of limitation and the circumstances of the case itself. There is nothing in section 9 of the Ordinance to confine its application only to the grant of future maintenance not covering the past.[5] The Council has jurisdiction to grant past maintenance to the wife from the date of the promulgation of the Ordinance notwithstanding the fact that the rules under the Ordinance were promulgated subsequently.[6]

7. **Maintenance of children.** Muslim Family Laws Ordinance contains no provisions for the maintenance of children unlike the one contained in section 488, Cr. P. C. section 9 only deals with the maintenance of neglected wives. Therefore a wife who makes an application under section 9 of the Ordinance cannot ask for the maintenance of her children.[7] The Council may however, while determining *quantum* of maintenance for a wife, keep in view the fact that she has also to maintain her children by that husband and their maintenance is as much her responsibility as his.[8] Thus where maintenance of child and mother was granted by the Union Council and a revision was filed against grant of maintenance to the child, whereupon the Revisional Authority increased maintenance of the mother while setting aside maintenance of the child, the order was held to be unexceptionable.[9]

8. **Recovery of maintenance.** A special favour done by the Ordinance to the wife in the matter of recovery of maintenance, is that where the husband does not pay in time the maintenance granted under the Ordinance becomes recoverable as arrears of land revenue.

9. **Reconciliation after order of maintenance.** Once an order of maintenence has been passed under this section, the mere reunion of the parties, does not make any difference. The provision about recovery is couched in mandatory form. If it is once proved that the amount payable has not been paid it shall be recovered as arrears of land revenue. This leaves no doubt that the order of payment of maintenance is neither terminated nor suspended by any act of parties so long as they remain husband and wife.[10]

10. **Notice to husband.** Proceedings on an application under section 9 for grant of maintenance are not competent, unless notice in writing has been served upon the husband in connection with proceedings of maintenance case filed against him.[11]

11. **Forum of application.** The jurisdiction to entertain an application for maintenance vests in the Chairman of the Union Council of the place where the wife is residing at the time of making the applica-

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5. PLD 1978 Quetta 17=PLJ 1978 Quetta 49 (DB)+PLD 1968 Lah. 93 (DB).
6. PLD 1972 S.C. 302+PLD 1966 Lah 703 (DB).
7. PLD 1966 Lah. 703 (DB).
8. 1968 SCMR 1432 (2).
9. PLD 1973 Lah. 690=PLJ 1975 Lah. 197.
10. PLD 1974 Lah. 495=PLJ 1974 Lah. 471.
11. NLR 1980 Civ. 205.

tion. Where there is more than one wife the jurisdiction vests in the Council at a place where the wife, who made the application first, was residing.[12]

12. Constitution of Arbitration Council. The Arbitration Council for the purposes of this provision is constituted by the Chairman with himself as its Chairman and one representative each of both of the parties. Where a party to the dispute is residing outside Pakistan, the order of the Chairman calling upon him to nominate his representative on the Arbitration Council shall be served on such party through the Consular Officer of Pakistan in or for the country where such party is residing.[13]

Arbitrator of party not joining Arbitration Council. An order of maintenance can only be made by a properly constituted Arbitration Council. Where the Arbitrator appointed by one party does not sit on the Council the order passed by the Council is nullity and may be set aside.[14] Where the husband was a soldier in the army and he was not given leave by his Commanding Officer to attend the proceedings of the Arbitration Council, and his nominee withdrew from the proceedings, the Court set aside the *ex parte* order passed against him.[15]

13. Revision. Parties are competent to file a revision against the orders of the Arbitration Council within 30 days of the decision. The revision petition shall be stamped with a non-judicial stamp of Rs. 2.[16] Section 5, Limitation Act does not apply to proceedings under the Ordinance, therefore, delay in filing a revision petition cannot be condoned under this section.[17]

Revisional Authority. The Collector is the revisional authority under the Ordinance.

"*Collector.*" The terms "Collector" has not been defined in the Ordinance or the Rules made thereunder. So reliance has to be placed on clause (1) of section 2 of the General Clauses Act, 1897 (Act X of 1897) (as adapted) for this definition. "Collector" means the Chief Officer incharge of the revenue administration of a district and shall include a Deputy Commissioner of such district. For the purposes of section 9 (2) it is the chief officer of the revenue administration of the district or the Deputy Commissioner of the district who is competent to entertain the revision. An Additional Deputy Commissioner, not being the chief officer incharge of the revenue administration in the district is not competent to dispose of the revision under the Ordinance, even when he has been given the powers of Collector under Land Revenue Act or Tenancy Act.[18]

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12. Muslim Family Laws Rules, R. 3 (*c*).
13. Rule 6 (2) as amended in 1965.
14. Law Notes 1973 Lah. 539.
15. PLD 1978 Lah. 232.
16. Muslim Family Laws Rules, R. 16 (1) and Rule 20.
17. PLJ 1982 Lah. 65.
18. PLD 1965 Lah. 439 (DB).

10. *Dower.* Where no details about the mode of payment of the dower are specified in the *nikahnama* or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

Synopsis

1. Prompt and deferred dower.
2. Mode of payment not specified.

1. Prompt and deferred dower. Under Muslim Law specified dower is usually split into two parts which are payable at different times. The part called prompt dower is payable on demand at any time after the contract of marriage. The other part called deferred dower is payable after a specified period of time and when no such period is fixed on the death of the husband or dissolution of the marriage.[19]

2. Mode of payment not specified. Prior to the promulgation of the Ordinance, the law regarding the payment of dower was as follows :—

Where it was not settled whether the dower is to be prompt or deferred, Shia law presumed that the whole was prompt.[20] But under Sunni law only a fair proportion of the dower was considered as prompt. In case of dispute the Court had jurisdiction to determine what portion may be treated as deferred. This was usually determined, with reference to the woman, amount of dower, and custom.[21] The Ordinance has adopted the Shia law view and has declared that where the dower has not been specified as prompt or deferred it should be presumed to be prompt, *i. e.* payable on demand.

11. *Power to make Rules.* [22][Federal Government] in respect of Cantonment areas and the Provincial Government [23][in respect of other areas] may make rules to carry into effect the purposes of this Ordinance.

(2) In making rules under this section, [24][such] Government, may provide that a breach of any of the rules shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

(3) Rules made under this section shall be published in

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19. Baillie, 92, 129.
20. (1837) 19 W.R. 315 P.C., (1899) 23 Mad. 371.
21. 5 P. R. 1891.
22. Subs. by P.O., 4 of 1975.
23. Ins. by P.O. 1, of 1964.
24. *Ibid.*

the official Gazette and shall thereupon have effect as if enacted in this Ordinance.

1. Scope. The rules formulated under the Ordinance are given on Page 48. They have been given the same force as the Ordinance itself and are therefore to be treated at par with and as supplement to the Ordinance.

12. *Amendment of Child Marriage Restraint Act, 1929 (XIX of 1929).* Omitted by Ord. 27 of 1981.

13. *Amendment of the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939).* Omitted by Ord. 27 of 1981.

WEST PAKISTAN RULES UNDER THE MUSLIM FAMILY LAWS ORDINANCE, 1961

[Gazette of West Pakistan, Extraordinary, 20th July, 1961].

No. Integ : 4-5/61.—In exercise of the powers conferred by section 11 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Governor of West Pakistan is pleased to make the following rules, namely :—

Preliminary

1. These rules may be called the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

2. In these rules, unless there is anything repugnant in the subject or context ,—

(*a*) "Form" means a form appended to these rules ;

(*b*) "Ordinance" means the Muslim Family Laws Ordinance, 1961 (VIII of 1961) ;

(*c*) "Register" means a register of *nikahnamas* prescribed under Rule 8 ; and

(*d*) "Section" means a section of the Ordinance.

Arbitration Council

[25][3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (*d*) of section 2 shall be as follows, namely ;

(*a*) In the case of an application for permission to contract another marriage under sub-section (2) of section 6, it shall be Union Council of the Union or Town where the existing wife of the applicant, or where he has more wives than one, the wife with

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25. Gazette Notification No. Integ. 10-34/64, dated 18-2-1965.

whom the applicant was married last, is residing at the time of his making the application :

Provided that if at the time of making the application, such wife is not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be —

(*i*) in case such wife was at any time residing with the applicant in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with the applicant ; and

(*ii*) in any other case, the Union Council of the Union or Town where the applicant is permanently residing in West Pakistan ;

(*b*) in the case of notice of *talaq* under sub-section (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom *talaq* has been pronounced was residing at the time of the pronouncement of *talaq* :

Provided that if at the time of pronouncement of *talaq* such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be —

(*i*) in case such wife was at any time residing with the person pronouncing the *talaq* in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person ; and

(*ii*) in any other case, the Union Council of the Union or Town where the person pronouncing the *talaq* is permanently residing in West Pakistan ; and

(*c*) in the case of an application for maintenance under section 9, it shall be the Union Council of the Union or Town where the wife is residing at the time of her making the application, and where application under that section is made by more than one wife, it shall be the Union Council of the Town or Union in which the wife who makes the application first is residing at the time of her making the application.]

COMMENTS

Synopsis

1. Last resided together.
2. Suit for dissolution of marriage.
3. Suit for recovery of dower.

1. Last resided together. Where a person has a permanent or *quasi*-permanent abode, howsoever short his stay therein may be, that would constitute residence for the purposes of sub-clause (*i*) of Rule 3, but where a person is obliged to leave his place of residence and goes to some other place on an occasional visit, the place of such visit, cannot be considered as his residence. Of course, the position is somewhat different, where a person has no fixed residence. It is to be noticed that in sub-clause (*ii*) the word 'residing' is preceded by the adjective

'permanently' but there are no such qualifying words figrures in sub-clause (*i*). This omission leads to the inference that such permanency as is attributed to residence in sub-clause (*ii*) is not intended to be given to the factum of last residence. While interpreting the provisions of the Muslim Family Laws Ordinance and the rules framed under it. Another matter of much significance, to be borne in mind, is, that it has extra-territorial applicability as it applies to all the Muslim citizens of Pakistan, wherever they may be. The words 'last resided' has a nexus with the territorial jurisdiction of the Union Council and, therefore, mean residence in Pakistan and not in a foreign country.[1]

2. **Suit for dissolution of marriage.** Having regard to section 7 (3) of the Muslim Family Laws Ordinance, 1961, and rule 3 (*b*) of the Muslim Family Laws Rules it is obvious that *talaq* is finalised only if the matter is taken cognizance of by the Union Council which exercised jurisdiction in the area where the wife resided. It is obvious therefore that the civil Court which will have jurisdiction relating to the *talaq* should ordinarily be at the place where the wife resided.[2]

3. **Suit for recovery of dower.** It is undisputed that in Muslim Law the dower is a debt which is owed by the husband to the wife. Accordingly the ordinary principle of payment of debt should also govern the case relating to the realisation of dower debt. The debtor in order to repay the debt must follow the creditor unless there is a contrary contract between them. The place of performance must be taken to be the place where the creditor resided. If the creditor resides within the realm then the debtor must find him out and pay him at that place. Therefore the suit lies at the place where the wife resides.[3]"

[4][3-A. Where the whereabouts of the wife who is to be supplied a copy of the notice of *talaq* under sub-section (1) of section 7 of the Ordinance, are not known to the husband and cannot, with due diligence, be ascertained by him, he may, if so permitted by the Chairman, give notice of the *talaq* to the wife through her father, mother, adult brother or adult sister, or if their whereabouts are not known to the husband or cannot, with due diligence, be ascertained by him, he may, with the permission of the Chairman, serve the notice of *talaq* on her by publication in a newspaper, approved by the Chairman having circulation in the locality where he last resided with the wife].

COMMENTS

1. **Notice, where may be served.** The husband must serve a notice of *talaq* to the Chairman of the Union Council where wife is residing. Rule 3-A by expression applies to only such cases where the whereabouts

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1. KLR 1982 CC 56=PLJ 1981 Raw 638 (DB),
2. 1970 DLC 560=22 DLR 617 (DB).
3. 1970 DLC 560=22 DLR 677 (DB).
4. Gazette Notification No. Intex. 10-34/64, dated 2-10-1965.

of the wife are not known to the husband and cannot be ascertained with due diligence.[5] Where there is no evidence that the husband showed due diligence in the matter and he sent the notice to the Chairman of the Union Council at '*L*' while the wife was residing at '*S*'. The Chairman of Union Council at '*L*' acted correctly in refusing to exercise jurisdiction in the matter. The Court refused to accept the proposition that as the Union Councils had ceased to exist the husband could send a notice of *talaq* to a Chairman of his own choice without reference to the district where the wife was residing.[6]

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4. Where a non-Muslim has been elected as Chairman of a Union Council, the Council shall, as soon as may be, elect one of its Muslim members as Chairman for the purposes of the Ordinance, in the manner prescribed for the election of a Chairman of a Union Council.

5. (1) All proceedings before an Arbitration Council shall be held *in camera* unless the Chairman otherwise directs with the consent of all the parties.

(2) The Chairman shall conduct the proceedings of an Arbitration Council as expeditiously as possible.

(3) Subject to the provisions of sub-rule (4), such proceedings shall not be vitiated by reason of a vacancy in the Arbitration Council, whether on account of failure of any person to nominate a representative or otherwise.

(4) Where a vacancy arises otherwise than through failure to make a nomination, the Chairman shall require a fresh nomination.

(5) No party to proceedings before an Arbitration Council shall be a member of the Arbitration Council.

(6) All decisions of the Arbitration Council shall be taken by majority, and where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration Council.

(7) A copy of the decision of the Arbitration Council, duly attested by the Chairman, shall be furnished free of cost to each of the parties to the proceeding.

6. (1) Within seven days of receiving an application under sub-section (2) of section 6 or under sub-section (1) of section 9, or a notice under sub-section (1) of section 7, the Chairman shall, by order in writing, call upon each of the parties to nominate his or her representative, and each such party shall, within seven days of receiving the order, nominate in writing a representative and deliver the nomination to the Chairman or send it to him by registered post.

(2) Where a representative nominated by a party is, by reason of illness or otherwise, unable to attend the meetings of the Arbitration Council, or wifully absents himself from such meeting, or has lost the

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5. NLR 1980 AC 421 (DB).

6. NLR 1980 AC 421 (DB) (Lab.).

confidence of the party, the party may, with the previous permission in writing of the Chairman, revoke the nomination and make, within such time as the Chairman may allow, a fresh nomination.

[7]["Provided that where a party on whom the order is to be served is residing outside Pakistan, the order may be served on such party through the Consular Officer of Pakistan in or for the country where such party is residing."]

(3) Where a fresh nomination is made under sub-rule (2), it shall not be necessary to commence the proceedings before the Arbitration Council *de novo*, unless the Chairman, for reasons to be recorded in writing, directs otherwise.

COMMENTS

1. **Notice to husband.** Proceedings on an application under section 9 for grant of maintenance is not competent, unless notice in writing has been served upon the husband in connection with proceedings of maintenance case filed against him.[8]

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[9][6-A. (1) Wherever, it is made to appear to the Collector, whether on the application of a party to the proceeding or on his own information, that the Chairman is interested in favour of a party to any proceedings before the Arbitration Council or is prejudiced against any such party, or that the Chairman is misconducting himself in any such proceedings, the Collector may, after giving notice to all the parties to the proceedings, appoint any other member of the Union Council as the Chairman for purposes of this Ordinance, and pending the passing of such order may stay the proceedings before the Arbitration Council.

(2) A Collector passing an order under this rule shall record in writing his reasons for the same.]

Registration of Marriages

7. (1) Any person competent to solemnise a marriage under Muslim Law may apply to the Union Council for the grant of a licence to act as Nikah Registrar under section 5.

(2) If the Union Council, after making such inquiries as it may consider necessary, is satisfied that the applicant is a fit and proper person for the grant of a licence, it may, subject to the conditions specified therein, grant a licence to him in Form I.

(3) A licence granted under this rule shall be permanent and shall be revocable only for the contravention of any of the conditions of a licence granted under this rule.

(4) If any person to whom a licence has been granted under this rule contravenes any of the conditions of such licence, he shall be

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7. Gazette Notification No. Integ. 10-34/64, dated 18-1-1965.

8. NLR 1980 Civ. 205.

9. Ins. by W.P. Gazette Notification No. Integ. 4-5/61, dated 2-9-1961.

punishable with simple imprisonment for a term, which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

COMMENTS

1. **Interpolation in Nikah Register by Registrar.** Where a Nikah Registrar has made interpolations in the entries of the Nikah Register so as to make the amount of dower fixed at Rs. 2,000 read as Rs. 20,000 his licence may be revoked and he may be punished under sub-rule (4) of Rule 7 but the false entry can only be corrected by a Civil Court.[10]

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8. (1) The Union Council shall, on payment of such cost as may be determined by the Provincial Government, supply to every Nikah Registrar a bound register of *nikahnamas* in Form II, and seal bearing the inscription. "The seal of Nikah Registrar of Ward[11] (x).....(y)... "

(2) Each Register shall contain fifty leaves, consecutively numbered, each leaf having a *nikahanma*, in quadruplicate, and the number of leaves shall be certified by the Chairman.

(3) Notwithstanding the payment of cost under sub-rule (1), the register and the seal remain the property of the Union Council.

9. (1) For the registration of a marriage registered under section 5, the Nikah Registrar shall be paid by the bridegroom or his representative a registration fee of two rupees, or when the dower exceeds two thousand rupees, a fee calculated at the rate of one rupee for every thousand or part of the thousand rupees of such dower, subject to a maximum fee of twenty rupees.

(2) Of the fees received under sub-rule (1), the Nikah Registrar shall retain for himself eighty per cent and shall pay the remaining twenty per cent to the Union Council.

(3) Where dower consists of property other than money, or partly of such property and partly of money, the valuation of the property shall, for purposes of fees under sub-rule (1), be the valuation as settled between the parties to the marriage.

10. (1) The Nikah Registrar shall, in the case of marriage solemnized by him, fill in Form II, in quadruplicate, in the register, the persons, whose signatures are required in the Form shall then sign, and the Nikah Registrar shall then affix his signature and seal thereto, and keep the original intact in the register.

(2) The duplicate and triplicate of the *nikahnama* filled in as aforesaid shall be supplied to the bride and the bridegroom, respectively, on payment of fifty paisa each, and the quadruplicate shall be forwarded to the Union Council.

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10. PLD 1967 Kar. 165 (DB).

11. For (x) insert the name or number of the Ward, and for (y) insert name of the Union Council.

(3) If any person required by this rule to sign the register refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees or with both.

11. (1) Where a marriage is solemnised in Pakistan by a person other than the Nikah Registrar, such person shall fill in Form II, to be had loose on payment of such price as may be determined by the Provincial Government, the persons whose signatures are required in the Form shall then sign, and the person solemnizing the marriage shall then affix his signatures to the Form and ensure delivery, as expeditiously as possible, of the same together with the registration fee to the Nikah Registrar of the Ward where the marriage is solemnized.

(2) If any person required by this rule to sign the Form refuses so to sign he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

12. (1) In the case of a marriage solemnized outside Pakistan by a person who is a citizen of Pakistan, such person shall ensure delivery of Form II, filled in, in accordance with the provisions of Rule II, together with the registration fee, to the consular officer of Pakistan in or for the country in which the marriage is solemnized, for onward transmission to the Nikah Registrar of the Ward of which the bride is a permanent resident, and in case the bride is not a citizen of Pakistan, the Nikah Registrar of the Ward of which the bridegroom is such resident.

(2) In the case of a marriage solemnized outside Pakistan by a person who is not citizen of Pakistan, the bridegroom, and where only the bride is such citizen, the bride, shall for purposes of filling in, as far as may be, Form II, be deemed to be the person who has solemnized the marriage under sub-rule (1).

13. On receipt of Form II under Rule 11 or Rule 12, the Nikah Registrar shall proceed in the manner provided in Rule 10 as if the marriage had been solemnized by him :

Provided that, except where the marriage has been solemnized within his jurisdiction, it shall not be necessary for the Nikah Registrar to obtain the signatures of the necessary persons.

Polygamy

14. 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 amongst others :—

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

15. An application under sub-section (1) of section 6 for permission

to contract another marriage during the subsistence of an existing marriage shall be in writing, shall state whether the consent of the existing wife or wives has been obtained thereto, shall contain a brief statement of the grounds on which the new marriage is alleged to be just and necessary, shall bear the signature of the applicant, and shall be accompanied by a fee of one hundred rupees.

Revision

16. (1) An application for the revision of a decision of an Arbitration Council, under sub-section (4) of section 6, or of a certificate under sub-section (2) of section 9, shall be preferred within thirty days of the decision or of the issue of the certificate, as the case may be, and shall be accompanied by a fee of two rupees.

(2) The application shall be in writing, set out the grounds on which the applicant seeks to have the decision or the certificate revised, and shall bear the signature of the applicant.

COMMENTS

1. **Condonation of delay.** The Muslim Family Laws Ordinance does not embody any provision making section 5 of the Limitation Act applicable to it. The mere fact that the Ordinance does not expressly exclude application of section 5 of the Limitation Act to proceedings under the Ordinance would, by itself, not extend the application of section 5 of the Limitation Act to such proceedings. Non-existence of any provision in the said Ordinance excluding application of section 5 of the Limitation Act would have been of some consequence if section 5 had also been mentioned in clause (*a*) of sub-section (2) of section 29 of the Limitation Act but since that has not been done, the non-existence of the aforementioned provision is of no avail to the petitioner seeking condonation of delay in filing an application for revision. A time-barred revision application cannot be admitted by applying to it the provisions of section 5 of the Limitation Act.[12]

Records and their inspection, etc.

17. As soon as may be after the Arbitration Council has given its decision under Rule 6, the record of the proceedings before it in which such decision has been given shall be forwarded by the Chairman to the office of the Union Council, where it shall be preserved for a period of five years from the date of the decision.

18. (1) The quadruplicate of the *nikahnama* forwarded by the Nikah Registrar under sub-rule (2) of Rule 10 shall be preserved in the office of the Union Council until such time as the Register containing the originals is, on being completed, deposited by the Nikah Registrar in such office.

(2) The completed register so received shall be preserved permanently.

(3) In the office of the Union Council there shall be prepared and maintained an index of the contents of every register, and every entry

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12. 1982 Law Notes 86+PLD 1982 Lah. 239=PLJ 1982 Lah. 65.

in such index shall be made, so far as practicable, immediately after the Nikah Registrar has made an entry in the register.

(4) The aforesaid index shall contain the name, place of residence and father's name of each party to every marriage registered within the Union or Town, as the case may be, and the dates of the marriage and registration.

19. (1) Subject to the previous payment of the fees prescribed in sub-rules (2) and (3), the index and the register shall, at all reasonable times, be open to inspection at the office of the Union Council by any person applying to inspect the same and copies of entries in the index and the register, duly signed and sealed by the Chairman, shall be given to all persons applying for such copies.

(2) The fee for the inspection of an index or register shall be fifty paisa.

(3) The fee for a certified copy of all or any of the entries relating to a marriage shall be :—

(*a*) for those in an index ... Fifty paisa.

(*b*) for those in a register ... Two rupees.

(4) Fees payable under this rule shall be credited to the Union Council.

Payment of fees

20. Except fees payable to the Nikah Registrar,[13] or the Union Council under the provisions of Rules 9, [14][10, 15 and 19] which shall be paid in cash, all fees payable under these rules shall be paid in non-judicial stamps.

Complaints

21. No Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the Union Council stating the fact constituting the offence.

PUNJAB AMENDMENT. For Rule 21, substitute the following :—

[15][21. No Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the aggrieved party, stating the facts constituting the offence.]

COMMENTS

1. Complaint by wife. A complaint by a wife for an offence under section 6 (5) of the Muslim Family Laws Ordinance is competent under Rule 21 as substituted in the Punjab.[16]

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13. Inserted by Gazette Notification No. Integ. 4-5/61, dated 2-9-1961.

14. Inserted by Gazette Notification No. Integ. 4-5/61, dated, 15-2-1962.

15. Pb. Notification No. S O.X-1-15/75, Vol. II, dated 26-11-1976.

16. NLR 1980 Cr. 381=1980 P. Cr. L. J. 122.

FORM I

(*See* Rule 7)

Licence granted in pursuance of section 5 (2) of the Muslim Family Laws Ordinance, 1961

(VIII of 1961)

In pursuance of sub-section (2) of section 5 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the [17]Union Council/Union Committee/Town Committee of————————in the district of———— hereby grants this————day of————19————to Mr.———— ————————————————son of———————————————— ————————————————resident of———————————————— ————————————————this licence to be from the said date the Nikah Registrar for the following [17]Ward/Wards.

(1) Ward————————

(2) Ward————————

(3) Ward————————

(4) Ward————————

Seal. *Signature of the Chairman.*

CONDITIONS

1. This licence is not transferable.

2. This licence is revocable for breach of any of the provisions of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), or the rules made thereunder or any condition of this licence.

3. The registers and seal supplied to the Nikah Registrar shall be returnable to the Union Council, without refund of cost, when this licence expires or is revoked.

4. The Nikah Registrar shall not put the seal supplied to him to any improper use.

5. Such other conditions, if any, as may be specified by the Provincial Government.

FORM II

(*See* Rules 8, 10, 11 and 12)

Form of Nikahnama

(1) Name of Ward————————Town/Union———————— Tehsil/Thana———————and District———————— in which the marriage took place.

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17. Strike out what is inapplicable.

(2) Name of the bridegroom and his father, with their respective residences———————————————————————

———————————————————————————————————

(3) Age of bridegroom———————

(4) The names of the bride and her father, with their respective residences———————————————————————

———————————————————————————————————

(5) Whether the bride is a maiden, a widow or a divorcee———————

———————————————————————————————————

(6) Age of the bride———————

(7) Name of Vakil, if any appointed by the bride, father's name and his residence :

———————————————————————————————————

(8) The names of the witnesses to the appointment of the bride's Vakil or with their fathers' names, their residence and their relationship with the bride :

(1) ———————————————————————————————

(2) ———————————————————————————————

(9) Name of the Vakil, if any appointed by the bridegroom, his father's name and his residence :

———————————————————————————————————

(10) The names of the witness to the appointment of the bridegroom's Vakil, with their fathers' names and their residences :

(1) ———————————————————————————————

(2) ———————————————————————————————

(11) Name of the witnesses to the marriage, their fathers' names and their residences :

(1) ———————————————————————————————

(2) ———————————————————————————————

(12) Date on which the marriage was contracted———————

(13) Amount of dower———————————————————

(14) How much of the dower is *mu'wajjal* (prompt) and how much *ghair ma'wajjal* (deferred).

(15) Whether any portion of the dower was paid at the time of marriage. If so, how much :

———————————————————————————————————

(16) Whether any property was given in lieu of the whole or any portion of the dower with specification of the same and its valuation agreed to between the parties :

———————————————————————————————————

(17) Special conditions, if any :

———————————————————————————————————

(18) Whether the husband has delegated the power of divorce to the wife, if so, under what conditions :

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(19) Whether the husband's right of divorce is in any way curtailed :

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(20) Whether any document was drawn up at the time of marriage relating to dower, maintenance, etc. If so, contents thereof in brief :

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(21) Whether the bridegroom has any existing wife, and, if so, whether he has secured the permission of the Arbitration Council under the Muslim Family Laws Ordinance, 1961, to contract another marriage :

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(22) Number and date of the communication conveying to the bridegroom the permission of the Arbitration Council to contract another marriage ———

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(23) Name and address of the person by whom the marriage was solemnized and his father———

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(24) Date of registration of marriage.

(25) Registration fee paid :

Signature of the bridegroom or his Vakil :

Signature of the witness to be appointed of bridegroom's Vakil :

Signature of the bride

Signature of the Vakil of the bride :

Signature of the witness to be appointed of the bride's Vakil :

Signature of the witnesses to the marriage

Signature of the person who solemnized the marriage :

(1) ———

(2) ———

Signature and seal of the Nikah Registrar.

Seal.

CHILD MARRIAGE RESTRAINT ACT
(XIX of 1929)

An Act to restrain the solemnization of child marriages.

Whereas it is expedient to restrain the solemnization of child marriages : It is hereby enacted as follows :—

Synopsis

1. Validity of marriage not affected by the Act.
2. Performance of child marriage.
3. Compensation for false complaint.

1. Validity of marriage not affected by the Act. A distinction must be observed between the performance of the act and the act itself. The Child Marriage Restraint Act aims at the restraint of solemnization of child marriages. It does not affect the validity of the marriages after they have been performed.[18] The validity of the marriage is a subject beyond the scope of the Act.[19] The act merely imposes certain penalties on the persons bringing about such marriages.[20]

2. Performance of child marriage. The act aims at and imposes restraint on the performance of child marriages. It has nothing to do with the validity or invalidity of a marriage.[21] Therefore the performance of a marriage which is valid according to the Personal Law of the parties would also be punishable under the Act if it falls within the mischief of the Act.

3. Compensation for false complaint. In a prosecution under the Act it is the duty of the prosecution to establish that the girl in question was below 16 years at the time of her marriage, but for awarding compensation under section 250, Cr. P. C. the position is reverse. In that case there ought to be evidence before the Magistrate for a positive finding that the complainant's allegation that the girl was below 16 at the time of her marriage was false. The mere fact that the evidence produced by the complainant in support of his allegation was unreliable or inconclusive will not justify the opposite finding that the allegation was false. In the absence of definite evidence showing the age of the girl, it is impossible to say that the complainant's allegation that the girl was below 14 at the time of her marriage is false. All that can be

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18. PLD 1975 Lah. 234=1975 LN 135+PLD 1962 Kar. 442 (DB)+AIR 1939 All 340.
19. AIR 1936 Mad. 397+AIR 1936 All 11.
20. AIR 1936 All 852=116 Ind. Cas 847.
21. AIR 1936 All 11=158 Ind. Cas. 1007.

said is that he failed to prove his allegation. It does not necessarily follow that his allegation was false.[22]

1. *Short title, extent and commencement.* (1) This Act may be called the Child Marriage Restraint Act (1929).

(2) It extends to all the Provinces and the Capital of the Federation, including Baluchistan and applies also to :

(*a*) All British subjects and servants of the Crown in any part of Pakistan wherever they may be.

(3) It shall come into force on the 1st day of April, 1930.

Synopsis

1. Extra-territorial operation.
2. Persumption of nationality.

1. Extra-territorial operation. The Child Marriage Restraint Act as well as the Penal Code are extra-territorial to the extent that if Pakistan subjects commit offences punishable under these laws outside Pakistan they are liable to be tried and punished when found in Pakistan.[23]

2. Presumption of nationality. In case of a complaint under sections 3, 5 and 6 it was held that the presumption was that the accused were Pakistan subjects and that as the place of their birth was within their special knowledge, it was for them to rebut the presumption.[24]

2. *Definition* In this Act, unless there is anything repugnant in the subject or context,

(*a*) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age ;

(*b*) "child marriage" means a marriage to which either of the contracting parties is a child ;

(*c*) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnized ;

(*d*) "minor" means a person of either sex who is under eighteen years of age ;

22. AIR 1936 All 363=161 Ind. Cas. 49.

23. AIR 1937 Mad. 273=168 Ind. Cas. 736.

24. AIR 1940 Nag. 245=41 Cri L. Jour 645.

[25][(e) "union council" means the Union Council or Town Committee constituted under the Law relating to Local Government for the time being in force].

PUNJAB AMENDMENT

(i) at the end of clause (c), the word "and" shall be added ;

(ii) the comma appearing at the end of clause (d) shall be replaced by a full stop ; and

(iii) clauses (e) shall be omitted.

Punjab Ord. 23 of 1971

Synopsis

1. Proof of age. 2. Compensation for false complaint.

1. Proof of age. Certificate of birth of a person is conclusive evidence of his age so long as it is not disproved by evidence produced by the party denying its correctness.[1]

2. Compensation for false complaint. In a complaint under the Act, it is the duty of the prosecution to establish that the girl in question was below 16 at the time of her marriage but for awarding compensation under section 250, Cr. P. C. the position is the reverse. There ought to be evidence before the Magistrate for a positive finding that the complainant's allegation that the girl was below 16 at the time of her marriage was false. The mere fact that the evidence produced by the complainant in support of his allegation was unreliable or inconclusive will not justify the opposite finding that the allegation was false. All that can be said is that he failed to prove his allegation.[2]

3. Omitted by Ordinance VIII of 1961.

4. *Punishment for male adult above eighteen years of age marrying a child.* Whoever, being a male above eighteen years of age, contracts child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Synopsis

1. Procedure.
2. Mistake as to age.
3. Expenses of marriage.
4. Female party to marriage is not guilty.
5. Deterrent sentence.
6. Validity of marriage not affected.

1. Procedure. A trial under the Child Marriage Restraint Act may

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25. Subs by Ord., 27 of 1981, Sch. II.

1. AIR 1935 Pat. 474=37 Cri. L. Jour 227.

2. AIR 1936 All 363=161 Ind. Cas. 49.

be summary, as it is permitted by section 260 (*l*) (*a*), Criminal P. C. beeause the offences charged come under the heading "offences not punishable with imprisonment for a term exceeding six months", section 4 (l) (O), Criminal P. C. states that "offence" means any act or omission made punishable by any law for the time being in force. Therefore, an offence under any law such as the Child Marriage Restraint Act will come under the provision of section 260 (1) (*a*), Cr. P. C.[3]

2. **Mistake as to age.** It is the duty of a male contracting a marriage to ascertain the age of the female with due care. Where the marriage took place after the age of the minor girl was declared by a lady doctor to be more than the stipulated age. It was held that the applicant should have gone to the Civil Surgeon in order to obtain a certificate and that the fact of their having secured a certificate from the woman medical officer was not material although the existence of the certificate was a matter which might be taken into account in considering whether imprisonment or fine should be imposed.[4]

3. **Expenses of marriage.** In spite of the fact that a marriage in contravention of the Act is valid, the Legislature disapproves all such marriages and makes the performance of such marriage punishable under the law. To incur expenses for performing a ceremony which is a criminal act, cannot be taken to be a legal necessity for which a *karta* of the family is empowered under the Hindu Law to effect an alienation.[5] A mortgage effected by manager of a joint Hindu family for the performance of the marriage of a minor in contravention of the provisions of this Act cannot be said to be for a necessary purpose and hence is not binding on the minor.[6] But the Pakistan view is that where alienation is made for the marriage of a boy, if the boy for whose marriage the money was arranged was less than the prescribed marriageable age even then the Child Marriage Restraint Act, 1929, would not take the alienation out of the ambit of legal necessity.[7]

Where money is required for the solemnization of a marriage in contravention of the Act and it is in the custody of the Court, it will be wrong in principle for the Court to facilitate conduct which the Legislature has made penal as being socially injurious on the ground that the promotion of the contemplated marriage is not punishable by the law of the place where it is proposed to celebrate it. More so, when the minor's estate is in the hands of the Receiver appointed by the Court and where the property, from which the funds for the marriage are sought to be obtained, is in the hands of the Court, through its Receiver, the Court ought not to sanction its use for a purpose, of which the Legislature has so clearly expressed its disapproval.[8] Even an application in an administration suit for liberty to spend a certain sum for a

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3. AIR 1934 All 331=148 Ind. Cas. 351.
4. AIR 1934 All 331=148 Ind. Cas. 351.
5. AIR 1961 Orissa 100+ILR (1937) 2 Cal. 764.
6. 1941 Nag. L. Jour 282.
7. 1980 CLC 862.
8. AIR 1937 Cal. 257=1936 Cal. 1153+170 Ind, Cas. 309.

marriage in contravention of this Act, outside Pakistan, when it is not prohibited at that place, cannot be granted.[9]

4. Female party to marriage is not guilty. The statute provides that whosoever contracts a marriage with a female below the age of 16 years will be guilty. There is no punishment provided for the female in these statutes. Therefore only the male who contracts a marriage in contravention of the statute will be liable to punishment under the section.[10]

5. Deterrent sentence. The Courts are not at liberty to treat the Act as a legislative imposture and manifestly, if it is to be effective, the sentence upon the priest or other celebrant without whose aid ordinarily no infringement of the Act is possible, should be such as to deter other avaricious members of his caste from following his example.[11]

6. Validity of marriage not affected. The Act does not permit the marriage of a girl below the age of 16 years, but if any girl below the age of 16 years marries in violation of that law, marriage itself does not become invalid on that score, although the adult husband contracting the marriage or the persons who have solemnised the marriage may be held criminally liable.[12] A Court acting under section 49, Cr. P. C. may permit the girl to go with her husband, notwithstanding the fact that her husband is liable to punishment under this Act.[13]

5. *Punishment for solemnizing a child marriage.* Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

Synopsis

1. Scope.
2. Essentials of offence.
3. "Perform, conducto rdirect."
4. Sentence.
5. Summary procedure.

1. Scope. This Act is a penal statute and is applicable to all crimes committed under it in Pakistan The fact that the accused are foreigners makes no difference even if such an act is not an offence in their country.[14] The Penal Code as well as the Child Marriage Restraint Act are extra-territorial to the extent, that if Pakistan subjects commit offences punishable under these laws outside Pakistan they are liable

9. AIR 1941 Cal. 244.
10. PLD 1975 Lah. 234=Law Notes 1975 Lah. 130.
11. AIR 1933 Pat. 471=146 Ind. Cas. 298.
12. PLD 1975 Lah 234=1975 LN 130+PLD 1970 S.C. 323=22 DLR (SC) 289+1970 P. Cr. L J. 1035=1970 SCMR 437.
13. 1970 P. Cr. L J. 1035=1970 SCMR 437.
14. 37 Cri. L. Jour 757 (Cal).

to be tried and punished when found in Pakistan. Where a child marriage is celebrated under a mistaken view that the territory where it was celebrated was outside Pakistan, the mistake of fact does not have the effect of rendering the celebration of the child marriage in question innocuous or innocent. The Child Marriage Restraint Act, can pursue the offenders even when they have broken that law after going outside Pakistan, and *a fortiori* after going to a place which they believed to be no part of Pakistan but was really a part of Pakistan.[15]

Consummation of marriage. Consummation or *gauna* is not a part of the marriage ceremony. The marriage is complete before the consummation, therefore a person may be convicted under this Act even though consummation of marriage has not taken place.[16]

Parent's liability. One view is that section 5 applies only to solemnization of marriage by a person other than the parents and hence section 6 alone applies to parents who participate in child marriage,[17] and they are not liable for two offences under sections 5 and 6 respectively.[18] But Pakistan view is that sections 5 and 6 deal with different offences. Section 5 deals with the person who performs, conducts or directs any child marriage. Section 6 provides for the offence where a minor himself contracts a child-marriage. It is only in a case where a minor contracts a child marriage, that any person having charge of the minor whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized shall be punishable.[19] Section 5 is wide enough to cover the case of the fathers of both the bridegroom and the bride.[20]

Purohat's liability. Section 5 contemplates that the *purohat* who solemnizes a marriage must make some reasonable inquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child.[21]

2. **Essentials of offence.** In the case of a complaint under sections 5 and 6 it is essential that the trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants, that is, the bridegroom was under the age of 18 or that the bride was under the age of 16.[22]

3. **"Perform, conduct or direct."** The words "perform, conduct or direct," in section 5 of the Act bear the same import and mean "working towards the end", that is completing the union ; and are used by the

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15. AIR 1937 Mad. 273=168 Ind. Cas. 736.
16. AIR 1936 All 11=36 Cri. L. Jour 1483=58 All 402.
17. AIR 1937 Mad. 490+AIR 1932 Nag. 174.
18. AIR 1932 Nag. 174=28 Nag. L.R. 302=34 Cri. L. Jour 311.
19. PLD 1964 Dacca 630=16 DLR 68.
20. PLD 1964 Dacca 630=16 DLR 68+AIR 1936 All 11=158 Ind. Cas. 1007.
21. AIR 1937 Mad. 490=ILR 1937 Mad 854=38 Cri. L. Jour 594.
22. AIR 1939 Cal. 288=40 Cri. L. Jour 605.

Legislature to indicate the solmnization of the marriage. That is the ordinary interpretation of those words. They do not suggest the arranging of a marriage merely or attending a marriage ceremony with a view to assisting in the solemnization of the marriage. The mere participation by parents in the ceremony of *kanyadan* would not offend against the provisions of section 5.[23] The negotiation, preparation or any other preliminary acts do not come within the mischief of the section.[24] Similarly merely applying for permission for conducting festivities on the occasion of marriage does not amount to "performing, conducting or directing a child marriage", and clearly is not an offence under section 5.[25]

Advancing money for marriage. Advancing money to enable an infant to marry in violation of the Act is not by itself punishable and does not bring the creditor within the mischief of the Act.[1]

4. Sentence. Sentence upon the priest or other celebrant should be deterrent.[2] But where the person solemnizing the marriage acted on a certificate of age from a doctor of the rank lower than that of a civil surgeon, that fact may be taken into consideration in fixing the punishment although that is not sufficient to excuse him from liability.[3]

The fact that the accused are foreigners and that the act which is an offence under this Act is not an offence in the foreign country can be considered in mitigation of punishment.[4] In a case the bridegroom and the mother of the bride were fined Rs. 50 each and the father of the groom and the stepfather of the bride were fined Rs. 100 each for an offence under this section.[5]

5. Summary procedure. A case under section 5 of the Child Marriage Restraint Act can be tried summarily.[6]

6. *Punishment for parent or guardian concerned in a child marriage.* (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful, or unlawful who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both :

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23. AIR 1940 Bom. 363=190 Ind. Cas. 794.
24. AIR 1938 Nag. 235=39 Cr. L. Jour 631=ILR 1939 Nag. 241.
25. AIR 1936 Oudh 311 (Permission asked was for holding *nach* with music and fireworks).
1. AIR 1939 (2) Cal. 764=65 Cr. L.J. 577=41 CWN 1176.
2. AIR 1938 Pat. 471=33 Cr. L. Jour 20.
3. AIR 1934 All. 331=35 Cri. L. Jour 677.
4. 37 Cri. L. Jour 757 (Cal).
5. PLD 1964 Dacca 360=16 DLR 68.
6. AIR 1956 Andhra 51=1956 Cri. L. Jour 196.

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

Synopsis

1. Applicability.
2. Marriage not arranged by parents.
3. Liability of parents.
4. Abetment of offence.
5. Both parties minors.
6. Procedure.
7. Sentence.

1. Applicability. Section 6 can come into play only where a child marriage has been performed and not before,[7] and it applies to parents who promote child marriage or permit it or negligently fail to prevent it.[8] The section has reference only to promotion of a prohibited marriage referred to in sections 4 and 5[9] When the marriage is not punishable under those sections, permitting such marriage is not punishable.[10]

2. Marriage not arranged by parents. A parent or guardian will be liable for the marriage of the minor even if the minor child has not directly entered into an agreement for the marriage and the agreement and arrangement had been made by some other person.[11]

3. Liability of parents. An intention to give a child in marriage in contravention of the Act is an unlawful purpose, within the exception to section 361, Penal Code, on the ground that if the purpose is carried out the person giving the child in marriage is liable to conviction and punishment for a criminal offence.[12] Parents of bridegroom cannot be convicted under the section merely because the bride was under 16 years of age, unless they know that fact about the age of the bride.[13] Where they had such knowledge, they were convicted under the section.[14]

The liability of the parents arises only where they are in a position to permit or prevent a marriage. Therefore the mother of a minor bridegroom not in actual charge of the minor and not able to prevent

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7. AIR 1957 Raj. 359=ILR (1947) 7 Raj. 567=1957 Cri. L. Jour 1317.
8. AIR 1937 Mad 490=ILR 1937 Mad. 854=38 Cri. L. Jour 594.
9. AIR 1938 Nag. 235=39 Cr. L. Jour 651=ILR 1939 Nag. 241.
10. AIR 1935 Bom. 437=59 Bom. 745=37 Cri. L. Jour 211.
11. AIR 1945 All 306=ILR 1945 All 272=47 Cr. L. Jour 43.
12. AIR 1933 Rang. 98=143 Ind. Cas 872 (FB).
13. AIR 1937 Mad. 490=ILR 1937 Mad. 854=38 Cri. L. Jour 594.
14. PLD 1964 Dacca 630=16 DLR 68.

the marriage commits no offence by mere participation in it.[15] On the same principle when the father is alive and is incharge of his minor daughter, her grandfather cannot be convicted for her marriage.[16]

4. **Abetment of offence.** This Act does not mention the offence of abetting but under the Penal Code there may be a prosecution for abetment of an offence under this Act. A person may be convicted for abetting an accused who is not the father of a minor who is married, so long as the other party to the marriage is a minor.[17]

5. **Both parties minors.** The expression "when a minor contracts a child marriage" in section 6 is wide enough to cover the case of a marriage to which both parties are minors as well as the one to which one party is a minor.[18]

6. **Procedure.** A case under the section can be tried summarily.[19]

Complaint. A report by a Magistrate conducting local investigation, recommending prosecution of the complainant under section 6, constitutes a complaint under section 4 (1) (*h*), Criminal P. C.[20]

7. **Sentence.** An offence under the Act may be committed for an altogether sordid motive such as love of lucre or, it may have been committed under a superstitious belief that the marriage confers religious merit upon the parents. The prosecution, too, for an offence might be tainted by an indirect and unworthy motive. The Court would not be wrong when deciding upon sentence to be imposed in a particular case in taking such factors into consideration.[21]

7. *Imprisonment not to be awarded for offences under section 3.* Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Pakistan Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

1. **Scope.** The section has become redundant in view of the omission of section 3 by section 12 (2) of Ordinance, VIII of 1961.

8. *Jurisdiction under this Act.* Notwithstanding anything contained in section 190 of the Code of the Criminal Procedure, 1898, no Court other than that of a Magistrate

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15. AIR 1937 Mad. 490=ILR 1937 Mad. 854=39 Cri. L. Jour 594.
16. AIR 1945 All 306=ILR 1945 All 272=47 Cri. L. Jour 43.
17. AIR 1935 Pat. 474=37 Cri. L. Jour 227.
18. AIR 1932 Nag 174=34 Cri. L. Jour 311=28 Nag. L.R. 302.
19. AIR 1956 Andhra 51=1956 Cri. L. Jour 196.
20. AIR 1933 Pat. 87=34 Cri. L. Jur 237.
21. AIR 1960 Andhra Pradesh 302 (DB).

of the first class shall take cognizance of, or try, any offence under this Act.

Synopsis

1. Jurisdiction. 2. Place of trial.
3. Summary procedure.

1. Jurisdiction. Though under section 8 of the Child Marriage Restraint Act as it stood originally, only a District Magistrate had jurisdiction, jurisdiction having been extended by the Amending Act (19 of 1938) to First Class Magistrates, the latter continue to have jurisdiction under the Act, notwithstanding the repeal of the Amending Act by the Repealing Act (25 of 1942) which embodies a saving clause which saves the incorporation of the words. "Magistrate of the First Class" in section 8, which was effected by the repealed Act. Likewise, the limitation of one year incorporated by section 9 of the repealed Act of 1938, also remains in spite of the repealing Act of 1942.[22]

2. Place of trial. Under the Act it is the place where the marriage ceremony was solemnized that fixes the place of trial.[23]

3. Summary procedure. A trial under this Act may be summary. The fact that the offences are to be tried only by the Magistrates mentioned therein does not bar a summary trial.[24]

9. *Mode of taking cognizance of offences.* No Court shall take cognizance of any offence under this Act except on a complaint made by the Union Council or if there is no Union Council in the area, by such authority as the Provincial Government may in this behalf prescribe, and such cognizance shall in no case be taken after the expiry of one year from the date on which the offence is alleged to have been committed.

PUNJAB AMENDMENT

The words and commas "except on a complaint made by the Union Council, or if there is no Union Council in the area, by such authority as the Provincial Government may in this behalf prescribe, and such cognizance shall in no case be taken" occurring after the words "under this Act" and before the words "after the expiry" shall be omitted.

Punjab Ord. 23 of 1971, section 3

Synopsis

1. Cognizance of offence. 2. Limitation.

1. Cognizance of offence. Taking cognizance does not involve any

22. AIR 1947 Nag. 79=225 Ind. Cas. 624.
23. AIR 1934 All 829=57 All 83=35 Cri. L. Jour. 1175.
24. AIR 1934 All 331+AIR 1956 Andhra 51.

formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Thus, it occurs as soon as he reads the complaint and even before he examines the complainant which he is bound to do. Having taken cognizance he proceeds to enquire into the charge. Hence, a Magistrate has jurisdiction to take cognizance under section 9 of the Child Marriage Restraint Act before a certificate is obtained under section 188 of the Criminal P.C.; the taking of cognizance is an action which is prior to and independent of the enquiry into the charge, so that the Court may have jurisdiction to take cognizance, although it has no jurisdiction to enquire into the charge before the certificate required by section 188, Criminal P.C. is obtained [25] Even when a Magistrate upon receiving a complaint decides upon the necessary preliminary enquiry, he is taking cognizance of the offence complained against and it cannot be said that he takes cognizance only when he directs the issue of process to the accused.[1] It is however to be noted that an offence under section 5 is not cognizable. So when such a case is forwarded to an Assistant Superintendent of Police for investigation, a letter from him to the District Magistrate is a "Police report" and not a "complaint".[2]

2. **Limitation.** The limitation prescribed in section 9 being incorporated in the original Act by the Amending Act (19 of 1938) continues to be effective notwithstanding the repeal of the Amending Act by the Repealing Act 25 of 1942, by virtue of the saving clause contained in section 4 of the Repealing Act.[3] Where a complaint to one Court is made prior to the expiry of one year from the date of the marriage and another complaint is made to a different Court after the expiry of the period of one year, the latter complaint is barred by time. Section 14, Limitation Act which applies to civil proceedings only, cannot validate the latter complaint on the strength of the former complaint having been made in time.[4]

10. *Preliminary inquiries into offence under this Act.* The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 292 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

Synopsis

1. Applicability.
2. Preliminary inquiry.
3. Dismissal of complaint.
4. Revision.

1. **Applicability.** Section 10 comes into play only when a court

25. AIR 1940 Nag. 245=188 Ind. Cas, 606.
1. AIR 1963 Andhra Pradesh 302 (DB). (*Diss.* AIR 1939 Nag. 530).
2. AIR 1938 Rang. 257=39 Cri. L. Jour 776=1938 Rang. L R 150.
3. AIR 1947 Nag. 79=ILR 1947 Nag. 80=47 Cri. L Jour 794.
4. AIR 1939 Mad. 512=40 Cri. L. Jour 816.

takes cognizance of an offence under the Act and not where merely an application has been made to prevent a child marriage from being performed under section 12.[5]

2. **Preliminary inquiry.** The object of the preliminary inquiry is to enquire whether there is a *prima facie* case or not. If the accused objects to his trial without an inquiry and the Magistrate proceeds in disregard of the objection of the accused, his order would be set aside. But where the accused makes no objection to the trial, he cannot raise it subsequently if there is a substantive case against him.[6] A preliminary inquiry under this section is absolutely essential before the Court can take cognizance of an offence under this Act.[7] Non-compliance with the provision makes the trial illegal from its inception.[8] But where the legality of a conviction is challenged in a revision petition on the ground that no preliminary inquiry was held, it is important to bear in mind that where such a question arises in a revisional proceeding, a mere contravention of provisions of the relevant statute, even though of a mandatory nature, cannot by itself be held to render the proceeding or the conviction recorded therein illegal unless it is further established that such contravention or non-compliance has actually caused prejudice to the accused.[9]

3. **Dismissal of complaint.** An order of dismissal of a complaint under the Act without holding a preliminary inquiry under section 202, Criminal P.C. is illegal and the dismissal must be set aside.[10]

4. **Revision.** It is proper in revision to send a case back for correction of an illegality such as an omission to hold preliminary inquiry provided under section 10, when that can be done before the case is tried, but after judgment, the case should not be remanded, unless there is a failure of justice. Where the Court had decided the case without objection, a mere omission to comply with section 10 is an irregularity curable under section 537, Criminal P.C. The High Court will not in such a case interfere under section 439, Criminal P.C.[11]

11. *Power to take security from complainant.* Omitted by section 12 (5) of Ordinance 8 of 1961.

12. *Power to issue injunction prohibiting marriage in contravention of this act.* (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized, issue an

5. AIR 1957 Raj. 359=ILR 1957 (7) Raj. 567=1957 Cri. L. Jour 1317.
6. AIR 1939 Pat. 525=40 Cri. L. Jour 887.
7. AIR 1934 Lah. 155+AIR 1931 Lah. 56=12 Lah. 383+AIR 1939 Mad. 539.
8. 6 Sau. L R. 252 (DB).
9. PLD 1964 Dacca 630=16 DLR 68 (*Rel.* AIR 1939 Pat. 525).
10. AIR 1954 Mad. 889=1954 Cri. L. Jour 1344.
11. AIR 1940 Nag. 375=42 Cr. L. Jour 37=ILR 1940 Nag. 488.

injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader ; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment.

Synopsis

1. Scope. 2. Personal appearance.

1. Scope. Section 12 is a self-contained provision and its main object is prevention, that is, to prevent child marriages from being performed.[12] Where a relation of the mother of a girl applied to be appointed the guardian of the girl and obtained an injunction against the father of the girl restraining him from giving her in marriage in contravention of the provisions of the Child Marriage Restraint Act, and the father gave the girl in marriage notwithstanding the injunction and it was contended on behalf of the father that the Court had no jurisdiction to issue the injunction and that he did not receive any notice of the injunction before the marriage. It was held that the father was entitled to an opportunity to prove that he had not received a notice before the marriage.[13]

2. Personal appearance. In a proceeding under section 12 of the Child Marriage Restraint Act, a Magistrate cannot compel the person complained against to put in personal appearance as he is allowed to appear, either personally or by a pleader.[14]

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12. AIR 1957 Raj. 359=ILR (1957) 7 Raj. 567=1957 Cri. L. Jour 1317.
13. AIR 1932 Cal. 719=137 Ind. Cas. 425.
14. AIR 1957 Raj. 339=ILR (1957) 7 Raj, 567=1957 Cri. L. Jour 1317.

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

An Act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married woman on her marriage tie.

Whereas it is expedient to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage ; it is hereby enacted as follows :

Synopsis

1. Object.
2. Act not exhaustive.
3. Change in Muslim Law.
4. Procedure.
5. Suit for restitution of conjugal rights.

1. Object. The main object of enacting the Act was to bring the law administered in the sub-continent in conformity with the authoritative texts[15] and to ameliorate the lot of a Muslim wife and enlarge her rights. Therefore the Courts must apply its provisions in such a manner as would give effect to the object.[16]

2. Act not exhaustive. The Dissolution of Muslim Marriages Act, 1939, only purports to clarify the law and has provided a saving clause in section 2, keeping all existing grounds of dissolution intact.[17] It does not add anything to the provisions of Muslim Law relating to suits for dissolution of marriage,[18] and hence it should be applied in conjunction with the provisions of the whole of Muslim Law as it stands.[19] Therefore in the application of clause (*ix*) of section 2, a reference to Muslim Law is necessary where the ground for dissolution is not covered by any one of the earlier clauses.[20]

3. Change in Muslim Law. The effect of the Act is that Muslim Law has been altered to the extent that even marriages arranged by

15. AIR 1950 Sind 8 (DB).
16. AIR 1947 All 16.
17. PLD 1967 S.C. 97+PLD 1956 Lah. 712=8 DLR 77.
18. AIR 1950 Lah. 133=Pak L R 1950 Lah. 227=51 Cri. L. Jour 1169.
19. AIR 1951 Nag 375=AIR 1949 Pesh. 7.
20. PLD 1952 Lah. 460+PLR 1959 Lah. 491=10 DLR (W.P.) Lah. 7.

father or paternal-grandfather have been rendered revocable and the age limit upto which option of puberty could be exercised has been extended [21]

4. Procedure. The provisions of the Act are complete and self-sufficient and not subject to the rules of procedure of Muslim Law.[22]

Arbitration. The Indian view is that the Arbitration Act does not stand excluded by the Dissolution of Muslim Marriages Act. The latter does not prescribe any special procedure for the disposal of suits instituted under it. In the absence of any specific procedure the general procedure which governs all civil suits and actions would be applicable. The C. P. C., the Arbitration Act and other procedural laws would, therefore, be attracted to suits under the Dissolution of Muslim Marriages Act.[23] But Pakistan view is that the question of dissolution of marriage of a person is not a fit subject for reference to arbitration.[24]

5. Suit for restitution of conjugal rights. The Act applies only in the case of a suit by a wife and therefore does not make available to the wife any benefits or rights given to her under the Act in a suit by the husband for the restitution of conjugal rights.[25]

A suit for dissolution of marriage is not barred by a decree for restitution of conjugal rights. There may be decrees of restitution of conjugal rights despite which the suit for dissolution of marriage may be competent on even grounds other than that of '*khula*'. One instance is where the decree is conditional on payment of dower. In such a case for so long as the dower is not paid, the wife is entitled to remain separate from the husband and can, therefore, invoke the Court's jurisdiction for dissolution of marriage after two years of such separation in case she has not been paid any maintenance, for non-performance of marital obligations if the period of separation exceeds three years or more [26]

1. *Short title and extent.* (1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to [1][all the provinces and the Capital of the Federation].

2. *Grounds for decree for dissolution of marriage.* A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any

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21. 53 Cal. W.N. 37.
22. AIR 1945 Pesh. 51 (DB)+AIR 1943 Pesh. 73 (D.B.)+AIR 1949 All 445.
23. AIR 1964 All 246.
24. PLD 1965 Karachi 326.
25. AIR 1960 Cal. 717 (DB).
26. 1979 Law Notes 178.

1. Subs. by Ord., 21 of 1960, S. 3 & 2nd Sch. (w.e.f. 14-10-1955).

one or more of the following ground, namely :—

(*i*) that the whereabouts of the husband have not been known for a period of four years ;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years ;

[2][(*ii-a*) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961 ;]

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards ;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years ;

(*v*) that the husband was impotent at the time of the marriage and continues to be so ;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease ;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of [3][sixteen] years ; repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consummated ;

(*viii*) that the husband treats her with cruelty, that is to say,

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her exercising her legal rights over it, or

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2. Inserted by S. 13 of Ordinance VIII of 1961.
3. *Ibid.*

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran,

(*ix*) on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law.

Provided that :—

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final ;

(*b*) a decree passed on ground (*i*) shall not take effect for a period of six 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 ; and

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Synopsis

1. Retrospective effect.
2. Forum of suit.
3. Courts acts as Qazis.
4. Clause (*ii*) — Neglect or failure to maintain wife.
5. Clause (*ii*) (*a*) — Additional wife.
6. Clause (*iv*)—Desertion of wife.
7. Clause (*vi*) — Venereal disease.
8. Clause (*vii*)—Repudiation of marriage.
9. Clause (*viii*)—Cruelty to wife.
10. Apostasy from Islam.
11. Clause (*ix*)—Any other ground.
12. Impotence of husband.
13. Pleadings.
14. Second marriage after dissolution of first marriage.
15. Appeal.

1. Retrospective effect. The section has retrospective effect in so far as it applies even to marriages solemnized prior to the enforcement of the Act.[4] The Act is a declaratory one and therefore in order to

4. PLD 1952 Dacca 272=PLR 1951 Dacca 623=4 DLR 619 (DB).

maintain a suit for dissolution in any place in which it did not apply originally but had been enforced later on, it is not necessary that the period of neglect should run after the enforcement of the Act. There would be sufficient compliance with the Act if there was such a period before the institution of the suit itself.[5]

2. **Forum of suit.** In a petition for dissolution of marriage, it is not necessary to prove the place of marriage or that it took place in Pakistan. It is enough if the parties are domiciled in Pakistan.[6] It is for the petitioner to prove that the parties reside or last resided together within the jurisdiction of the particular Court which is hearing the petition.[7] It has been held in India that if at the time of the institution of a suit for divorce the parties were domiciled in India the Court will have jurisdiction to decide the suit, even though the parties have subsequently migrated to Pakistan.[8] The position, it is submitted, is the same in Pakistan.

Where the wife is turned out of his house by her husband she may bring a suit for dissolution of marriage at the place where she may be residing even if that place was neither the place where the marriage took place nor the place where her husband resided;[9] provided that she could establish that she had been unjustly turned out from the house by her husband and was entitled to live apart and to be maintained by him where she resided. If it could be proved that her conduct in living apart from the husband was justified and further that the husband had failed to maintain her for over two years prior to the institution of the suit, she could legitimately claim dissolution of marriages by the Courts at the place where she resided as cause of action arose partly at that place when she was not provided maintenance.[10] Where marriage is sought to be dissolved on the ground that the husband associated with women of evil repute or lived an infamous life, the suit can be brought in the Court which has jurisdiction at the place where the association with woman of evil repute or the leading of an infamous life has taken place or is alleged to have taken place.[11]

3. **Courts act as Qazis.** Under the Dissolution of the Muslim Marriages Act, the position of the Civil Courts is akin to that of Qazis as they are entitled to effect a divorce on the grounds on which it could be granted under Muslim Law. The words "Muslim Law" were employed in the Act to convey that divorce could be granted by the Courts for reasons for which it could have been granted under the Shariat regardless of the fact whether that reason has been recognised by the British Courts or not.[12] As the Court has to perform the functions of a Qazi

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5. AIR 1956 Raj. 102 (DB). (Case from Rajasthan where the Act came into force only in 1950).
6. PLD 1958 Lahore 699 (DB)+('96) 20 Bom. 362 (FB).
7. PLD 1955 Dacca 1=PLR 1953 Dacca 7=5 DLR 462 (DB).
8. AIR 1954 Nag. 51.
9. PLR 1952 Lah. 227.
10. PLD 1952 Lah. 227.
11. PLD 1952 Lah. 31=PLR 1951 Lah. 804.
12. PLD 1967 S.C. 97+AIR 1945 Lah. 51=ILR 1944 Lah. 542 (DB).

and it is the pronouncement of the Court which dissolves the marriage, that function cannot be delegated by the Court to anyone else either by arbitration or by accepting the statement of a witness even with the consent of a party at least on an immaterial point in the case. The Court should not decide a suit for dissolution of marriage merely on an oath on Holy Quran taken by the plaintiff's witness but should decide the case on merits after the parties have led evidence on the issues framed.[13]

4. Clause (ii)—Neglect or failure to maintain wife. There is nothing in the wording of section 2 (*ii*) to suggest that failure to maintain the wife must be wilful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to any other cause whatsoever.[14] But the right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and failure of the husband to provide her with maintenance in those circumstances would not entitle the wife to dissolution of the marriage.[15] Where however, a husband ill-treats his first wife and turns her out of the house. He marries two other wives and does not pay maintenance for two years to his first wife who is living with her parents or brothers and sisters, she is entitled to a divorce. If the husband tries to take back the wife by recourse to section 100, Cr. P. C. it cannot be said that she refused to go with him and thus lost her right to maintenance.[16]

Means of wife. The fact that the wife has means of her own to maintain herself is no reason why the husband should not maintain her. Therefore such a defence cannot be set up by the husband in answer to a suit for dissolution of marriage for non-maintenance of wife.[17]

Failure to maintain due to conduct of wife. The maintenance mentioned in clause (*ii*) of section 2 is the maintenance to which a Muslim wife is entitled under the Muslim Law. The Muslim Law does not confer upon a wife an absolute and unconditional right to maintenance. A wife is not entitled to dissolution of her marriage when the husband has not been paying her maintenance on account of a fault of her own [18] The onus is on the wife to prove that her husband was bound to pay her maintenance which he failed to pay. The Court rejected the contention that unless the wife was held disentitled to maintenance on account of

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13. AIR 1945 Lah. 183.
14. AIR 1941 Lah. 167+AIR 1946 Sind 48=ILR 1945 Kar. 327.
15. PLD 1967 A.J. & K. 32=19 DLR (W.P.) 104 (DB).
16. PLD 1968 Dacca 376=PLR 1967 (1) Dacca 281=19 DLR 751.
17. 17 DLR 687.
18. PLD 1969 Dacca 548+PLD 1967 Pesh. 32+PLD 1963 Dacca 583=14 DLR 465 +PLD 1960 Pesh 66+PLD 1957 (W P.) Lah. 871=10 DLR (W.P.) Lah. 11+ PLR 1963 Dacca 589=14 DLR 471 (DB)+PLR 1957 Dacca 242 (DB)+PLD 1952 Lah. 460+AIR 1949 Pesh. 7 (DB)+AIR 1944 Lah. 536 (DB)+AIR 1943 Sind 65.

her conduct, it should hold that there was a failure to maintain her.[19] The right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and the failure of the husband to provide her with maintenance would not entitle the wife to seek dissolution of the marriage tie.[20] It is therefore submitted that the earlier view that in order to succeed in a suit for dissolution of marriage all that a woman is required to do is to establish that for two years immediately preceding the suit, her husband has not provided her maintenance, and once that is established she will be entitled to a decree as a matter of course, and the Courts have not to go into the question whether the woman herself has contributed towards the failure of her husband to provide maintenance for her and her refusal to stay with her husband or to refuse conjugal rights to him is also a ground for refusing her claim for dissolution,[21] is no more good law.

The wife is under an obligation to obey and carry out lawful and reasonable instructions of her husband, submit herself to him and live with him in his house.[22] Before the husband can be said to have neglected or failed to provide maintenance for his wife, it must be shown that he was under a legal duty to provide such maintenance and that where there was no such legal duty cast on him by the Muslim Law, it cannot be said that he had neglected or failed to maintain her if the wife without reasonable cause refused to live with her husband, disobeyed his instructions and declined to co-habit with him. The husband's failure to maintain her in such circumstances cannot entitle her to a divorce under section 2 (*ii*).[23] But refusal of a husband to pay maintenance to his wife on the ground of her failure to live with him would amount to default on his part to pay maintenance within the meaning of section 2 (*ii*) where the wife's refusal to live with him is justified in law because of his non payment of the dower debt decreed to her.[24] If the wife refuses herself to her husband without any lawful excuse and deserts her husband or otherwise wilfully fails to perform her marital duties she has no right to claim maintenance from the husband and if the husband in that case does not maintain the wife, it cannot be said that there is a negligence or failure to provide maintenance to the wife. Therefore dissolution of marriage cannot be claimed on failure to maintain in those circumstances.[25] A Muslim wife cannot compel her husband to divorce his other wife and if she refuses to live with her husband unless he divorced his other wife, there is no liability on the husband to maintain the wife and his failure to do so would not entitle

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19. PLD 1959 (W.P.) Lah. 470=11 DLR (W P.) Lah. 124.
20. 1980 CLC 1098=PLJ 1980 A. J. & K. S C 107+PLD 1969 Dacca 548+PLD 1967 A. J. & K. 32 (DB).
21. PLD 1956 Sind 298=8 DLR (W.P.) Sind 51 (DB)+PLD 1953 A.J.&.K. 10+PLD 1950 Sind 36=PLR 1948 Sind 108 (DB).
22. PLD 1958 W P. Kar. 219=PLR 1958 (1) W.P. 192 (DB).
23. 1980 CLC 1098=PLJ 1980 A.J.&K. (S.C.) 107=NLR 1980 A.C. 43.
24. PLD 1960 Kar 663+PLD 1959 Lah. 470+11 DLR W.P. 124+AIR 1953 Mys. 145+AIR 1946 Pat. 467.
25. PLR 1963 Dacca 589=13 DLR 471 (DB)+PLD 1953 Dacca 216=5 DLR 36.

the wife to a divorce under section 2 (*ii*).[1]

Intermittent payments. Payment by husband of maintenance intermittently without any intention of continuing the payments cannot defeat the right of a wife to dissolution under Cl. (*ii*). The question of husband's intention is one of fact.[2]

Period of two years. The failure of the husband to maintain his wife should be for a continuous period of two years immediately preceding the suit and a failure for broken periods aggregating to two years or a period of two years followed by a period during which the wife has been maintained is not contemplated by the language of Cl. (*ii*).[3] Where the husband had not maintained his wife for a period of ten years but had paid her maintenance under the orders of a Magistrate for some months preceding the institution of the suit and thus the default had not been for a continuous period of 2 years before the suit for dissolution was brought, the wife was entitled to dissolution of her marriage.[4]

Where it has been established that a husband has failed to provide maintenance for his wife for a period of two years, the wife, irrespective of the fact whether she has attained puberty or not, is entitled to a decree for dissolution of marriage under section 2 (*ii*) of the Act.[5]

Nature of maintenance. The duty of a husband to maintain his wife is only this that he is to give the wife food and clothing and a place for residence. Under ordinary circumstances, the food, clothing and residence is to be provided at the house of the husband and there is no failure to maintain unless the husband is not prepared or refuses to give her food and clothing at his own house. It is only in exceptional circumstances that there would be a duty cast on the husband to pay maintenance in cash. This will happen, for instance, where under his direction the wife is living separately.[6]

Defence of husband. A plea by the husband of an ulterior motive on the part of the wife is not a valid defence to a suit for dissolution of marriage brought against him by the wife under Cl. (*ii*).[7]

5. **Clause (ii) (a)—Additional wife.** The fact that the husband has married another woman is not a ground for dissolution of marriage. Dissolution can only be claimed where the subsequent marriage has been contracted by the husband in contravention of the provision of the Muslim Family Laws Ordinance.

6. **Clause (iv)—Desertion of wife.** A husband may by his conduct become guilty of desertion to entitle his wife to dissolution of marriage.[8]

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1. AIR 1944 Lah. 336=ILR 1945 Lah. 517 (DB) (AIR 1942 Lah. 92, *Reversed*).
2. AIR 1946 Sind 48=ILR 1945 Kar. 327.
3. AIR 1946 Sind 48=ILR 1945 Kar. 327.
4. AIR 1941 Sind 23=ILR 1941 Kar. 114.
5. 5 DLR 527 *Rel.* L.R. 60 I.A. 10.
6. PLD 1959 Lah. 470=11 DLR Lah. 124.
7. AIR 1946 Sind 48=ILR 1945 Kar. 327.
8. AIR 1953 All 571 (DB).

This will be the case where the husband neither calls back his wife from the house of her parents nor maintains her and according to the custom of the family she cannot go back to him without his calling her back.[9]

The plea of desertion and separation are not mutually destructive. The possibility of a husband causing physical harm or mental torture to his wife during the period of their separation cannot be ruled out because he can do so by giving her beating and/or abuses outside their respective abodes or by writing pinching letters or making obnoxious calls on telephone if his wife has a telephonic connection.[10]

7. **Clause (vi)—Venereal disease.** Dissolution can be claimed only when the husband is suffering from virulent venereal disease and not when he is suffering from venereal disease which is not at a stage where it can be communicated to the wife. Venereal disease is in a virulent form when its communication by sexual intercourse is likely.[11]

8. **Clause (vii)—Repudiation of marriage.** A person contracted is marriage by his guardian during minority has an option on attaining puberty, either to abide by the marriage or to cancel it.[12]

Option exercised before the age of sixteen. When a girl has attained puberty before the age of sixteen, and she wants to repudiate the marriage before attaining the age of sixteen she cannot do so if she was contracted in marriage by her father or paternal-grandfather unless father or grandfather had acted fraudulently or negligently. The father would be said to have acted fraudulently and negligently if the minor was married to a lunatic or the contract was to her manifest disadvantage. Disparity of age is not manifest disadvantage, but if the prospective bridegroom were diseased, or of weak intellect and had some grave physical deformity, or if his wordly position was such that the change from father's house to that of the bridegroom would be one attended by material discomfort to her, all those factors might be taken into consideration.[13] When the character of the husband has serious blemishes the option exists.[14] A Shia girl married to a Sunni husband may exercise option of puberty on grounds of conscience.[15]

Option after the age of sixteen. After the girl has attained the age of sixteen, she can exercise option of puberty under section 2 of the Dissolution of Muslim Marriages Act, 1939. There are three pre-conditions for exercising option of puberty, namely, the performance of

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9. AIR 1953 All 571 (DB)
10. NLR 1981 Civ. 685=PLD 1981 Lah. 732=PLJ 1981 Lah. 653=1981 Law Notes 618. (In this case during their separation the husband beat his wife outside the college where she worked as a teacher.).
11. 1947 All L W. 533 (Disease in quiscent stage with no chance of infection is not 'virulent').
12. Hedaya page 30; Baillie pages 50, 51+PLD 1956 Lah. 712=8 DLR W.P. 77.
13. AIR 1937 Rang. 361+47 All 823=50 All 733+97 PLR 1915.
14. AIR 1940 Sind 145=190 I.C. 94.
15. 47 All 823=89 I.C. 94.

marriage during minority with the consent of the guardian, its non-consummation, and its repudiation between the age of 16/18 years.[16] Before the Act a minor girl given in marriage by the father or the father's father had no option to repudiate it on attainment of puberty but this has been changed. The contract by father or father's father stands on no higher footing than that of any other guardian and the minor can repudiate or ratify the contract made on his or her behalf during the minority, after attaining of puberty.[17] This provision of law creates no new remedy. It gives under Cl. (*vii*) of section 2 only a statutory recognition to the view which is more in accordance with the times out of the several conflicting view prevailing under different schools of Muslim Law.[18]

Consummation during minority. Anything done by the minor during minority, would not destroy the right which could accrue only after puberty. The cohabitation of a minor girl would not thus put an end to the "option" to repudiate the marriage after puberty. The assent should come after puberty and not before, for the simple reason that the minor is incompetent to contract ; nor should the fact that consummation has taken place without her consent take away the right to repudiate the marriage.[19] Even where consummation had taken place after the girl had attained the age of 16 and had not attained the age of eighteen, but it had taken place by force and not by her consent, she can exercise the option of puberty before attaining the age of eighteen.[20] If the wife is living with her husband when she arrives at puberty, her option is not determined unless she assents explicitly or by implication to the marriage. Nor is mere consummation sufficient. There must be consummation with the wife's consent. Moreover, all the necessary facts must be proved by the husband to the satisfaction of the Court. The Court leans in such cases in favour of the wife.[21]

Consummation of marriage should be proved as a fact on consideration of the entire evidence of the case and the refusal of the woman to have herself medically examined by a lady doctor cannot be taken to be proof of consummation of marriage.[22]

Presumption of puberty. In the absence of evidence to the contrary, a Muslim girl is presumed to have attained puberty at the age of sixteen. But, it is a question of fact in each case and a girl may reach the puberty stage even earlier.[23] It would, therefore, necessarily follow that the minor should exercise the option after the age of 16 years unless there

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16. PLD 1970 Lah. 475.
17. PLD 1976 Lah 516=PLJ 1976 Lah. 294+PLD 1969 Lah. 448+PLD 1962 A.K. 7 (DB)+PLD 1949 Lah 75+AIR 1950 Lah. 45+PLR 1950 Lah. 227 (AIR 1942 Sind 92, *Dissented from*).
18. PLR 1950 Lah. 227=AIR 1950 Lah. 133=51 Cri. L. Jour 1169.
19. PLD 1949 Lah. 75+PLD 1957 Lah. 651=9 DLR W.P. 45+PLD 1952 Lah. 548+AIR 1950 Lah. 45.
20. PLD 1962 A.K. 7 (D.B.).
21. PLD 1965 Peshawar 1=17 DLR (W.P.) 71.
22. AIR 1950 Lah. 45.
23. PLD 1952 Lahore 548+PLR 1951 Lah. 658+PLD *1965* Karachi 454.

was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading.[24] It is to be noted that the plaintiff need not prove her exact age, but she must prove that she was given in marriage before she attained the age of sixteen and that she repudiated the marriage before attaining the age of eighteen.[25]

When option may be exercised. A marriage can be dissolved by a woman without the aid of the Court after attaining the age of puberty but before she attains the age of 18 years. It is not necessary for her to approach the Court for exercise of such option, she can exercise the option otherwise.[1] Clause (*vii*) of section 2 of Dissolution of Muslim Marriages Act adopts sixteen as the fixed age of puberty without an opportunity of rebuttal. This clause does not speak of puberty at all but only of an age though in fact it does deal with the option arising at puberty, and the only way in which it can reasonably be interpreted is that a woman who has before the age of sixteen years been given away in marriage by her guardian is allowed to repudiate her marriage for a period of three years after she attains the age of sixteen and before she attains the age of eighteen. The clause eliminates any conflict over proof of puberty.[2]

Age till when option may be exercised. A minor girl contracted in marriage retains the option of puberty up to the age of 18 years or until she expresses her consent or disapprobation in express terms. In other words, the right of annulment continues until she expressly ratifies the marriage say by express words or by cohabiting with the husband, or by asking for her dower or maintenance.[3]

Option after the age of eighteen. Where a girl does not know of her marriage till she attains the age of eighteen the option of puberty may be exercised when she comes to know of the existence of her marriage and it is prolonged to such time when she comes to know that she has a right to repudiate it. She can repudiate it within a reasonable time thereafter.[4]

How option may be exercised. The law does not prescribe any particular form or procedure for repudiation of marriage, it may be by oral word or even by conduct signifying rejection of marriage. The essence of the matter is the actual repudiation of marriage before attaining the age of 18 years by the woman. Till then the marriage remains inchoate, as it were, liable to dissolution by unilateral repudiation by the woman. In other words the fate of the marriage hangs by the slender thread of unilateral option to be exercised by her before attaining the age of

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24. PLD 1949 Lah. 75+AIR 1919 Cal. 84 (DB).
25. AIR 1947 Sind 102+ILR 1945 Kar. 246 (DB).
1. PLD 1981 Lah. 68=PLJ 1981 Lah. 112=1981 Law Notes 31.
2. PLD 1965 Lah. 712=PLR 1953 Lah. 332=8 DLR W.P. 77.
3. PLD 1965 Pesh 5=17 DLR (W.P.) 76+PLD 1965 Pesh. 1=17 DLR W.P. 71.
4. AIR 1916 Lah. 827+AIR 1938 Lah. 719. (In this case the age at the time of repudiation was more than 18)+AIR 1938 Pat. 604.

eighteen years. Once it is exercised, the marriage stands dissolved.[5] The withholding of consent may be expressed in a variety of ways. It may be indicated by the fact that without having recourse to institution of a suit for the dissolution of marriage the girl may, where there has been no consummation and provided also that she is not more than 18 years old, get remarried. It may be indicated by serving a notice on the husband through an attorney or publishing a notice in a newspaper that the option of puberty has been exercised. It may be manifested by the mere institution of a suit for dissolution of marriage[6] which may eventually be dismissed in default under Order IX, rule 3, C. P. C.[7] Marrying some other man, on attaining puberty, is enough to constitute repudiation.[8] In certain circumstances even mere denial of marriage may amount to its repudiation.[9] Where repeated efforts for the *rukhsati* of the woman were made but the same could not come off because of her refusing to go and live with her husband ; it was held that this conduct on the part of the woman furnished strong circumstantial corroboration of the repudiation of marriage.[10]

If the minor girl enters into a second marriage on attaining puberty, it would be sufficient proof of her having repudiated the earlier marriage, and the subsequent marriage would be valid.[11]

Decree of Court. A decree of Court is not necessary for imparting validity to the exercise of the option of puberty.[12] But if the other party challenges her contention that she has exercised her option, then on account of accrual of cause of action in her favour she may approach the Court for a declaration.[13] The right of option of puberty can be exercised up to the age of 18 years but a suit for declaration that such right was duly exercised within that period is competent even after that age. Therefore a suit for a declaration that the right was duly exercised cannot be thrown out merely because the wife filed it when she was 29 years of age.[14] Where the wife has repudiated the marriage but the husband began to describe her as his wife on a subsequent date, the limitation for a suit for declaration by the wife will begin to run from the date when the husband begins to act like that.[15] A declaration can be given by the Court itself even in the course of criminal proceedings initiated under section 494, Pakistan Penal Code to the effect that the

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5. PLD 1976 Lah. 516=PLJ 1976 Lah. 294+PLD 1969 Lah. 448=21 DLR (W.P.) 115+PLD 1965 Pesh. 5+PLD 1965 Pesh. 1.
6. PLD 1981 Lah 68=PLJ 1981 Lah 112=1981 LN 31.
7. PLD 1965 Pesh 5=17 DLR (W.P.) 76+PLD 1965 Pesh 1=17 DLR W.P. 71.
8. PLD 1970 Lah. 475+AIR 1934 All 589=150 I.C. 139.
9. PLD 1953 Lahore 131=PLR 1953 Lahore 341.
10. PLD 1969 Lah. 448=PLR 1969 Lah. 108=21 DLR (W.P.) 115.
11. PLD 1976 Lah. 516=PLJ 1976 Lah. 294.
12. PLD 1976 Lah 516=PLJ 1976 Lah 294+PLD 1970 Lah. 475+1970 P. Cr. L.J. 166 (Lah)+PLD 1970 Lah 203+PLD 1956 Lah. 403=8 DLR W.P. 25.
13. PLD 1981 Lah. 68=PLJ 1981 Lah. 112=1981 Law Notes 31.
14. PLD 1981 Lah 68=PLJ 1981 Lah. 112=1981 Law Notes 31.
25. PLD 1981 Lah. 68=PLJ 1981 Lah. 112=1981 Law Notes 31.

first marriage stands dissolved by the option of puberty having been exercised.[16] It is to be noted in this context that no period of limitation is prescribed for obtaining the decree of the Court on the ground of exercise of option of puberty.[17]

Effect of the exercise of the option. By the exercise of the option of puberty the marriage ceases to be a marriage and must be treated as having never taken place.[18]

Option of puberty of a male. The option of a boy to repudiate his marriage continues till after attaining puberty he acquiesces in the marriage either expressly or by implication.[19]

Option of puberty of insane person. If an insane person is contracted in marriage by his guardian during his insanity, he may exercise option to dissolve the marriage on recovering his reason. It would have the same effect as repudiation by option of puberty.[20]

Compromise of suit. Where a woman has brought a suit for dissolution of marriage on the ground of option of puberty and her husband brought a suit for restitution of conjugal rights, and a decree for dissolution was granted to the wife in appeal by the District Judge. However an attempt at reconciliation was made which ended in a compromise under which the husband was paid Rs. 4500 and a *talaq-bil-mal* instead of dissolution by exercise of option of puberty was granted to the wife.[21]

9. **Clause (viii)—Cruelty to wife.** Marriage is not, in Islam, an act so irrevocable that one may be forced to say to the wife; "You are unlucky. True you are not to blame, and you are being subjected to an intolerable life, but we cannot help it." The law gives sufficient powers to the Qazi to dissolve it in case married life is intolerable for the wife.[22] Therefore although actual habitual cruelty be not established, a decree for dissolution can be granted when considering the circumstances, it would be cruel to the wife to continue the marriage.[23]

Cruelty can be physical and mental Mental cruelty is the worst.[24] Dissolution of marriage can be decreed on the ground of mental cruelty.[25] Persistence in inordinate sexual demands or malpractices by

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16. PLD 1950 Lah. 203=PLR 1950 Lah. 227.
17. PLD 1965 Pesh. 5=17 DLR W.P. 76.
18. AIR 1938 Lah. 719=178 I.C. 732
19. Baillie 52.
20. Baillie 54.
21. PLD 1982 A J.&K. 58=NLR 1982 A.C. 92.
22. PLD 1957 Lah. 998=PLR 1958 (1) W P. Lah. 725=10 DLR W.P. 19.
23. PLD 1958 Lah. 59=PLR 1958 (2) W.P. Lah. 173=10 DLR W.P. 50.
24. PLD 1963 Dacca 947 (DB).
25. PLJ 1980 Kar. 230 (DB).

either spouse can be cruelty if it injuries the other spouse. Indeed, according to matrimonial experts, this sphere of conjugal life ought to be more sedulously guarded against psychological injuries than any other. Each spouse is entitled to expect the other to show due consideration and respect for the health, requirements, feelings, and sentiments of the other.[1] It is hard to base a decree for dissolution on a single incident which does not appear to have been more than a kick or a slap.[2] An isolated slap or a trivial blow by a loving husband may not come within the mischief of section 2 (*viii*) (*a*) provided there are adequate materials to interpret the same in a different way. The entire bundle of circumstances and the background of such occurrences as well as the effect on the life and the physical and mental well-being of the wife has to be considered in arriving at a finding whether the wife's life was rendered miserable thereby or not.[3] The Court must dissolve a marriage where habitual cruelty is proved.[4]

No rule as to the period required to prove habitual ill-treatment, can be laid down and such a treatment can arise as soon as the conduct of the husband shows that it is his habit to maltreat his wife.[5] Habitual cruelty may be proved even by a letter written by the wife to her father. Thus where in a suit for restitution of conjugal rights by a Muslim husband, the wife pleaded legal cruelty on the part of the husband, a letter written by the wife to her father was adduced in evidence to establish the plea. The letter ran as follows : "Today he—the husband beat me very much, I could not stand this beating. It is better that I should consider myself a widow. I would rather live without such a husband. Please come at once and take me from here or I should come with somebody or step out of the house all by myself. You please come and take me. I want to get judicial separation. As I am writing this letter I am weeping and shedding tears." It was held that the letter did not show any isolated beating but evidenced habitual beating on the part of the husband. The letter was therefore sufficient to establish legal cruelty on the part of the husband so as to disentitle him to any relief.[6]

Instances of cruelty. Cruelty can include the habitual use of abusive and insulting language to the plaintiff. The life of the plaintiff, who comes out of a respectable family and is well educated, can become miserable if the defendant were to habitually use abusive and insulting language to her,[7] or if he makes it a habit to disagree with her on each and every matter, without any rhyme or reason, and his conduct in this behalf is motivated by a desire to make her life miserable[8] or compelled

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1. AIR 1965 All 280.
2. PLJ 1975 A.J.&K. 21 (DB).
3. PLD 1969 Dacca 548.
4. PLD 1976 Lah. 1473.
5. AIR 1952 All 633 (Such treatment can arise where a wife is ill-treated by a husband even within first twenty days of her living with him).
6. AIR 1947 Allahabad 16.
7. PLD 1955 Sind 378=8 DLR (W.P.) Sind 1.
8. NLR 1981 Civ 685=PLD 1981 Lah. 732=PLJ 1981 Lah. 653=1981 Law Notes 618.

the wife to live at her parents house for a very long time and denied her his company.[9] or where he wanted to subject her to unnatural intercourse [10] But it has been held that the compulsion of wife to sexual intercourse by husband suffering from venereal disease does not amount to legal cruelty within the meaning of Cl. (*viii*) (*a*) of the section it would certainly amount to cruelty on his part.[11]

Where a husband not merely imputed adultery to his wife but also prosecuted her under section 494, Penal Code and attempted several times during such prosecution to get her arrested ; it was held that these circumstances constituted legal cruelty which entitled the wife to claim dissolution under Cl. (*viii*) (*a*) of section 2.[12]

Beating the wife. According to the Holy Quran the husband ranks higher than his wife but there is no authority for the proposition that he can beat or maltreat her without any reason. If he does so he cannot avoid the legal consequences of his act.[13]

Disposal of wife's property. The disposal of property which would attract the provisions of Cl. (*viii*) (*d*) is disposal by a husband, without the wife's consent, of a substantial portion of her property, not for her benefit but for his own selfish ends, and in a wasteful manner, with the intention of depriving her of her property.[14] It is just disposal without any intention that makes the conduct actionable. If the disposal is with her consent, then the matter should be pursued to the full implications of that consent. If, for instance, the plaintiff allowed her husband to sell her property or even requested him to do so with the object of depositing the sale proceeds in the bank and the husband after complying with the first part of the request appropriated the money to his own use. It will constitute disposal under the clause.[15] The fact that the disposal was to meet a pressing need of the husband does not make the disposal of property legitimate so as to take it out of the scope of this provision.[16]

Equitable treatment of more than one wife. The neglect of a husband to maintain within the meaning of Cl. (*ii*) of the section one of his two wives affords the neglected wife a valid ground to claim dissolution under sub-clause (*f*) of Cl. (*viii*).[17] Where the wife began to live separately because of the ill-treatment of the husband, and the latter did not make any effort to treat her at all, much less to treat her equitably, in accordance with the injunctions of Qur'an, the case falls within

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9. AIR 1941 Sind 23. (The wife was compelled to live with her parents for 12 years).
10. 1982 SCMR 478.
11. 1947 All L W 538.
12. PLD 1963 Dacca 947 (DB)+AIR 1952 All 145.
13. NLR 1981 Civ 685=PLD 1981 Lah. 732=PLJ 1981 Lah. 653=1981 Law Notes 618.
14. AIR 1945 Lah. 56.
15. PLD 1954 Lah. 614=7 DLR W.P. 87 (DB).
16. PLD 1954 Lah. 614=7 DLR W.P. 87 (DB).
17. AIR 1943 Lah. 310 (DB).

section 2 (*viii*) (*f*)[18] Therefore where the husband had been living with another wife for 20 years so that there had been no marital life for the plaintiff (wife) for a very long time, it would be cruel to continue the marriage and the Court would grant her relief by way of dissolution of marriage.[19]

Conduct of wife. Where the fault is either of the wife herself or of her parents and the husband has not been permitted to treat her at all, either equitably or inequitably, the fact that the husband has married a second wife does not entitle the wife to claim dissolution under Cl. (*viii*) (*f*)[20]

10. Apostasy from Islam. Prior to the Dissolution of Muslim Marriages Act, 1939, apostasy of either party to a Muslim marriage operated as a complete and immediate dissolution of the marriage.[21] But under the Dissolution of Muslim Marriages Act, 1939, section 4, renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage, but she is entitled to obtain a decree of divorce on any of the grounds enumerated in section 2 of the Act.

Apostasy by a woman converted to Islam. Dissolution of Muslim Marriages Act, section 4, has a proviso to the effect that it shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith. It means that the section applies to Muslim women only and where a woman has changed her faith and embraced Islam she can get her marriage dissolved by re-embracing her former faith. She would however not be able to take advantage of the proviso if she embraced any faith other than the one from which she had been converted to Islam. Thus a Hindu woman converted to Islam would not be able to claim a dissolution of her marriage by embracing Christianity.

Apostasy of a Muslim male. The law continues to be that the marriage of a Muslim male with a Muslim female shall stand dissolved on his apostasy.

Inequitable treatment of more than one wife. The neglect of a husband to maintain within the meaning of clause (*ii*) of the section one of his two wives affords the neglected wife a valid ground to claim dissolution under sub-clause (*f*) of clause (*viii*).[22] Where the wife began to live separately because of the ill-treatment of the husband, and the latter did not make any effort to treat her at all, much less to treat her equitably, in accordance with the injunctions of Quran, the case falls within section 2 (*viii*) (*f*).[23] Therefore where the husband had been living with another wife for 20 years so that there had been no

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18. AIR 1941 Sind 23=ILR 1941 Kar. 114.
19. 17 DLR 687.
20. AIR 1944 All 23=ILR 1944 All 27 (DB).
21. AIR 1937 Lah. 759+AIR 1933 All 433+AIR 1938 Lah. 482.
22. AIR 1943 Lah. 310 (DB).
23. AIR 1941 Sind 23=ILR 1941 Kar. 114.

marital life for the plaintiff (wife) for a very long time, it would be cruel to continue the marriage and the Court would grant her relief of dissolution of marriage.[24]

Conduct of wife. Where the fault is either of the wife herself or of her parents and the husband has not been permitted to treat her at all, either equitably or inequitably, the fact that the husband has married a second wife does not entitle the wife to claim dissolution under clause (*viii*) (*f*).[25]

11. Clause (ix)—Any other ground. In the application of clause (*ix*) of section 2, a reference to Mulim Law is necessary where the ground for dissolution is not covered by any one of the earlier clauses.[1] Some such grounds for dissolution available under Muslim Law are given below.

(*a*) *Charge of adultery against wife.* The Act nowhere lays down that false imputation of unchastity or a false charge of adultery against the wife is a good ground for divorce. This ground falls within the omnibus provisions of clause (*ix*) of section 2 of the Act.[2] In cases where a marriage is dissolved by the Courts in Pakistan on account of an accusation of adultery it is technically not a case of *Li'an* for there has been no imprecation but *Li'an* has always been understood in this sense in prepartition India, and it cannot be said that this is an improper use of the term once it is conceded that dissolution is the result in the case of *li'an* or the accusation. It is because the term was understood in this sense in pre-partition India that in Muslim Personal Law (Shariat) Application (Amendment) Act, 1951, *Li'an* is referred to as one of the grounds of dissolution. The reference in these Acts to *li'an* can be only to dissolution for accusation of adultery, because the procedure of *li'an* cannot, under the existing law, be applied at all.[3] In case where dissolution is claimed on the ground that the husband has accused his wife of adultery, the case of the wife should be that the charge against her is not true but she is not bound to prove the falsity of the charge. It is for the husband to show that the charge is true if that be his case. So a decree of dissolution may be based on a charge of adultery which is denied and which is not proved to be true.[4]

Retraction of charge of adultery. It is not the right of the husband to defeat a claim for dissolution based on a false charge of adultery by just saying that he would withdraw the charge. A retraction, in order that it may be effective, has in the first place, to be sincere. In the second place the husband has to satisfy the Court that he had brought the charge *bona fide* and not carelessly. A retraction can be of no help to the husband if his sole object is to defeat the suit of the wife. A true and effective retraction takes place when a husband comes to Court and

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24. 17 DLR 687.
25. AIR 1944 All 23=ILR 1944 All 27 (DB).
1. PLD 1952 Lah. 460=PLR 1953 Lah. 1045.
2. PLD 1958 Dacca 62=9 DLR 528+AIR 1962 Allahabad 570 (DB).
3. PLD 1957 Lah. 998=PLR 1958 (1) W.P. Lah. 735=10 DLR W.P. 19.
4. PLD 1957 Lah. 998=10 DLR W.P. 19.

says, "I brought this charge because I was misled by certain circumstances. The circumstances were such that one would reasonably come to the conclusion that my wife was guilty. I have found now that, in fact, she is altogether innocent. I am very sorry I withdraw the charge." In such a case, the Court allows the retraction because the husband has not behaved in an improper manner at all and it is simply a case of a *bona fide* misapprehension.[5] A retraction to be a valid retraction under the Muslim Law must imply an admission of having made the charge and then acknowledgment that the charge was false. Where, therefore, a person denies having made the charge and says that if such a charge has been made, he is prepared to retract it, that is not sufficient to constitute a retraction according to the rules of Muslim Law, for, thereby he saves himself from punishment for slander or perjury in the previous trial if any, as also defeats the wife's suit for the dissolution of marriage.[6] If a husband brings a charge on strong grounds and on coming to know that he has been misled retracts the charge *bona fide* and in all sincerity, and not merely as a device to defeat the suit of the wife, that may be a good ground for not decreeing dissolution.[7]

Cases where charge of adultery does not furnish ground for dissolution. Under the Hanfi Law, there is no *li'an* in a case where the wife is a *kitabia*, or a slave girl, or a minor, or an insane person. So in respect of all these, the husband may bring false charge without incurring any liability in respect of the marital tie.[8]

(b) Incompatibility of temperament With reference to the parties to a marriage, the expression "incompatibility of temperament" must be understood in relation to the various forces acting on the couple which compel or induce them in the direction of harmonious and happy association. There are in favour of such a result, a considerable number of powerful factors. Besides the fact that the pair belong to opposite sexes and may be assumed to possess a normal desire for making a happy union of their lives, there are various pressures which are exercised by their respective families and by society, and is in addition, through the procreation of children, the forces which guide them in the direction of mutual adaptation are greatly reinforced by the affection which accompanies the raising of a family. Where therefore, it is found that there is such a lack of agreement between the couple as to fall within the full meaning of the expression "incompatibility of temperament" it must be traced to a total lack of sympathy between them, such as induces a resistance to mutual adaptation despite the various influences, guiding the couple in that direction. There should and must be basically hatred or aversion on the part of one or both of the parties to the marriage to produce such a result. The best evidence to establish incompatibility of temperament must necessarily be that afforded by instances of such behaviour. It is of course entirely insufficient, to establish incompatibility of temperaments in a particular case, for one of the spouses to declare that their temperament are completely

5. PLD 1958 Lah. 59=10 DLR W.P. Lahore 50.

6. PLD 1963 Dacca947=14 mLR 854 (DB)+PLD 1958 Dacca 62=9 DLR 528.

7. PLD 1957 Lah. 998=19 DLR (W.P.) Lah. 19+PLD 1693 Dacca 947 (DB)+AIR 1962 All. 570 (DB).

8. PLD 1957 Lah. 998=10 DLR (W.P.) Lah. 19.

conflicting and they cannot pull together.[9] One of the earlier views was that such matters as incompatibility of temperaments, aversion or dislike cannot form a ground for a wife to seek dissolution of her marriage, at the hands of a Qazi or a Court, but they fall to be dealt with under the powers possessed by the husband as well as the wife under Muslim Law, as parties to the marriage contract.[10] But the Supreme Court has held that if the Court regards the continuance of the marriage as improper, there is no further limitation on its jurisdiction to dissolve the marriage.[11] This decision makes incompatibility of tempraments to be a good ground for dissolution of marriage if the wife satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union.[12] The wife is not required to make out a reasonable cause for her aversion. She has not to give reasons amenable to an objective test whereupon the Court can base its decision. It is for the Court to look at all the circumstances of the case to satisfy its conscience that the parties could not live in marital union within the limits of God. If the wife is adamant that she has developed a fixed aversion and if all attempts at reconciliation have failed, there is little choice for the Court except to grant a decree, for, the consequences in adopting any other course may be disasterous.[13] Even when the grounds on which *khula* is claimed are not proved, the Court has yet to consider whether the marriage may be dissolved on the grounds of incompatibility of temperament.[14] Where there are allegations and counter-allegations and the husband had admitted to have lodged a case of theft against his wife. Moreover, the fact that after the dissolution of marriage the wife had contracted another marriage and had borne a child could not be lost sight of. The marriage was, therefore, rightly dissolved and no case was made out for interference, in constitutional jurisdiction.[15] Incompatibility of temperaments cannot be claimed on the ground of disparity of the ages of the spouses. There is no recorded case either in the judicial authorities or in the authentic books, of a union having been dissolved on the mere ground of disparity of ages between the husband and the wife.[16] Similarly dissolution cannot be ordered on the mere ground that the wife has stayed away from her husband for 7 years, unless she can show that she has done so for sufficient cause.[17]

(c) '*Khula*.' A divorce by *khula* is effected with the consent of the parties and at the instance of the wife when she gives or agrees to give consideration to the husband for her release and the husband accepts the offer.[18] *Khula* may be by agreement between the parties or it may

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9. PLD 1952 Lah. 113=PLR 1952 Lahore 89=4 DLR 134 (FB).
10. PLD 1952 Lah. 113=4 DLR 134 (FB)+AIR 1945 Lah. 51+AIR 1945 Lah. 56.
11. PLD 1967 S.C. 97+PLD 1959 Lahore 566=11 DLR Lah. 193(FB).
12. PLD 1967 S C 97.
13. 1981 CLC 63 (Lah).
14. NLR 1980 Civ. 344=1980 CLC 1212.
15. 1980 CLC 1212=NLR 1980 Civ. 344.
16. PLD 1950 Lah. 504=PLR 1950 Lahore 773.
17. PLD 1981 Lah. 335.
18. PLD 1952 Lah. 113.

be effected through the Court where the husband is not agreeable to the proposition. Thus the Court may grant *khula* even when the husband is not willing to oblige the wife in the matter [19] This is so even when no other ground alleged by the wife for dissolution of marriage is made out in the suit for dissolution of marriage. In each individual case the issue of *khula* would have to be considered on its own merits; and despite the failure of the wife on other issues, there might be some elements in and facts of those other issues, which either individually or when combined together might furnish sufficient ground for dissolving the marriage on the ground of *khula*.[20] The wife is entitled to a dissolution of marriage on restoration of what she received in consideration of marriage if the Judge apprehends that the parties will not observe the limits of God [21] However, it is not correct that in cases of *khula*, *ipso facto* the wife should return all benefits. This has to be determined on the facts and circumstances of each case and balance has to be maintained. If a wife seeks *khula* without pointing out to any default of the husband and the Court considers it proper to grant a decree for *khula* then the wife should be ordered to return all the benefits received by her and also forego such rights under which she can claim any benefit. However, while passing such an order the Court should take into consideration the reciprocal benefits received by the parties.[22] It is not necessary for the wife to return the dower received or her right to dower for ob aining *khula*. Where the husband did not make any claim for return of dower nor the wife had waived her claim for dower and secondly, the decree passed by the Court granting *khula* did not make it a condition that the appellant will forego her right to claim dower; the wife was held to be entitled to recover dower from the husband.[23]

Though it is abominable on the part of the husband to have more than the dower itself, in a case of separation by *khula*, yet if he insists, it is legally permissible for him to demand something more than the dower, and to the extent that he might have been out of pocket, in respect of gifts, given to the wife on marriage, he may, in law, demand restitution. This would necessitate an enquiry into the facts and the final decision as to what compensation must be paid by the wife for her relief, must rest with the Court.[24] It follows that it is necessary for the Court to ascertain in a case of *khula* what benefits have been conferred on the wife by the husband as a consideration for the marriage, and it is in the discretion of the Court to fix the amount of compensation [25]

The law does not grant a right to the wife to come to the Court at any time and obtain *khula* if she is prepared to restore the benefit she has received. There is in an important limitation on her right. The Judge

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19. NLR 1982 Civ. 158 (DB)+PLD 197? Lah. 805=PLJ 1975 Lah. 241.
20. PLD 1975 Lah. 805=PLJ 1975 Lah. 241=L. N. 1973 Lah. (NUC) 348.
21. PLD 1975 Lah. 805=PLJ 1975 Lah. 241+PLD 1959 Lah. 566=11 DLR W.P. 193 (FB).
22. NLR 1982 AC 104.
23. NLR 1982 AC 104.
24. PLD 1967 S C. 97.
25. 1981 CLC 68 (Lah)+PLD 1967 S.C. 97.

will grant dissolution only if the Judge apprehends that the limits of God will not be observed, that is in their relation towards one another, the spouses will not obey God ; that a harmonious married state as envisaged by Islam will not be possible. The wife cannot have divorce for every passing impulse. The Judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift.[1] In other words in deciding whether *khula'* is deserved, the Court has to see whether efforts at reconciliation have failed, whether the rift is so serious that there remains no possibility of the spouses living in amity and if the wife is willing to return the benefits she has received from the husband. There is no authority to support the proposition that in order to secure her release, the wife must come out with logical, objective and sufficient reasons such as would satisfy the ordinary Court. All that the Judge is required to do is to see if according to his appreciation of the situation his conscience is satisfied that there is no possibility of the parties living in harmony. For, forcing the parties to live in a hateful union is not in accord with the concept of marriage in Islam. No Judge could possibly take upon himself the responsibility of forcing the parties into a situation which leaves them no choice but to go astray or to adopt a sinful life.[2]

Khula was granted where the wife stated that on account of non-payment of dower, ill-treatment, non-payment of maintenance allowance and an accusation that she gave birth to an illegitimate child, she was forced to leave her husband.[3]

Plea of 'khula' may be raised in appeal. *'Khula'* is a legal issue ; it may be raised in the pleadings in the trial Court or at appellate stage, in presence of evidence relating to dower. It may be decided without introducing an amendment in the pleadings and producing further evidence.[4]

(*d*) *Talaq-bil-mal.* Where the husband agrees to divorce his wife on receipt of a certain sum of money and he does so after pronouncing *talaq* thrice, the Court would grant *talaq-bil-mal* the wife.[5]

12. Impotence of husband. Where dissolution is sought on the ground of impotence of the husband, and the Court agrees with the plaintiff, the Court is required to give an opportunity to the defendant within one year of the order to show that he had ceased to be impotent. But this need not be done *suo motu*. It is only when the defendant prays that an opportunity be given to him that the Court is bound to do so.[6]

13. Pleadings. In case of dissolution of marriage plaintiff has to disclose the statement of facts giving rise to the cause of dissolution of marriage. On conclusion of evidence, relief may be allowed by the Court on all or any of the proved grounds acknowledged by law of Dissolution of Muslim Marriages Act. The law lays down specific

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1. NLR 1982 CLJ 69=PLD 1981 A. J. & K. 94+PLD 1959 Lah. 566=11 DLR W P. 193 (FB)+PLD 196 S C. 97+PLD 1975 A. J. & K. 27.
2. 1981 CLC 143= PLJ1981 Lah. 9.
3. NLR 1982 CLJ 69=PLD 1981 A. J. & K. 94.
4. NLR 1982 CLJ 69=PLD 1981 A. J. & K. 94.
5. NLR 1982 AC 92 (A. J. & K.).
6. PLD 1982 Kar. 449.

grounds for dissolution of a marriage of Muslim spouses. When statement of facts is disclosed in pleadings, but definite and specific ground constituted by such facts, is not raised in pleadings, on proof of such facts, the Court cannot refuse relief merely on account of omission to specify the ground. A relief flowing from proved facts, cannot be denied. Strictly speaking this cannot be called an omission in true sense of the term. Similarly, where a statement of facts is disclosed and parties lead evidence in support and rebuttal, failure of a party to get an issue framed or negligence of the Court to constitute an issue, would not render it incompetent to grant relief flowing from the proved facts. On that premises of the proposition is case of divorce, the Court has to weigh the evidence of parties and if it arrives at a conclusion that all or any one of the legal grounds are proved it cannot withhold relief of dissolution of marriage.[7]

14. Second marriage after dissolution of first marriage. Once a wife is armed with a decree for the dissolution of marriage, she is at liberty to contract a second marriage, unless and until the husband obtains injunction from the appellate Court, restraining her from contracting a second marriage. Serious complications are bound to arise, when the appeal comes for hearing after a lapse of several years, when in the meantime, the respondent has contracted herself in second marriage and given birth to children. Therefore the counsel who files an appeal against the dissolution of marriage should do so as expeditiously as possible within the period of limitation, and should invariably make an application to the appellate Court for injunction, restraining the respondent not to re-marry during the pendency of the appeal.[8]

15. Appeal. A finding of fact reached by the lower appellate Court on an appraisal of the evidence by it, is not to be disturbed even though the finding be fallacious unless the fallacy involves an error of law or of procedure. But in a case where the lower appellate Court has not applied its mind at all to a material piece of evidence, oral or documentary, and where the finding of fact is based on an oversight or misstatement of that evidence, the High Court in second appeal would be hesitant to accept that finding as conclusive, and it will then be open to the High Court to review the evidence itself to give effect to correct conclusions deducible from that evidence and in consonance with the correct weight of that evidence. Therefore where the lower appellate Court had not properly considered the evidence as to the age of the girl when she exercised the option of puberty and had wrongly come to the conclusion that the option was exercised after she had attained the age of 18 years, the High Court set aside the finding in second appeal.[9]

3. *Notice to be served on heirs of the husband when the husband's whereabouts are not known.* In a suit to which clause (*i*) of section 2 applies : (*a*) the names and addresses of the persons who would have been heirs of the

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7. NLR 1982 CLJ 69—PLD 1981 A. J. & K. 94.
8. PLD 1967 Pesh. 324.
9. PLD 1965 (W.P.) Lah 32.

husband under Muslim Law if he had died on the date of the filing of the plaint shall be stated in the plaint.

(*b*) notice of the suit shall be served on such persons, and

(*c*) such persons shall have the right to be heard in the suit :

Provided that paternal-uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. *Effect of conversion to another faith.* The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage :

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2 :

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

1. Section not retrospective. Section 4 is not retrospective. It applies only to renunciation or conversions which might take place after the Act came into force. Hence apostasy of either party to a Muslim marriage prior to the coming into force of the Act *ipso facto* dissolved the marriage.[10] Therefore where a Muslim woman embraced Christianity before the coming into force of this Act, her marriage with her Muslim husband stood dissolved. On re-embracing Islam she married 'R' another Muslim, who acknowledged her as his wife in Civil litigation. There was also other evidence to show that she was the wife of *R*. It was held that she was not obliged to prove her marriage with *R* beyond reasonable doubt. The marriage was held to be valid, and her children from *R* were legitimate.[11]

5. *Rights to dower not to be affected.* Nothing contained in this Act shall affect any right which a married woman may have under Muslim Law to her dower or any part thereof on the dissolution of her marriage.

6. (Repeal of section 5 of Act, XXVI of 1937) Rep. by the Repealing and Amending Act, 1942 (XXV of 1942), section 2 and First Sch.

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10. PLD 1981 S.C. 56=PLJ 1981 S.C. 100=NLR 1981 AC 163+AIR 1941 Lah. 292+AIR 1941 Lah. 291+AIR 1940 Lah. 448.

11. NLR 1981 AC 163=PLD 1981 SC 56=PLJ 1981 SC 100.

WEST PAKISTAN FAMILY COURTS ACT 1964 (ACT XXXV OF 1964)

An Act to make provision for the establishment of Family Courts.

[First published, after having received the assent of the Governor of West Pakistan in the Gazette of West Pakistan, dated the 18th July 1964) (Assent received on 14th July 1964.]

Preamble. Whereas it is expedient to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith ;

It is hereby enacted as follows :

1. *Short title, extent and commencement.* (1) This Act may be called the West Pakistan Family Courts Act, 1964.

(2) It extends to the whole of [12][Pakistan].

(3) It shall come into force in such area or areas and on such date or dates as Government may, by notification in the official Gazette, specify in this behalf.[13]

[14][(4) Nothing in this Act shall apply to any suit, or any application under the Guardians and Wards Act, 1980, pending for trial or hearing in any Court immediately before the coming into force of this Act, and all such suits and applications shall be heard and disposed of as if this Act were not in force.

(5) Any suit, or any application under the Guardians and Wards Act, 1890, which was pending for trial or hearing in any Court immediately before the coming into force of this Act, and which has been dismissed solely on the ground that such suit or application is to be tried by a Family Court established under this Act, shall, notwith-

12. Subs by P.O., 4 of 1975.

13. The Act has been enforced in the whole of Pakistan except Tribal Areas *vide* Notification No. Integ. 10-31/64, dated 21-2-1967.

14. Ins. by W P. Family Courts (Amendment) Ordinance, 1966 (X of 1966), S. 2.

standing anything to the contrary contained in any law, on petition made to it in that behalf by any party to the suit or application, be tried and heard by such Court from the stage at which such suit or application had reached at the time of its dismissal].

Synopsis

1. Applicability.
2. Retrospective operation of Act.

1. Applicability. West Pakistan Family Courts Act, 1964 is not only applicable to Muslims but also to non-Muslims and the Family Court concerned had jurisdiction to decide the question of dower in case of Qadianis.[15] However in the cases of dissolution of marriages among non-Muslims Family Courts have no jurisdiction because the Family Court can decree dissolution only in cases falling under Dissolution of Muslim Marriages Act.[16]

The Act does not apply to proceedings under Divorce Act [17] Therefore the Act does not apply to Christians.[18]

2. Retrospective operation of Act. It is clear from reading subsections (4) and (5) of this section that the Legislature intended that only suits and applications under Guardians and Wards Act are to be disposed of by the Courts in which they were pending at the time of the coming into force of the Act. In other words, the necessary implication and intendment derivable from these two provisions is that all other matters pending at the time of the coming into force of the Act will be taken up and disposed of by the new forums created by the Act.[19]

2 *Definitions.* [20][(1) In this Act unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

(*a*) "Arbitration Council" and "Chairman" shall have the meanings respectively assigned to them in the Muslim Family Laws Ordinance, 1961.

Synopsis

1. Arbitration Council.
2. Chairman.

1. Arbitration Council. To settle all disputes referred to in the

15. 1981 CLC 195.
16. 1982 PSC 71 (F. Sh. C.).
17. PLD 1971 Kar. 887 (DB).
18. PLD 1978 Kar. 336 (DB)
19. PLD 1969 Pesh. 62.
20. Renumbered by W.P. Family Courts (Amendment) Ord., 1966 (X of 1966), S. 3.

Muslim Family Laws Ordinance, an Arbitration Council is to be convened by the Chairman. It shall consist of the Chairman, and one representative of the husband another of the wife, who are parties to the dispute. The Ordinance does not limit the powers of the council, in a case in which a party fails to nominate its repsesentative to the council. On receiving a complaint the chairman of the council, has to call upon the parties to nominate their representatives within seven days of the receiving of the notice. If they do not do so within that period the Council starts proceedings without the representative of the party which has failed to appoint one. This provision is a safeguard against the delaying tactics which may be used by one of the parties who is not willing to bring the matter before the council.

Substitution or replacement of representative. Where a nomination has been made but the representative nominated by a party is unable to attend on account of illness, or some other reason or has lost confidence of the party or wilfully absents himself from the meeting of the council, the Chairman may permit the party to revoke the nomination and may give him further time for making a fresh nomination. This provision has been made to give an opportunity to party to appoint another representative when the first one, appointed *bona fide*, does not perform his duties due to some cause beyond the control of the party to the proceedings. It is to be noted that where the party does not nominate a representative no further opportunity is to be given to him or her to do so. Time is granted for the nomination of a representative only in a case where the party is not at fault and has not tried to delay or obstruct the proceeding of the Council. As a further safeguard the rules provide that in case of a new nomination the proceedings before the Council shall not commence *de novo*. Thus the proceedings shall continue after the appointment of the new representative from the point where the previous one left the Council. Only in exceptional cases the Chairman is empowered to permit *de novo* proceedings. In such cases he has to record his reasons in writing for doing so.

2. Chairman. The word "Chairman" has been defined in the Muslim Family Laws Ordinance as follows :

"Chairman" means the Chairman of the Union Council or a person appointed by the Federal or a Provincial Government, or by an officer authorised in that behalf by any such Government to discharge the functions of chairman under this Ordinance. Provided that where the Chairman of the Union Council is a non-Muslim ; or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason unable to discharge the functions of Chairman, the council shall elect one of its Muslim members as Chairman for the purpose of this Ordinance.

Non-Muslim Chairman. Where a non-Muslim has been appointed Chairman of the Union Council, the Ordinance provides that the Council shall elect a Muslim as its chairman for the purpose of the Ordinance. This has not to be done for each of the disputes which come before the Arbitration Council. On the other hand a chairman is appointed for the

same term as the other chairman with the difference that he acts only in matters which fall under the Ordinance. His tenure of office is during the term of his membership of the Council.

Inability of chairman to act. Even a Muslim chairman may be unable to act on account of several reasons. They are as under :

1. When he himself wishes to make an application to the Arbitration council.
2. On account of illness.
3. For any other reason.

In such a case the Council has to elect a Muslim member as its chairman for the purpose of the proceedings under the Ordinance. But the difference between this election and the election in case of a non-Muslim chairman is that in the former case the Chairman under the Ordinance acts only during the inability of the regular chairman to act on the Council, whereas in the latter case the chairman continues to act during the whole term of his office or so long as the non-Muslim Chairman remains in office.

Prejudiced or interested chairman. Under R. 6-A of the Rules under the Ordinance it has been specifically stated that if any party to the proceedings considers the chairman to be interested in favour of the other party, he may apply to the collector for the appointment of a different chairman to hear the dispute. On receiving such an application the officer shall stay the proceedings before the Arbitration Council till the disposal of the application. If he deems it fit he may appoint another Chairman for the purpose of the dispute. It is to be noted that the Chairman so appointed acts only in the matter of that particular dispute.

(*b*) "Family Court" means a Court constituted under this Act ;

1. Scope. The powers of 1st Class Magistrate have been conferred on every Judge of the Family Court so that he may act under section 488, Cr. P.C. and may make orders for maintenance under that section.[21]

(*c*) "Government" means the [22][Provincial Government].

(*d*) "Party" shall include any person whose presence as such is considered necessary for a proper decision of the dispute and whom the Family Court adds as a party to such dispute ;

1. Surety for payment of dower. If there is a dispute about dower, it relates to marriage and the liability of a surety *qua* dower is a matter connected with such dispute. Therefore the husband and the

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21. Notification No. Integ. 10-31-64/1 dated 5-4-1966.
22. Subs. by P.O. 4 of 1975.

surety are both necessary parties insofar as the determination of questions relating to liability to pay dower are concerned.[23]

(e) "prescribed" means prescribed by rules made under this Act.

[24][(2) Words and expressions used in this Act but not defined, shall have the meanings respectively assigned to them in the Code of Civil Procedure, 1908].

3. *Establishment of Family Courts.* Government shall establish one or more Family Courts in each District or at such other place as it may deem necessary and appoint a Judge [25][for] each of such Courts.

Synopsis

1. Kalat. 2. Family Courts, nature of.
3. Pecuniary jurisdiction of Family Courts.

1. Kalat. A family Court for Kalat Division has been established with headquarters at Kalat with President of Majlis-e-Shoora, Kalat, as its judge.[1]

2. Family Courts, nature of. The provisions of the Family Courts Act make it clear that the intention of law is to set up Courts and entrust matters to them in their capacity as Courts and not as a *persona designata.* A Family Court is, therefore, a Court of law as contemplated in Article 102 read with Article 242 of the Constitution of 1962.[2]

Family Court is a Civil Court. Though the provisions of Evidence Act and C.P.C. are excluded under section 17 from applying to proceedings before the Family Courts yet that would not in any way change the character of the Family Court as a Civil Court.[3]

3. Pecuniary jurisdiction of Family Courts. Family Courts have unlimited pecuniary jurisdiction. They are not ordinary Courts whose jurisdiction is limited by the West Pakistan Civil Courts Ordinance, 1962 to Rs. 25,000.[4]

[5][4. *Qualification of Judges.* No person shall be appointed as a Judge of a Family Court unless he is or has been

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23. NLR 1979 Civ. 67=PLD 1979 Lah. 176=1979 LN 31.
24. Ins by W.P. Family Courts (Amendment) Ordinance, 1966 (X of 1966), S. 3.
25. Subs. by W.P. Family Courts (Amendment) Ordinance, 1966 (X of 1966), S. 4.
1. Notification No. Integ. 10-31/64 (*II*), dated 30-1-1968.
2. PLD 1968 Lah. 987.
3. PLD 1978 Lah. 716 (DB).
4. PLD 1968 Kar. 650.
5. Subs. by W.P. Family Courts (Amendment) Ordinance, 1966 (X of 1966), S. 5.

a District Judge, an Additional District Judge, [6][aCivil Judge or a Qazi appointed under the Dastur-ul-Amal Diwani, Riasat Kalat].

1. Judge need not be Muslim. It cannot be said that a Judge of a family Court should be a Muslim : though without doubt he occupies a position akin to that of a *Qazi* since he could effect a divorce on any ground, on which it could be granted under the Muslim Law. The emphasis is on the functions which are alike and not that the Judge should profess Islam.[7]

5. *Jurisdiction.* Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

Synopsis

1. Ouster of jurisdiction of ordinary Courts.
2. Pecuniary jurisdiction of family Courts.
3. Maintenance.
4. Custody of children.
5. Restitution of conjugal rights.
6. Dissolution of marriage.
7. Jacitation of marriage.
8. Dower, Suit for.
9. Objection to jurisdiction.

1. Ouster of jurisdiction of ordinary Courts. It is clear from the provisions of the Act that the Legislature intended that only suits and applications under Guardians and Wards Act were to be disposed of by the Courts in which they were pending at the time of the coming into force of the Act. In other words, the necessary implication and intendment derivable from these two provisions is that all other matters pending at the time of the coming into force of the Act will be taken up and disposed of by the new forums created by the Act. This intendment is further supported by the use of strong language in section 5 of the Act, wherein the words used : "the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule." Apart from stress on the exclusiveness of the jurisdiction, the three stages of the proceedings are dealt with separately, *i.e.* (*i*) entertaining a matter ; (*ii*) hearing a matter ; and (*iii*) adjudicating a matter. This provides sufficient scope for the proposition that if a matter has been entertained in another forum, on the coming into force of the Act if that matter has gone to the exclusive jurisdiction of a forum created by the Act, it shall be heard and adjudicated by the new forum.[8]

2. Pecuniary jurisdiction of family Courts. Family Courts have unlimited pecuniary jurisdiction. They are not ordinary Courts whose

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6. Subs. by W.P. Act (1 of 1969), S. 2.
7. PLD 1974 Kar. 20 (DB).
8. PLD 1969 Pesh. 62+PLD 1969 Lah. 512=21 DLR W.P. 253.

jurisdiction is limited by the West Pakistan Civil Courts Ordinance, 1962 to Rs. 25,000.[9]

3. Maintenance. Section 5 read with section 20 of West Pakistan Family Courts Act, 1964 has ousted the jurisdiction of the Magistrate to deal with applications under section 488, Cr. P.C.[10] This is so even where the proceedings were pending before a Magistrate prior to the coming into force of the Act.[11] Where orders were passed by a Magistrate under the section after enforcement of W. P. Family Courts Act, they were set aside as without jurisdiction.[12]

Where an application was made to a Family Court when power under section 488, Cr. P. C. has not been conferred on the Judge, it was held that the Court could grant maintenance under section 5.[13] Where an application for maintenance was made to Family Court under section 488, Cr. P. C. the contents of the application including the demand therein for past maintenance beyond the date of application clearly show that in pith and substance, the application was for grant of maintenence under general law, as under section 488 of ths Cr. P. C, maintenance cannot be claimed beyond the date of application. It was held that the Family Judge was conscious from the very first act of entertaining the application for maintenance till its decision as also throughout the proceedings that he was trying the same as Family Court under section 5 of the Family Courts Act treating the subject-matter as one of a suit for maintenance under the general law and not under section 488 of the Cr. P. C. It cannot be denied that the Judge, notwithstanding the mention of a wrong provision of law in the heading of the application for maintenance, could entertain it under correct provision of law and within a jurisdiction which was available to him.[14]

Mistake as to description of Court. In the judgment of the Family Judge the description of the Court was mistakenly given as 'administrative Civil Judge'. The decree sheet clearly showed that the suit was decided by the trial Court as "Judge of Family Court". The entire proceedings were conducted by the Judge, as 'Family Court', therefore, the mere misdescription of the Court in the formal heading and ending parts of the judgment was inconsequential. The misdescription of the Court is on account of an inadvertent mistake committed by the staff of the Family Court Judge. The trial was held to have been conducted by Family Court and not by an ordinary Civil Court.[15]

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9. PLD 1968 Kar. 650.
10. PLJ 1981 Lah. 424+PLD 1981 Lah. 761 (PLJ 1978 Cr. C. 11 does not lay down correct law)+PLD 1969 Pesh. 62+PLD 1971 Lah. 813+1972 P. Cr. L.J. 1311 (Lah.).
11. PLD 1969 S C. 187=21 DLR S.C. 123+PLD 1981 Lah. 761(1969 P. Cr. L.J. 269 does not lay down correct law)+1972 P. Cr. L.J. 1311 (Lah.)+1968 P. Cr. L.J. 525 (Lah)+1972 P. Cr. L J. 351 (Kar.)+1972 P. Cr. L.J. 730 (Lah.)+1968 P. Cr. L.J. 1373 (Lah).
12. 1975 P. Cr. L.J. 678.
13. Law Notes 1975 Lah. 446.
14. PLD 1978 Lah. 696 (decided on 23-12-1974).
15. PLD 1978 Lah. 696 (decided on 23-12-1974).

Maintenance of wife. According to Islamic injunctions it is the obligation of a husband to maintain his wife till she disobeys him without any good cause and that being so a husband is obliged to pay even the arrears of maintenance if not paid during the subsistance of the marriage if the wife has not given any cause for their non-payment. If an obligation under the law has not been fulfilled for sometime by paying the maintenance, a husband cannot be absolved of his responsibility to fulfil that obligation even at a later stage, as such the arrears of maintenance would be considered to be a debt upon the husband who is liable to pay the same even in the absence of any agreement or a decree in favour of the wife. According to Islam a wife has only to show for payment of maintenance allowance that she has been neglected by her husband for such and such time and has not been paid maintenance without any fault [16] Where the husband alleges that he has divorced his wife but the wife produces a decree of a Civil Court annulling the dissolution of marriage, the husband is bound to maintain the wife notwithstanding his plea.[17]

Maintenance of children. An able bodied Muslim father is bound to pay maintenance of his children.[18] The fact that their mother, in whose custody they are, is employed and earns money does not affect his obligation. Even if she earns sufficient amount to maintain her children it is the duty of the petitioner under the law, being their father, to maintain them till they attain the age of majority. He is bound to pay educational expenses of the children from the time when they begin to go to school.[19]

Children born abroad. According to section 14 of the Succession Act of 1925 the domicile of a minor follows the domicile of the parents from whom he derives his domicile of origin. Therefore where the father is a citizen of Pakistan his children would be citizens of Pakistan by descent as provided by section 5 of the Citizenship Act, irrespective of the fact that they were born in U. K. As such the Judge, Family Court at the place where the children are residing would have jurisdiction to entertain an application for grant of maintenance to them.[20]

Past maintenance. Maintenance is one of the items mentioned in the Schedule of the West Pakistan Family Court Act, 1964, which read with section 5, would show that the Family Court, apart from its competency to deal with a matter under section 488, Cr P C (if Magisterial powers are conferred on it), has the jurisdiction to decide all questions of maintenance.[21] If it is found that the husband has been negligent in maintaining her in spite of being obliged under the law to do so, then the wife would be entitled not only to future maintenance but

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16. PLD 1981 Lah. 761=PLJ 1981 Lah. 424.
17. PLD 1978 Lah. 696.
18. PLD 1976 Lah. 1466.
19. NLR 1982 CLJ 35=PLJ 1981 Lah. 246=PLD 1981 Lah. 280.
20. NLR 1982 CLJ 35=PLD 1981 Lah. 280=PLJ 1981 Lah. 246.
21. PLD 1975 Lah. 571=PLJ 1975 Lah. 227.

even to past maintenance for the period during which she has not been maintained.[22]

Order passed by Magistrate before enforcement of Act. Where a Magistrate had passed an order under section 488, Cr. P. C. prior to the enforcement of the Act the order is valid and proper. The mere fact that a revision was pending against the order on the date when the Act was enforced was not sufficient to make the order invalid. This is so because a Revision is not like an appeal a continuation of the original proceeding.[23] But a difficulty would arise in such cases if the order is not complied with and the Magistrate has to pass an order after enforcement of the Act for enforcement of his order passed earlier. As the Magistrate lost jurisdiction as soon as the Act was passed, the order of Magistrate calling upon the husband to pay arrears of maintenance after enforcement of the Act is without jurisdiction.[24]

4. **Custody of children.** The Schedule of the Act speaks of custody of children, therefore, the Family Courts have special and exclusive jurisdiction to deal with matters concerning the custody of children.[25]

Application for custody after dismissal of previous application. Where a mother applied for custody of her children under Guardians and Wards Act but the application was dismissed for default and she subsequently filed another application under the W. P. Family Courts Act for the same relief, and she alleged that she could not pursue her previous application on account of threats and juicy promises; it was held that if the plea amounted to allegations of coercion and fraud and was entertainable as well as correct, then it meant more than a mere denial of her default in pursuing the former application and had the potentials of furnishing an independent answer to the defence under Order IX, Rule 9, C. P. C.[1] Moreover in a proceeding under the Guardians and Wards Act the Court should not lose sight of the fact that the overriding consideration is always the welfare of the minor. The Court in such cases is really exercising a parental jurisdiction as if it were in *loco parentis* to the minor. This is not a jurisdiction, therefore, in which there can, by its very nature, be any scope for any undue adherence to technicalities. The right to the custody of a minor is, in any event, in the nature of a continuing right as for each day the minor is kept out of the custody of a person lawfully entitled thereto, a separate application can be made. Unless, of course, the right of custody itself has been adjudicated upon and one or the other contesting party has been found to be disentitled to it or that it has been found that the welfare of the minor demands that no guardian shall be appointed. But even then if a change in the situation has taken place a defeated party may still be entitled to renew his application for custody. Until such an adjudica-

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22. PLD 1981 Lah. 761=PLJ 1981 Lah. 424+PLD 1981 Kar. 773 (DB)+PLD 1975 Lah. 571=PLJ 1975 Lah. 227+PLJ 1978 Kar. 404=1978 Law Notes 707.
23. PLD 1970 S.C. 75=22 DLR (S.C.) 192.
24. PLD 1971 Kar. 759=1971 LN 182+1972 P. Cr. L.J. 351 (Kar).
25. 1973 P. Cr. L J. 98 (Kar). (*Foll.* PLD 1969 S.C. 187).
1. PLD 1967 Lahore 977.

tion of the right of the party concerned has been made there can be no question of a second application being barred, specially if the second application is founded upon additional or new grounds which have come into existence since the making of the last application.[2]

5. **Restitution of conjugal rights.** A Family Court has exclusive jurisdiction in matters relating to restitution of conjugal rights. Where decision on that point hinges on the question whether there was a subsisting marriage, the Courts may go into the question also, even though ordinarily the Court has no jurisdiction in such cases. Where the matter before the Court was whether or not *M* was entitled to a decree for restitution of conjugal rights against *F*, the Family Court could not refuse or grant the relief prayed for unless it had first decided the issue raised by *F* that she had already been divorced and was not the wife of *M*. The question whether *M* had divoreed *F* was not the basis of the suit, but arose in a suit for restitution of conjugal rights which was within the exclusive jurisdiction of the Family Court to entertain and decide.[3] Where it was found by the Court that the husband had sent a notice of *talaq* to the wife and there was no evidence to support the plea that he had withdrawn the notice, the Court could not grant the husband a decree for restitution of conjugal rights.[4]

Decree for restitution need not be condition on payment of dower. Where the dower is deferred it cannot be paid on demand. Therefore a decree for restitution of conjugal rights need not be conditional on payment of dower by the decree-holder to his wife.[5]

6. **Dissolution of marriage.** A Family Court has exclusive jurisdiction in suits for dissolution of marriage. The jurisdiction is not ousted by sections 7 and 8 of Family Laws Ordinance, 1961.[6] Sections 7 and 8 are applicable only when the parties to a marriage wish to dissolve it otherwise than through the intervention of the Family Court. The provisions of these sections do not oust the jurisdiction of the Family Courts conferred upon them by section 5 read with the Schedule in respect of dissolution of marriage.[7]

Cruelty to wife, dissolution for. A Muslim marriage can be dissolved on the ground of cruelty to wife. But cruelty is not to be proved by applying principles of Muslim Law of evidence. It is to be proved under the ordinary law of the land.[8]

Li'an. Where the person accusing another of *li'an* does not persist in the accusation and the accused does not insist on putting him to proof of the accusation, the Court should let the matter rest there. He should not administer oath to the parties.[9]

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2. PLD 1967 S C. 402.
3. PLD 1972 Lah. 694=1972 LN 291.
4. 1982 SCMR 478.
5. PLD 1981 Lah. 512=PLJ 1981 Lah. 390.
6. Law Notes 1973 Lah. 4.
7. PLD 1978 Lah. 701.
8. PLD 1977 Lah. 328=PLJ 1977 Lah. 101.
9. PLD 1976 Lah. 1473=1977 Law Notes. 3.

Dislike of husband by wife. The finding that in view of strong dislike of the wife for the husband she would not be able to love him and would certainly be transgressing the limits of God was sufficient to grant a decree for dissolution of marriage.[10]

7. **Jactitation of marriage.** The essence and main object of a suit for jactitation of marriage is to perpetually silence a false allegation or claim put forward by the defendant, of a marriage having taken place between the defendant and the plaintiff.[11] A suit for a declaration that the defendant is not the husband or wife of the plaintiff but that the defendant alleges to be the wife or husband of the plaintiff, is a suit for jactitation of marriage. Such a suit falls under the schedule and could, therefore, be filed only before a family Court.[12] The term "jactitation of marriage," cannot be confined to a suit for a declaration that there was no marriage. In a suit by a plaintiff, who denies the marriage, the declaration of the civil Court would be effective to silence the defendant. Similar consequences would follow if a suit for a declaration about the existence of marriage is dismissed on the ground that there was no marriage at all or there was no subsisting marriage. Such decree was as effective in silencing the plaintiff as a declaratory decree obtained to silence the defendant. Therefore a suit in the latter form is equally a suit for jactitation which would fall within the exclusive jurisdiction of a Family Court.[13] All cases where the dispute relates to a false marriage shall be decided by a Family Court and the jurisdiction of the civil Court shall be deemed to be barred under section 5. It would be frustrating the object of the Family Courts Act, 1894 in case the Judge Family Court is not given the power to examine the validity of marriage on which the defendant relies. In almost all such suits based on the denial of marriage the Family Court can only decide the question after examining the validity of the marriage set up by the defendant.[14] Where the plaintiff produces evidence to show that the marriage is not duly registered and the *nikahnama* is forged, the Family Court acts within its jurisdiction to go into the validity of the marriage and give a finding on the existence or non-existence of the marriage. Where the main prayer for the respondent's suit is for a declaration that "relationship of wife and husband never existed and does not exist between her and the applicant." Additional prayers for declaring the *nikahnama* to be a forged document and its cancellation will not alter the character of her suit, which is essentially for perpetually silencing the alleged false claim of marriage put forward by the applicant. The suit continues to retain its character as a suit for jactitation of marriage, which is exclusively within the jurisdiction of the Family Court to entertain, hear and adjudicate under section 5 of the Family Courts Act, 1964 and, as such its trial by Civil Court is barred.[15]

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10. 1969 SCMR 118.
11. 1979 CLC 462=PLJ 1980 Kar. 17.
12. PLD 1975 Lah. 323=PLJ 1975 Cr. C. (Lah.) 423=1975 LN 51+PLD 1974 Lah. 105=1973 LN 635=PLJ 1973 Lah. 381.
13. PLD 1976 Quetta 97+PLD 1974 Lah. 78.
14. 1981 CLC 1097 (Lah).
15. 1979 CLC 462=PLJ 1980 Kar. 17.

Suit to challenge marriage by persons not parties to marriage. A suit for jactitation of marriage can be competently submitted to the Family Court and the Family Court would be competent to give a declaration as to whether matrimonial relations exist between the contestants or not. In case of other persons or parties who raise such a claim which is disputed, the aggrieved person shall have to file a regular civil suit in order to obtain a prohibitory decree within the meaning of section 54 of the Specific Retief Act, as a Family Court is not competent to pass such a decree.[16]

8. **Dower suit for.** Dower (*mehr*) is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage in the latter case proper dower (*mehr mithl*) becomes due. The dower, therefore, is a right which comes into existence with the marriage contract itself except that in case the dower is deferred its enforcement is held in abeyance till a certain event, *i.e.* dissolution of marriage by death or divorce, occurs [17] The dower of a wife can either be in cash or kind or it may be in the form of rendition of personal service.[18]

The Family Court or the Court sitting in appeal of its decrees have exclusive jurisdiction in the matter of dower and, therefore, these Courts were competent to determine whether any property movable or immovable in nature, formed part of the dower or not.[19]

Parties to suit for dower. The existence of wedlock at the time of suit is not necessary for claiming the dower because for example an ex-wife who is divorced, has contracted a second marriage and has children from a new husband cannot be estopped from claiming her "dower money" from her ex-husband. Since the nature of the claim both in the case of an ex-wife or heirs of an ex-wife is essentially the recovery of "dower" that remains so always and the mere fact that it is being claimed by the heirs of the deceased wife does not detract any thing from its real character.[20] Even otherwise when the suit for recovery of dower is filed by the wife, heirs of the wife may be impleaded on her death.[21]

Surety for payment of dower. If there is a dispute about the dower, it relates to marriage and the liability of a surety *qua* dower is a matter connected with such dispute. Therefore the husband and the surety are both necessary parties insofar as the determination of questions relating to liability to pay dower are concerned.[22]

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16. PLD 1976 Quetta 97.
17. PLD 1980 Kar. 477 (DB).
18. PLD 1980 Pesh. 37=PLJ 1980 Pesh. 66.
19. PLD 1980 Pesh. 37=PLJ 1980 Pesh. 66.
20. PLD 1975 Lah. 739=PLJ 1975 Lah. 181.
21. PLD 1971 Lah. 711+1973 LN 428.
22. NLR 1979 Civ. 67=PLD 1979 Lah. 176=1979 Law Notes 31.

Chairman, Arbitration Council cannot order payment of dower. According to section 5, subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961, the Family Courts have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule. The matters which have been specified in the Schedule, relate to Dissolution of marriage, dower, maintenance, restitution of conjugal rights, custody of children, guardianship and jacitation of marriage. It will be seen that since the matter with regard to dower was not within the jurisdiction of any Union Committee or Council to decide according to Muslim Family Laws Ordinance, 1961, therefore, till the enforcement of Family Courts Act, 1964 aggrieved parties used to approach the civil Courts for the redress of their grievance. After the enforcement of the aforesaid Act, all suits with regard to dower are being filed before the Family Courts established under the Act. Therefore the order of the Chairman Arbitration Council decreeing payment of dower was without jurisdiction and the action taken by Revenue Authorities on that order to recover the dower amount as arrears of land revenue was without lawful authority.[23]

Non-Muslims. The West Pakistan Family Courts Act, 1964 is not only applicable to Muslims but also to non-Muslims and the Family Court concerned had jurisdiction to decide a dispute relating to dower between parties who are Ahmedis.[24]

Proof of dower. The liability to pay dower may be proved by *Kabinnama* ratified by the petitioner, firstly by the agreement entered into in the performance of Nikah as is evident from the testimony of the Imam who not only performed the same but also witnessed the deed in question.[25]

9. Objection to jurisdiction. An objection to jurisdiction of the Family Court must be raised at the earliest opportunity. Where it was raised for the first time before the Supreme Court, the Court refused to entertain it.[1]

6. *Place of sitting.* Subject to any general or Special order of Government in this behalf, a Family Court shall hold its sittings at such place or places within [2][the District or area for which it is established] as may be specified by the District Judge.

1. Place of sitting. The Family Court may sit at any place within the District or within the area for which it is established. Thus it can sit at any place, town or tehsil headquarter. It is not necessary for the Court to sit at the District Headquarter only.[3]

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23. PLD 1981 Lah. 232=PLJ 1981 Lah. 174.
24. 1981 CLC 195 (Lah).
25. PLD 1980 Pesh 37=PLJ 1980 Pesh. 66.
1. 1980 SCMR 933.
2. Subs. by W.P. Ordinance, X of 1966, S. 6.
3. PLD 1974 B.J 4.

Recording evidence at house of party. There is no prohibition for a Civil Judge to go to the residence of a party for the purpose of recording his or her statement. It is, however, true that it should be done only if the circumstances of a particular case so require and the reasons, for that should be given in writing. If a Court records the statement of a party at his residence without specifying the reasons, it may be an omission but it will not amount to nullifying the whole proceedings.[4]

7. *Institution of suit.* (1) Every suit before a Family Court shall be instituted by the presentation of a plaint or in such other manner and in such Court as may be prescribed.

(2) The plaint shall contain all [5][material facts relating to the dispute and shall contain a Schedule giving the number of witnesses intended to be produced in support of the plaint, the names and addresses of the witnesses and brief summary of the facts to which they would depose :

Provided that the parties may, with the permission of the Court, call any witness at any later stage, if the Court considers such evidence expedient in the interest of justice.

[6][(3) (*i*) Where a plaintiff sues or relies upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time, deliver the document or a copy thereof to be filed with the plaint.

(*ii*) Where he relies on any other document, not in his possession or power, as evidence in support of his claim, he shall enter such documents in a list to be appended to the plaint.]

(4) The plaint shall be accompanied by as many duplicate copies thereof including the Schedule and the lists of documents referred to in sub-section (3), as there are defendants in the suit, for service upon the defendants.

Synopsis

1. Notice to Chairman.
2. Territorial jurisdiction.
3. Suit for dissolution of marriage and dower.

1. Notice to Chairman. A notice to Chairman is not necessary before the institution of a suit for dissolution of marriage.[7]

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4. PLD 1974 B.J. 4.
5. Ins. by W.P. Ordinance, X of 1966, S. 7.
6. Subs. by W.P. Act, 1 of 1969, S. 3.
7. PLD 1975 Lah. 766=PLJ 1975 Lah. 256+PLD 1975 Lah. 805=PLJ 1975 Lah. 241+PLD 1975 Lah. 1118.

2. Territorial jurisdiction. In a suit for dissolution by a wife, the intention of the wife to stay at a place confers jurisdiction on the Court at that place to entertain the suit.[8]

3. Suit for dissolution of marriage and dower. It is in the interest of avoiding multiplicity of proceedings and in the interest of justice that the claim for dissolution of marriage, and the claim for payment of deferred dower, consequent upon the grant of decree for dissolution of marriage, may be entertained simultaneously by the Family Courts.[9]

[10][8. *Intimation of defendant.* (1) When a plaint is presented to Family Court, it—

(*a*) may fix a date ordinarily of not more than thirty days for the appearance of the defendant ;

(*b*) shall issue summons to the defendant to appear on a date specified therein ;

(*c*) shall, within three days of the presentation of the plaint, send—

(*i*) to each defendant, by registered post, acknowledgment due, a notice of the suit together with a copy of the plaint, a copy of the schedule referred to in sub-section (2) of section 7 and copies of the documents and a list of documents referred to in sub-section (3) of the said section ; and

(*ii*) to the Chairman of the Union Council within whose jurisdiction the defendant or defendants, as the case may be, reside and where the defendants reside within the jurisdiction of different Union Council, to the Chairman of every such Union Council, a notice of the plaint having been presented.

(2) Every summons issued under clause (*b*) of sub-section (1) shall be accompanied by a copy of the plaint, a copy of the schedule referred to in sub-section (2) of section 7, and copies of the documents and list of documents referred to in sub-section (3) of the said section.

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8. PLD 1976 Kar. 978=PLJ 1976 Kar. 388 (DB).

9. PLD 1980 Kar. 477 (DB).

10. Subs. by W.P. Act, 1 of 1969, S. 4.

(3) On receipt of the notice under clause (*c*) of sub-section (1), the Chairman shall display the notice on the Notice Board of the Union Council for a period of seven consecutive days, and shall, as soon as may be, after the expiry of the said period, inform the Family Court of the notice having been so displayed.

(4) Service of the plaint and its accompaniments in the manner provided in clause (*b*) or clause (*c*) of sub-section (1) shall be deemed to be due service of the plaint upon the defendant.

(5) Every notice and its accompaniments under clause (*c*) of sub-section (1) shall be served at the expense of the plaintiff. The postal charges for such service shall be deposited by the plaintiff at the time of filing the plaint.

(6) Summons issued under clause (*b*) of sub-section (1) shall be served in the manner provided in the Code of Civil Procedure, 1908, Order V, Rules 9, 10, 11, 16, 17, 18, 19, 21, 23, 24, 26, 27, 28 and 29. The cost of such summons shall be assessed and paid as for summons issued under the Code of Civil Procedure, 1908.

Explanation. For the purposes of this section, the expression "Union Council" means a Union Council, Town Committee or Union Committee constituted under section 57 of the Electoral College Act, 1964 (IV of 1964).]

PUNJAB AMENDMENT

In section 8 :—

(*i*) in sub-section (1), for clause (*c*), the following clause shall be substituted :—

"(*c*) shall, within three days of the presentation of the plaint, send to each defendant by registered post, acknowledgment due, a notice of the suit, together with a copy of plaint, a copy of the Schedule referred to in sub-section (2) of section 7 and copies of the documents and a list of documents referred to in sub-section (3) of the said section;" and

(*ii*) sub-section (3) and the Explanation occurring at the end of the section shall be deleted.

(*Punjab Ord. 24 of 1971 enforced from 23-6-1971*)

1. Knowledge of proceeding cures irregularity in service. Where the defendant alleged that process had not been properly served on him.

It was held that the main question which required consideration in such a case was whether the respondent can be said to have been aware that the appellant had instituted against him a suit for the dissolution of her marriage and had deliberately avoided to be served. As he was not ignorant of the proceedings, the irregularity was not of much consequence.[11]

[12][9. *Written Statement.* (1) On the date fixed under clause (*a*) of sub-section (1) of section 8, the plaintiff and the defendant shall appear before the Family Court and the defendant shall file his written statement, and attach therewith list of his witnesses along with a precis of the evidence that each witness is expected to give.

(2) Where a defendant relies upon a document in his possession or power, he shall produce it or a copy thereof in the Court along with the written statement.

(3) Where he relies on any other document, not in his possession or power, as evidence in support of his written statement, he shall enter such documents in a list to be appended to the written statement.

(4) Copies of the written statement, list of witnesses and precis of evidence referred to in sub-section (1) and the documents referred to in sub-section (2) shall be given to the plaintiff, his agent or advocate present in the Court.

(5) If the defendant fails to appear on the date fixed by the Family Court for his apppearance, then—

(*a*) if it is proved that the summons or notice was duly served on the defendant, the Family Court may proceed *ex parte* ; provided that where the Family Court has adjourned the hearing of the suit *ex parte*, and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, he may upon such terms as the Family Court directs, be heard in answer to the suit as if he had appeared on the day fixed for his appearance ; and

(*b*) if it is not proved that the defendant was duly served as provided in sub-section (4) of section 8, the

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11. 1978 SCMR 335=PLJ 1978 SC 397.

12. Subs. by W. P. Act, *1 of 1969, S, 5.*

Family Court shall issue fresh summons and notices to the defendant and cause the same to be served in the manner provided in clauses (*b*) and (*c*) of sub-section (1) of section 8.

(6) In any case in which a decree is passed *ex parte* against a defendant under this Act, he may apply within reasonable time of the passing thereof to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall; after service of notice on the plaintiff, and on such terms as to costs as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit: provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also.]

1. Scope. The only provision whereby the Act "requires" a party to put in appearance may be found in section 9. Under this section the defendant alone comes under the obligation to put in appearance and this provision may rightly be construed as "requiring" the defendant to appear. There is no provision in the Act which compels a plaintiff to appear in the Court.[13]

[14][10. *Pre-trial proceeding.* (1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.]

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties, and their counsel.

(3) At the pre-trial, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for [15][recording] evidence.

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13. PLJ 1979 Lah. 26=PLD 1979 Lah. 217.

14. Subs. by W.P. Act, 1 of 1969, S. 6 (*a*).

15. Ins. by W. Pakistan Act, 1 of 1969, S. 6 (*b*).

Synopsis

1. Procedure.
2. Pre-trial hearing.
3. Appointment of guardian.
4. Framing of issues.
5. Consolidation of suits.
6. Presence of parties.

1. Procedure. The Act prescribes a special procedure for trial of cases which is one of its major objects. Even in the preamble stress has been laid on expeditious settlement and disposal of disputes relating to marriage and family affairs. A trial and proceeding not held in accordance with the procedure laid down in the Act would be rendered not merely irregular but illegal and void.[16]

2. Pre-trial hearing. According to section 10 of the Family Courts Act, as soon as the written statement is filed, the Family Court shall fix an early date for pre-trial hearing of the case and on that date the Court shall examine the plaint, the written statement, if any, and the precise of evidence, any document filed by the parties and shall also, if it so deems fit hear the parties and their counsel. Further according to sub-section (3), the Court shall ascertain the points at issue between the parties at the pre-trial stage and attempt to effect compromise or reconciliation between the parties, if this be possible.[17]

Compromise or reconciliation. An attempt on the part of the Presiding Judge to effect a compromise or reconciliation is not a mere question of technicality. It is an important function which he has to perform in cases triable under the Family Courts Act. Where he fails to do so, he fails to exercise an essential part of jurisdiction vested in him and thus acts without lawful authority and such judgment, may be set aside.[18] However, it is not necessary that attempt at reconciliation should be clearly stated in the order. Where it is clear from the order sheet that such an attempt was made, the attempt in the order would not vitiate the proceedings.[19]

Procedure and mode of reconciliation. A Family Judge is required to make attempts at reconciliation between the parties twice; (*i*) before the commencement of the evidence and (*ii*) after the close thereof. Neither in the Act nor in the rules made thereunder any procedure for making the attempt has been prescribed. It has been left to the discretion of the Family Judge to do so keeping in view the peculiar circumstances of each case. Sometimes, it might become necessary even during the conciliation proceedings, when positive assertions are being made by the parties, to put one or the other under oath with a view to sort out their differences or to seek certain clarification. Other discussions, allegations, counter-allegations, apologies, etc. might continue without putting the parties under oath. It might not be possible for a Judge for example to direct a wife to seek apology from her husband "under oath"; but an undertaking might be so. Similarly there is no law requiring the Family Judge to record the demeanour of the parties during the course of reconciliation.[20]

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16. PLD 1975 Lah. 318.
17. 1981 CLC 243=1981 LN 19 (Lah.).
18. 1981 CLC 243=1981 LN 19+PLD 1975 Lah. 1118.
19. PLD 1976 Lah. 1473=1977 LN 3.
20. PLD 1976 Lah. 1598=PLJ 1977 Lah. 321.

There is no doubt that for effecting compromise or reconciliation, presence of the parties is necessary so that genuine attempt, by affording them opportunity to meet each other, may be made. However, departure at certain stages can be made, in the given circumstances of a case and such departure will not amount to failure on the part of the Court to comply with the mandatory provision.[21] Therefore in conciliation proceedings, parties may appear through their representatives.[22] It is desirable that at both the stages both the parties should be present in person and the trial Court should have insisted on their presence because a direct meeting between the spouses would be helpful to attempt a reconciliation. The mere recording, in the presence of the parties' counsel, of the fact that a reconciliation was not possible is not a satisfactory compliance of the relevant provision of the law.[23] However the absence of parties is a mere irregularity. It does not vitiate the trial. Where the first respondent's suit was being defended on behalf of the petitioner by his father. The fact that the Family Court had tried to effect a conciliation between the parties, as required under the said Act, by questioning the petitioner's father on his behalf, would at the highest be an irregularity, which did not in any way affect the outcome of the suit. Therefore the High Court would not be justified in interfering with the Family Court's Judgment on this ground in its limited constitutional Jurisdiction.[24]

Non-appearance of parties—effect. An opportunity has to be granted to the parties to come to some compromise or reconciliation and if a party does not avail of such an opportunity, it means that it does not want compromise or reconciliation and in that case finding to that effect should be given by the Judge, Family Court, and thereafter further proceedings may be held under subsection (4) of section 10 of the Family Courts Act by framing issues and fixing the case for recording evidence. There is no provision in the Act enabling the Family Court to pass *ex parte* decree in the case of failure of a party to appear at the pre-trial stage.[25]

3. Appointment of guardian. Under section 25, the Family Courts have to follow the procedure laid down in Guardians and Wards Act in matters of guardianship and custody of minors. This is an exception to the procedure otherwise laid down by this Act. The main reason for this exception is that the Court's powers and duties in appointment of guardians or in respect of the custody of the minors are in the nature of parental jurisdiction, the main question to be considered by the Court being the welfare of the minor. All that the Court is required to see is that in passing an order the Court might also consider the personal law to which the minor is subject, but the paramount consideration is always one regarding the minor's welfare and protection of his interest. No case under the Guardians and Wards Act with regard to the custody or

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21. 1981 CLC 243=1981 Law Notes 19 (Lah).
22. NLR 1978 Civ. 1035.
23. 1979 CLC 647=PLJ 1979 Lah. 424=1979 LN 408.
24. NLR 1978 Civ. 932=1978 SCMR 130=PLJ 1978 SC 384.
25. 1981 CLC 243=1981 LN 19 (Lah.).

guardianship of a minor can be decided merely by consent of the parties or by giving effect to any compromise Under these circumstances a pre-trial hearing, to induce the parties to effect a compromise in respect of questions connected with the guardianship or custody of minor children, is not only unnecessary but even undesirable.[1]

4. Framing of issues. In sub-section (4) of section 10 no consequence has been provided, like the provisions contained in rules 1 and 3 of Order XIV, C.P.C. if no issues are framed. The word "shall" prefixed before the words "frame the issues" makes the intention of the Legislature clear that the issues should be framed invariably on the pleadings of the parties. Since no consequence is provided for not framing the issues, therefore, the requirement in context of the provisions is directory, and any omission to frame such issues in the circumstances would not be fatal to the case nor would the proceedings be vitiated on that account.[2] Where the parties were fully alive to the points involved in the case and lead evidence accordingly but they did not request the framing of issues, and consequently no issues were framed, the omission to frame the issues was not fatal to the case and proceedings were not vitiated.[3] But where the non-framing or improper framing of an issue prejudiced a party in his defence, the High Court set aside the decree of the Family Court in its Constitutional jurisdiction.[4]

5. Consolidation of suits. A family Court may in the interest of justice consolidate suits for dissolution of marriage and restitution of conjugal rights.[5]

6. Presence of parties. Personal attendance of a party in the Family Court is not indispensible. In the given circumstances of a case his or her presence may be dispensed with.[6]

Presence of defendant. It is not necessary for the defendant to be present at all stages of the proceedings in the Family Court. Where the defendant had appeared at the outset, submitted his written statement and also remained present when the date was fixed for reconciliation and, therefore, had fulfilled his obligation under the provisions of the Act. Furthermore, to insist on his personal presence would necessarily delay the conclusion of the suit which has already been considerably delayed. The prayer for the attendance of the defendant was rightly rejected.[7]

'Ex parte' decree. Where an *ex parte* decree is passed in a suit for dissolution of marriage, by the wife, the husband has a right to make an

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1. PLD 1976 Kar. 506=PLJ 1976 Kar. 203 (DB).
2. PLD 1976 Kar. 506=PLJ 1976 Kar. 203 (DB).
3. PLD 1974 B. J. 4.
4. NLR 1981 UC 451.
5. PLJ 1975 Lah. 293=PLD 1975 Lah. 567=1975 LN 42.
6. 1981 CLC 243=81 Law Notes 19 (Lah.)+PLD 1979 Lah. 217=PLJ 1979 Lah. 26.
7. 1981 SCMR 395=PLJ 1981 S.C. 605.

application for getting the proceedings set aside on showing cause for his non-appearance. The Family Court cannot dismiss an application by the husband for setting aside the decree on the sole ground that the wife has married another person soon after obtaining the *ex parte* decree.[8]

11. *Recording of evidence.* (1) On the date fixed for [9][recording of the evidence], the Family Court shall examine the witnesses produced by the parties in such order as it deems fit.

(2) The Court shall not issue any summons for the appearance of any witness unless, within three days of the framing of issues, any party intimates the Court that it desires a witness to be summoned through the Court and the Court is satisfied that it is not possible or practicable for such party to produce the witness.

[10][(3) The witnesses shall give their evidence in their own words :

Provided that the parties or their counsel may further examine, cross-examine or re-examine the witnesses :

Provided further that the Family Court may forbid any question which it regards as indecent, scandalous or frivolous or which appears to it to be intended to insult or annoy or be needlessly offensive in form.

(3-A) The Family Court may, if it so deems fit, put any question to any witness for the purposes of elucidation of any point which it considers material in the case.]

(4) The Family Court may permit the evidence of any witness to be given by means of an affidavit :

Provided that if the Court deems fit it may call such witness for the purpose of examination in accordance with sub-section (3).

1. Closure of evidence. There is no provision in the W.P. Family Courts Act to the effect that the evidence of a party shall not be closed in any case. As it is a brief enactment aimed at securing expeditious disposal of matrimonial disputes, the Court held that the Family Court can close the evidence of a party who fails to adduce evidence without sufficient cause.[11]

8. NLR 1979 Civ. 334.

9. Subs. by W. Pakistan Act (1 of 1969), S. 7 (*a*).

10. Subs. by W. Pakistan Act (1 of 1969), S. 7 (*b*).

11. PLD 1982 Lah 281=PLJ 1932 Lah. 62=1982 Law Notes 94.

12. *Conclusion of trial.* (1) After the close of evidence of both sides, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.

(2) If such compromise or conciliation is not possible, the Family Court shall announce its judgment and give a decree.

1. **Personal attendance of parties.** Personal attendance of the parties at both pre-trial and trial stage is necessary. The trial Court should have insisted on their presence because a direct meeting between the spouses would be helpful in attempting a reconciliation. Therefore, the mere recording, in the presence of the parties' counsel, of the fact that a reconciliation was not possible is not a satisfactory compliance of the provisions of the law.[12] However, where the defendant had appeared at the outset, submitted his written statement and also remained present when the date was fixed for reconciliation and, therefore, had fulfilled his obligation under the provisions of the Act. Furthermore, to insist on his personal presence would necessarily delay the conclusion of the suit which had already been considerably delayed. The prayer for personal attendance of the defendant at that stage was rightly refused.[13]

13. *Enforcement of decrees.* (1) The family Court shall pass a decree in such form and in such manner as may be prescribed, and shall enter its particulars in the prescribed register.

(2) If any money is paid, [14][and] any property is delivered in the presence of the Family Court, in satisfaction of the decree, it shall enter the fact of payment and the delivery of property, as the case may be, in the aforesaid register.

(3) Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, the same shall, if the Court so directs be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder.

(4) The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order, direct.

(5) A family Court may, if it so deems fit, direct that any money to be paid under a decree passed by it be paid in such instalments as it deems fit.

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12. 1979 CLC 647=PLJ 1979 Lah. 424=1979 Law Notes 408.

13. 1981 SCMR 395=PLJ 1981 S.C. 605.

14. Subs. by W. Pakistan Ord. (X of 1966), S. 11.

Synopsis

1. Execution of decree.
2. Dower.
3. Adjustment of dower and *'zare khula'*.
4. Payment by instalments.

1. **Execution of decree.** Special procedure for the execution of money decrees has been provided for in sub-section (3) but no special procedure has been provided for the execution of other types of decrees and the only logical conclusion in view of the provision of sub-section (4) is that such decrees are to be executed in the manner provided for in the C.P.C. There is no other provision for the execution of decrees of a Family Court either in the Act or in the rules framed thereunder and it does not stand to reason that the decrees of a Family Court other than those for money were not to be executed and had to remain dead letters. Therefore, the decrees for restitution of conjugal rights and for possession of movable and immovable properties, etc. excluding money decrees passed by a Family Court are to be executed according to provisions of C.P.C.[15]

Several decrees. Where a decree has been passed for maintenance of wife and another decree has been passed in a suit by husband for custody of children and restitution of conjugal rights the executing Court must execute all the decrees independently. The Court cannot set aside order of maintenance on the ground that payment of maintenance would encourage the wife to disobey the decree for restitution of conjugal rights and custody of children.[16]

2. **Dower.** A Family Court has exclusive jurisdiction to decide questions relating to dower. A Union Council or Union Committee has no power whatsoever under the Muslim Family Laws Ordinance, 1961 to decide the matter with regard to dower amount. Therefore an order for recovery of dower amount by the Chairman Union Council cannot be executed.[17]

3. **Adjustment of dower and 'zare khula'.** Where decree for dower happens to be of same amount which was payable as *zare khula*. Such decree could not be executed by Family Court on execution application of the wife. An order of the District Judge, on appeal, directing that *zare khula* shall be adjusted against dower amount and decree for dissolution of marriage shall become final without any payment.[18]

4. **Payment by instalments.** The Family Court has jurisdiction to allow the decretal amount to be paid by instalments, but when the decree does not direct the payment by instalments, the Court has no jurisdiction during execution of the decree to order that the decretal amount may be paid by instalments except with the consent of the decree-holder.[19]

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15. PLD 1970 Pesh. 52=22 DLR (W.P.) 144.
16. 1972 SCMR 131.
17. PLD 1981 Lah. 232=PLJ 1981 Lah. 174.
18. PLD 1979 Lah. 414=PLJ 1979 Lah. 229=1979 LN 183.
19. NLR 1978 Civ. 631.

14. *Appeal.* [20][(1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a family Court shall be appealable—

(*a*) to the High Court, where the Family Court is presided over by a District Judge, an Additional District Judge, or a person notified by Government to be of the rank and status of a District Judge or an Additional District Judge, and

(*b*) to the District Court, in any other case.]

(2) No appeal shall lie from a decree passed by a Family Court—

(*a*) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (*d*) of item (*viii*) of section (2) of the Dissolution of Muslim Marriages Act, 1939.

(*b*) for dower not exceeding rupees one thousand ;

(*c*) for maintenance of rupees twenty-five or less per month.

Synopsis

1. Validity.
2. Forum for appeal.
3. Appealable orders.
4. Dissolution of marriage.
5. Restitution of conjugal rights.
6. Disposal of wife's property.
7. Guardianship cases.
8. Interlocutory orders.
9. Second appeal.
10. Constitutional jurisdiction.
11. Revision.
12. Court fee on appeal.
13. Limitation.

1. Validity. Where the validity of this section was challenged in Federal Shariat Court. It was held that section 14 deals with matters of procedure which are beyond the jurisdiction of the Court.[21]

2. Forum for appeal. According to section 14 of the Family Courts Act, 1964, in such cases where a Family Court is presided over by a District Judge, an appeal shall lie to the High Court and in any other case to the District Court, which, according to section 2 (21) of the West Pakistan General Clauses Act, and section 2 (4) of the C.P.C. means the principal Civil Court of original civil jurisdiction of a district.[22]

Assignment to Additional District Judge. The District Judge may assign appeals or function of entertaining appeals to Additional District Judge.[23]

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20. Inserted by W.P. Ordinance X of 1966, S. 12.
21. 1982 F.S.C. 71.
22. PLD 1968 Lah. 987.
23. PLD 1977 Lah. 718 (DB).

3. Appealable orders. An order does not mention the reasons due to which it was passed, it is not a proper order, especially if it is an appealable order and an appeal lies against it.[24]

4. Dissolution of marriage. A decree for dissolution of marriage on the ground of failure of the husband to maintain the wife and also to perform marital obligations, and also on the ground that the husband had deprived the wife of her ornaments and misappropriated them, was not appealable under this section.[25] A decree for dissolution of marriage on ground of *khula* is not appealable.[26] However the bar is only against appeal filed against the decrees of dissolution of marriage and not against the decrees of dismissal of suits for dissolution of marriage.[1] Where dissolution of marriage has been decreed by the Family Court a suit for restitution of conjugal rights by the husband fails. Therefore, although there is no clear prohibition against an appeal from an order of a Family Court refusing restitution of conjugal rights, yet keeping in view the object of the law and clear command of the Legislature, no appeal would be competent against an order, refusing restitution of conjugal rights, where a decree for dissolution of marriage has been passed.[2]

5. Restitution of conjugal rights. By conferring finality on a decree for dissolution of marriage, the Legislative clearly intended that there should be no revival of any controversy with regard to the existence of conjugal relations between the parties. Therefore although there is no clear prohibition against an appeal from an order of a Family Court, refusing restitution of conjugal rights, yet keeping in view the object of the law and clear command of the Legislature, no appeal would be competent against an order, refusing restitution of conjugal rights, where a decree for dissolution of marriage has been passed.[3]

6. Disposal of wife's property. The disposal of property which would attract the provisions of clause (*viii*) (*d*) of section 2 of Dissolution of Muslim Marriages Act, is a disposal by the husband, without the wife's consent, of a substantial portion of her property, not for her benefit but for his own selfish ends, and in a wasteful manner, with the intention of depriving her of her porperty.[4] It is just disposal without any intention that makes the conduct actionable. If the disposal is with her consent, then the matter should be pursued to the full implications of that consent. If, for instance, the plaintiff allowed her husband to sell her property or even requested him to do so with the object of depositing the sale proceeds in a bank and the husband after complying with the first part of the request appropriated the money to his own use. It will constitute disposal under the Act. The fact that the disposal was to meet a pressing need of the husband does not make the disposal of property legitimate so as to take it out of the scope of this provision.[5]

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24. 1982 CLC 799=NLR 1982 Civ. 121.
25. Law Notes 1973 Lah. 4.
26. PLD 1976 Lah. 1327.
1. 1979 LN 179 (Lah).
2. PLD 1968 Lah. 309 (DB).
3. PLD 1968 Lahore 309 (DB).
4. AIR 1945 Lah. 56.
5. PLD 1954 Lah. 614=7 DLR W.P. 87 (DB).

7. **Guardianship cases.** The obligation imposed by section 25 to follow the procedure prescribed in the Guardians and Wards Act is an obligation imposed on the Court, and there is nothing in the section to support the view that it was intended to regulate the rights of the parties after the Family Courts had become *functus officio*. Therefore in appeal in guardianship cases, section 47 of the Guardians and Wards Act is irrelevant to the construction of section 25, because this section has been enacted only in order to regulate the procedure of the trial before the Family Court. As the District Judges are empowered, under the rules framed under the said Act, to transfer guardianship cases to Civil Judges, and, when a Civil Judge acts as the Guardian Judge, clause (*b*) of sub-section (1) of section 14 prescribes that an appeal against his order lies to the District Court.[6]

As in cases of appeal in guardianship cases section 14 of this Act applies and limitation is 30 days from the date of judgment.[7]

The expression "a decision given" in section 14 was not in any manner qualified by any such word as 'final' and, therefore, an order under section 12 of the Guardians and Wards Act, 1890 was "a decision given" and hence appealable under section 14.[8]

8. **Interlocutory orders.** Only decrees and final orders are appealable under the Act. No appeal lies against interlocutory orders.[9] It would, therefore, be logical to hold that in matters which culminate not in a decree but a decision the interlocutory orders passed therein can also not be appealed against.[10]

Stay Order. The question of grant or refusal to grant a stay pending the main matter, is an interlocutory matter and as such the order does not amount to a "decision" contemplated under section 14 of the Act. Therefore no appeal lies against it.[11]

Order setting aside ex parte decree. An order reopening the case after setting aside an *ex parte* decree in order to give an opportunity to the defendant to show cause and to put his point of view before the Court, does not amount to a decision within the meaning of section 14 of the Family Courts Act and as such it is not appealable.[12]

Orders under section 12, Guardians and Wards Act. An order on an interim application under section 12 of Guardians and Wards Act is "a decision given, within the meaning of the words used in section 14 and therefore it is an appealable order.[12a]

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6. PLD 1981 SC 454=PLJ 1981 SC 816 (PLD 1977 Lah. 911 does not lay down correct law).
7. PLD 1973 Kar. 503.
8. NLR 1982 Civ. 121=1982 CLC 799 (DB) (Kar). (*Rel.* PLD 1975 Kar. 448).
9. PLJ 1979 Lah. 504+PLD 1976 Lah. 1015=PLJ 1976 Lah. 696=Law Notes 1976 Lah. 193.
10. 1979 CLC 754=PLJ 1979 Lah. 504.
11. 1979 CLC 754=PLJ 1979 Lah. 504.
12. PLJ 1979 Lah. 575=1979 CLC 364=1979 LN 590.

12*a*. 1982 CLC 441 (Kar.).

Constitutional jurisdiction. If interlocutory orders regarding framing of additional issues summoning of witnesses and closing of evidence are challenged in constitutional jurisdiction, it would delay the adjudication of matrimonial disputes and would therefore result in defeating the object for which this Act was promulgated.[13]

9. **Second appeal.** The words, "decision" and "decree" used in sub-section (1) of section 14, refer to the original decision or decree given by a Court of first instance and not by an appellate Court. The purpose of the statute is to shorten the proceedings; therefore, no second appeal or revision has been provided.[14]

10. **Constitutional jurisdiction.** There is no bar to a writ petition where the appellate Court has not exercised appellate jurisdiction in so far as it has not considered the plea raised by the appellant that she was entitled to dissolution of marriage on ground of *khula*, the High Court set aside the order dismissing the appeal in writ jurisdiction and directed the appellate Court to hear the appeal afresh and decide the plea.[15] But no constitutional petition has to challenge an order in appeal on the ground that the evidence in the case has not been properly appreciated.[15a]

11. **Revision.** Even if the Family Court is regarded as a Court subordinate to the High Court, the effect of section 17 of the Act is to exclude the orders of the Family Courts from the operation of S, 115, C.P.C. and the said provision of law is not available for obtaining revision of an order passed by the Family Court.[16]

12. **Court fee on appeal.** A suit for maintenance involves an ascertained sum and that being so provisions as contained in section 7 of the Court Fees Act would be applicable and the amount of Court-fee will be computed under Article 1 of Schedule 1 of the Court Fees Act.[17] Where deficient Court fee has been paid on a memorandum of appeal the High Court can in constitutional jurisdiction direct that the judgment and decree in appeal will not take effect till deficiency in Court fee is made up.[17]

13 **Limitation.** Where a writ petition is filed in *bona fide* belief that remedy by way of appeal was not available, an extension in limitation for appeal may be claimed on that ground.[18]

15. *Power of Family Court to summon witnesses.* (1) A Family Court may issue summons to any person to appear and give evidence, or to produce or cause the production of any document : Provided that—

(*a*) no person who is exempt from personal appearance

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13. PLJ 1982 Lah. 62=1982 Law Notes 94.

14. 1980 CLC 550+PLD 1978 Lah 701+PLD 1970 Kar. 293=1970 LN 174+PLD 1971 Lah. 813=1973 LN 4.

15. PLD 1975 Lah. 1118.

15*a*. NLR 1982 CLJ 348.

16. PLD 1980 Pesh. 246+1980 CLC 205+PLD 1970 Lah. 641+PLD 1971 Lah. 875=1971 LN 605+PLD 1971 Kar. 118.

17. PLJ 1981 Lah. 181.

18. PLD 1976 Lah. 1327.

in a Court under sub-section (1) of section 133 of the Code of Civil Procedure, 1908, shall be required to appear in person ;

(*b*) a Family Court may refuse to summon a witness or to enforce a summons already issued against a witness when, in the opinion of the Court, the attendance of the witness cannot be procured without such delay, expense or inconvenience as in the circumstances would be unreasonable.

(2) If any person to whom a Family Court has issued summons to appear and give evidence or to cause the production of any document before it, wilfully disobeys such summons, the Family Court may take cognizance of such disobedience, and after giving such person an opportunity to explain, sentence him to a fine not exceeding one hundred rupees.

16. *Contempt of Family Courts.* A person shall be guilty of contempt of the Family Court if he, without lawful excuse—

(*a*) offers any insult to the Family Court ; or

(*b*) causes an interruption in the work of the Family Court ; or

(*c*) refuses to answer any question put by the Family Court, which he is bound to answer ; or

(*d*) refuses to take oath to state the truth or to sign any statement made by him in the Family Court ; and the Family Court may forthwith try such person for such contempt and sentence him to a fine not exceeding rupees two hundred.

Synopsis

1. What is contempt of Court.
2. Interruption in the work of the Court.
3. When Court would act under the section.
4. Contempt must be committed within view or presence of Court.
5. Summary procedure.

1. What is contempt of Court. The law gives wide powers to Superior Courts to punish their contempt but the position of the Conciliation Courts is entirely different. The law punishes a person only when he offers insult to the Court while the Court is functioning as such act he does so without lawful excuse. Where he has lawful excus for

making any imputations against the members of the Court or for criticising their procedure, he cannot be said to have come within the mischief of the section. It is not a *sine qua non* that alleged interruption must delay the proceedings of the Court for any length of time. The determining factor is not the duration of the time but the nature of the act committed by the accused.[19]

2. **Interruption in the work of the Court.** It is contempt of Court to interrupt the work of the Court. It is immaterial whether the interruption is for a long time or for a short time. Any interruption would bring the case within the mischief of the section; if the intention is to interrupt the work of the Court. However, the Courts should not be unduly sensitive or touchy about their dignity. A mere audible remark not meant for the Court should not be taken as an interruption or interference in the Court's work.[20]

3. **When Court would act under the section.** When acting under this section the Court is both a prosecutor and a Judge and therefore the power should be used only in exceptional cases.[21] It has been held that though the Court is entitled to maintain the dignity of the Court, yet it should not be too sensitive and too ready to take offence where none is intended,[22] or where the contempt is of a trivial nature.[23]

Lawyer. Lawyers are expected to show due respect to a Court and the Court, on its part is required to be reasonably indulgent to a lawyer and to exercise such control and patience as are calculated to promote the calm and unruffled climate of a Court of law.[24] A lawyer should never forget that however important in substance or principle a matter may be, which he is placing before the Court, his own dignity as a lawyer obliges him to place it before the Court in the manner of a submission, couched in the traditional language of courtesy that is due to the Court. He will find that any stand which he takes in support of a right principle will always gain in strength and effectiveness if it is supported by appropriate courtesy.[25]

4. **Contempt must be committed within view or presence of Court.** The summary power under the section extends to offences mentioned therein committed in the view or presence of the Court.[1] The section will not be attracted if a statement, alleged to be an insult or interruption, is made within the hearing of the Court but not within its presence.[2]

The Court, when sitting in any stage of a judicial proceedings, is

19. AIR 1918 Lah. 65.
20. 1969 P. Cr. L.J. 627.
21. AIR 1916 Mad. 648.
22. AIR 1925 Lah. 210+AIR 1921 Lah. 102+AIR 1961 Mad. 648.
23. 1963 Pun. L.R. 29+13 Cri. L. Jour 576 (Lah).
24. 1968 P. Cr. L.J. 682=19 DLR 354 (DB).
25. PLD 1966 SC 94=17 DLR (SC) 608.
1. AIR 1919 Cal. 44+AIR 1963 Tri. 50.
2. AIR 1963 Tripura 50.

deemed present in every part of the place set apart for its own use and for the use of its officers and witnesses.[3]

5. **Summary procedure.** The Family Court has been given the power of summary trial of the accused. But this does not mean that the accused may be punished by the Court without giving him an opportunity to explain his conduct, it is necessary for the Court to state to him particulars of the offence of which he is accused and to give an opportunity to him of explaining and correcting any misapprehension as to what had, in fact, been said or meant by him. It is only after affording this opportunity that the Court should make up its mind whether any intentional insult was offered. This is particularly necessary because the Court itself is the prosecutor and the prosecution witness and there is to be no trial or examination of witnesses and the only opportunity for the accused to make a statement is in reply to the notice of charge against him. If this is not done it would amount to a miscarriage of justice and would be fatal to the proceedings.[4]

17. *Provisions of Evidence Act and Code of Civil Procedure not to apply.* (1) Save as otherwise expressly provided by or under this Act, the provisions of the Evidence Act, 1872, and the Code of Civil Procedure, 1908 [5][except sections 10 and 11] shall not apply to proceedings before any Family Court.

(2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts.

Synopsis

1. Scope.
2. Impleading heirs of deceased party.
3. Proof of documents.
4. Party failing to adduce evidence.
5. Transfer of cases.
6. Fresh plaint, if may be filed.
7. Applicability of Oaths Act.
8. Revision.
9. Judgment.

1. **Scope.** The application to the Family Court of the Evidence Act and C.P.C. except sections 10 and 11 has been definitely excluded, but the procedure prescribed "in" not "by" or "under" the Guardians and Wards Act, 1890 has been retained. This situation cannot be so interpreted as to bring C.P.C. again, through a back door, to take its old place in guardianship proceedings. This will amount to repealing section 17 of the West Pakistan Family Courts Act, 1964.[6]

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3. AIR 1917 Cal. 428+AIR 1919 Cal. 44 (Contempt committed in the office set apart for the Court).
4. AIR 1963 Tripura 50.
5. Subs. by West Pakistan Act XV of 1967, S. 2.
6. PLD 1967 Lah. 977 (DB).

2. **Impleading heirs of deceased party.** Though C.P.C. does not apply to Family Courts yet where in a matter the Family Court has exclusive jurisdiction, and the right to sue survives, substitution of heirs cannot be refused on the ground that provision for it exists in Civil Procedure Code and those provisions have not been made applicable to Family Court. Such an approach amounts to refusal to exercise jurisdiction vested in the Court, and may lead to manifest injustice.[7]

3. **Proof of documents.** The technical provisions of Evidence Act do not apply to proceedings before the Family Court. Therefore the mere fact that a party has failed to formally prove a document placed on the file of the Court would not be sufficient for the Court to refuse to notice the document. The proceedings before a Family Court are both adversary as also inquisitorial. If, for any reason, may be on account of the act of the Court or otherwise, through innocent mistake, a party fails to perform a technical act, it is the duty of the Court to make necessary enquiry, if the question is of substantial nature. In this case, apart from the petitioner it was the duty of the Family Judge also to frame correct issues and also to take note of any material lying on his own record in connection with a question of real controversy between the parties.[8]

However that does not affect the power of the Court to evaluate evidence. Therefore merely because documents have been placed on the record, the Court need not accept them as true and genuine. It may, when they are in the interest of the maker who produces them, refuse to attach any weight to them.[9]

4. **Party failing to adduce evidence.** If a party fails to adduce evidence without sufficient cause, the Family Court has jurisdiction to order the closing of his evidence [10]

5. **Transfer of cases.** A case pending before a Family Court cannot be transferred to another Court under the Code of Civil Procedure but the High Court can under Art. 102 of the Constitution of 1962 which corresponds to Art. 203 of Constitution, 1973, order the transfer of a case from one Family Court to another.[11] But such power cannot be exercised by way of relief unless defect, is found in the Court trying a family suit, which it is necessary to rectify, in which case the High Court would act under this provision, being responsible for the administration of justice. Such relief cannot be granted *ex debito justitiae* merely at the behest of the party and that too for its convenience.[12]

6 **Fresh plaint may be filed.** Where a plaint was returned to the plaintiff to be presented to the proper Court. He did not present that

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7. Law Notes 1972 Lah. 428.
8. NLR 1981 UC 451 (Lah).
9. NLR 1982 Civ. 116 (Kar).
10. 1982 Law Notes 94=PLJ 1982 Lah. 62.
11. PLD 1968 Lah. 987.
12. PLD 1976 Kar 68=PLJ 1976 Kar. 88 (DB) (*But see* 1976 LN 412).

plaint to the Court but presented a new plaint to it. It was held that he could not be penalized for that act. The presentation was legal because the provisions of section 9 and Orders 7 to 9 are not applicable to proceedings under this Act.[13]

7. **Applicability of Oaths Act.** Sections 8 to 11 of the Oaths Act have been made applicable to the proceedings under the Act.

Sections 8 to 11 read as follows :—

"S. 8. If any party to, or witness in any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

S. 9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party, to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

S. 10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more coveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

S. 11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

Effect of statement on oath. The object of oath is to substitute superhuman retribution for falsehood, for earthly punishment. Actual words or ceremonies used for the purpose are immaterial.[14] The Oaths Act does not concern itself with any agreement, compromise, or adjustment in a suit. It only provides for a procedure by which certain facts

13. 1982 CLC 22=1981 Law Notes 621.

14. AIR 1924 Oudh 442.

may be held to be conclusively proved as against the party which offers to be bound by the oath administered under the Act. Therefore where a decree follows in respect of the whole or part of the subject-matter of a suit on the basis of a statement made by a party, or a witness, on oath, in pursuance of the agreement of the parties to the suit, the decree should be regarded as a consent decree. But if the intention of the parties is not to obtain a decision of the whole or part of the subject-matter of the suit, but is only confined to finding a short cut for the proof of some fact or facts in controversy by means of a statement on oath, no decree can immediately follow such oath and the question of determining the nature of the decree in such a case does not really arise.[15]

Court cannot order a person to appear for taking oath. It is a rule of prudence that unless both parties agree to be bound by the special oath of a witness or a party, the special oath is not to be administered.[16]

Section 9 of the Oaths Act, 1873, which enables the Court to give effect to an offer by one party to be bound by the oath of the opposite party, provides that "no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question", *i.e.* whether or not he will make the oath.[17] Therefore where a defendant desires that the plaintiff should be required to appear in Court to state whether or not he is prepared to make a certain statement on solemn affirmation, the order of the Court dismissing the suit on the ground that the plaintiff has disobeyed the order requiring him to attend in person is without jurisdiction, or at all events the Court acts with material irregularity.[18]

Form of oath. The oath or solemn affirmation referred to in S. 8, Oaths Act may be in any form common amongst or held binding by persons of the race or pursuasion to which "the deponent" belongs and not repugnant to "justice or decency".[19] An oath of *talaq* whereby the person taking the oath swears that if he makes a false statement his wife would stand divorced is not indecent. It can be taken under this section.[20]

Offer and acceptance of decision on basis of oath. Sections 9 and 11 of the Oaths Act do not require that all parties in a suit should agree to be bound by an oath. The evidence given on oath is binding as against those parties who have offered to be bound.[21]

Where a party offers to be bound by a Special Oath to be taken by the other party and the other party accepts the offer, there is a completed agreement between the parties even though no oath is taken. Taking of the oath is the performance of the agreement and does not

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15. PLD 1961 Lahore 823=PLR 1962 (2) W.P. 431 (DB).
16. AIR 1952 All 678=1952 Cri. L. Jour 1183.
17. PLD 1960 S.C. 301=1960 (2) P.S.C.R. 172=12 DLR S.C. 261.
18. AIR 1950 Pat. 180.
19. PLJ 1981 Lah. 179+AIR 1954 Nag. 56.
20. 1981 CLC 565=PLJ 1981 Lah. 179.
21. AIR 1929 All 759 (DB).

affect its making.[22] To allow a party to resile, without adequate reasons, from an undertaking of this nature would amount to allowing him to play the game of hide and seek with the other party and even to abuse the process of the Court. This situation, however, does not lead to the conclusion that once an offer has been made and accepted or when evidence on oath has been given and recorded, it becomes impossible for one or both of the parties to be relieved of the consequences.[23]

Where a party offers to be bound by the statement on oath of any of the opposite parties under section 9 of the Oaths Act and the opposite party accepts the offer, there is a completed agreement which cannot be revoked and he cannot resile from such an offer unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile.[24] The reason is that a transaction can, in certain circumstances be vitiated by misunderstanding, misrepresentation or fraud and that there can also be an agreement amongst the parties to depart from the course adopted by them and to take a different line of action for the settlement of their disputes. Even an irrevocable agreement may, unless there is any legal impediment, be revoked or modified by the agreement of the parties, because the authority and the force of such an agreement is nothing more than the consensus of the parties.[25] But he can resile from it if there has been no such acceptance or counter-offer by any other party to judicial proceeding.[1]

Oath by third party. An agreement that the Court may decide the matters in dispute between the parties in accordance with the statement on oath of a third person is not covered by the provisions of the Oaths Act.[2]

Place and time for taking oath. Agreement to take an oath must specify form of oath and place where it is to be administered.[3] An oath should be taken in the presence of the parties to be bound by it.[4] Where an agreement was to take an oath on a particular day but the oath was taken on a later day, burden lies on the person who relies on the oath to show that the time was not the essence of the contract.[5]

Discretion of Court to administer oath or not to administer it. The Court has discretion to administer an oath or not to administer it even

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22. AIR 1952 All 882=ILR 1953 (1) All 494 (FB).
23. PLD 1972 Kar. 622.
24. AIR 1952 All 882 (FB)+AIR 1952 All 890 (FB)+AIR 1959 Punj. 252 (DB)+AIR 1957 Orissa 226 retraction cannot be allowed after the oath is administered)+AIR 1946 Lah. 78+AIR 1927 All 590+AIR 1941 Lah. 173+AIR 1926 Lah. 240 (Court has discretion to allow retraction on good ground. But retraction cannot be allowed after the oath is administered)+38 Pun. L.R. 1171+65 Ind Cas. 700 (DB) (Lah).
25. PLD 1972 Kar. 622.
1. AIR 1952 All 882=ILR 1958 (1) All 494 (FB).
2. PLD 1970 S.C. 241=22 DLR (SC) 146=1970 SCMR 421.
3. 21 Mad. L. Jour 618.
4. 3 Low Bur Rul 60.
5. AIR 1919 Mad. 615 (DB).

after an offer has been accepted by the opposite party.[6] Where a challenger who offers to be bound by an oath on condition precedent that he should perform certain act in the proceedings for administration of oath, fails or refuses to do the act as agreed, he must be deemed to have waived that condition and cannot insist upon it. The duty of administering the oath under the Act devolves on the Court and it cannot be said to be acting in excess of its power if it orders the Commissioner to be appointed by it, to perform certain things which the challenger refuses to do in spite of his agreement.[7]

Court must give decision on oath. Even when the procedure of sections 9, 10 and 11, Oaths Act has been gone through, the Court is still required to pass a judgment.[8] Where the defendant offers to be bound by the statement on oath made by the plaintiff on a certain question and agrees that if the statement is made the suit may be decreed against him, and the statement is duly made by the plaintiff, there is no issue of law or fact to go into and the plaintiff is entitled to a decree as prayed for by him.[9]

Default in taking oath. Unless oath is taken in pursuance of an agreement, the case cannot be disposed of on the basis of default either on behalf of challenger or by the acceptor. Provisions of S. 11, Oaths Act can only be attracted after the oath hed been taken in accordance with the agreement arrived at between the parties as mentioned in sections 9 and 10 of the Act.[10]

Party resiling from agreement to take oath. Where the party agreeing to abide by the oath of his opponent imposes fresh conditions at the time of taking oath, the party taking oath has a right to enforce the agreement originally entered into and if he takes the oath according to the original agreement, evidence will be conclusive against the other party.[11] Once the defendant agrees to take special oath, the plaintiff cannot resile from the agreement and the statement made by the defendant is binding on the plaintiff, even if it was made after the plaintiff's retraction.[12]

'*Res judicata.*' Effect of oath taken under the Act is merely to furnish conclusive evidence on the matter in issue and a decision on oath is *res judicata*.[13] Therefore any further evidence that may be taken should be limited to matters not proved by oath.[14]

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6. 31 Pun. L R. 1171.
7. AIR 1938 Mad. 385 (DB).
8. AIR 1959 All 93 (DB).
9. AIR 1919 Lah. 138=1919 Pun. Re. No. 118+AIR 1924 All 126.
10. AIR 1938 Mad. 385 (DB).
11. 21 Mad L. Tim 613 (DB).
12. AIR 1931 Cal. 549 (DB).
13. 36 Mad. 287 (DB).
14. 22 Mad 234 (DB).

Unless a party offers to be bound by a special oath, the statement cannot be conclusive evidence for the purpose of section 11, Oaths Act.[15] Therefore a decision by oath is conclusive only as against the person who offered to be bound.[16]

8. **Revision.** In view of provisions of section 17 of the W.P. Family Courts Act whereby application of Civil Procedure Code have been excluded, there is no scope for preferring a revision petition to the High Court.[17]

9. **Judgment.** Since Order 20 of the Civil Procedure Code itself is inapplicable to proceeding under the Act, it cannot be urged that the judgment is vitiated merely for the failure of the trial Court to discuss each and every piece of evidence.[18]

18. *Appearance through agents.* If a person required under this Act to appear before a Family Court, otherwise than as a witness, is a *pardahnashin* lady, the Family Court may permit her to be represented by a duly authorised agent.

Synopsis

1. Advocate, right of, to appear. 2. Appearance through agent.

1. **Advocate, right of, to appear.** The provisions of section 18 which enable the Court to permit an authorised agent to represent a *pardanashin* lady does not in any manner take away the right of a counsel to appear and act for and on behalf of his client. Such a right is recognised by section 22 of the Legal Practitioners and Bar Councils Act, 1973 and it is by virtue of that provision that he is "entitled to appear or act" for his client.[19]

2. **Appearance through agent.** This section by itself does not cast any obligation on any person to put in appearance. On the contrary it is an enabling provision which invests the Court with powers to dispense with the legal "requirement" in relation to appearance by any person and to admit that person to be represented through an authorised agent. The occasion for exercise of power under section 18, would, therefore, arise only if it is shown that any person is "required" by any of the

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15. AIR 1928 Bom. 285=52 Bom. 295 (DB).

16. AIR 1918 Lah. 128 (DB)+AIR 1923 Nag. 180+AIR 1929 All 759 (DB)+AIR 1924 Bom. 511 (DB). (But does not prevent Court from attempting to establish that particular statement was false in fact and to the knowledge of maker+ AIR 1926 All 577 (Facts that case was decided on oath of defendant is not sufficient ground for refusing defendant opportunity to prove to satisfaction of Court that the claim had been made on false document)+AIR 1925 Oudh 104.

17. 1982 CLC 205 (Kar.)+PLD 1980 Pesh 246+PLD 1971 Kar. 118+PLD 1972 Kar. 410+PLD 1970 Lah. 641+PLD 1971 Lah. 875=1971 Law Notes 605.

18. PLD 1977 Lah. 328=PLJ 1977 Lah. 101.

19. 1981 SCMR 395=PLJ 1982 SC 605.

provisions of the Family Courts Act, 1964 to appear before the Court and that person being a *pardanashin* lady wishes to appoint an authorised agent.[20]

19. *Court-fees.* Notwithstanding anything to the contrary contained in the Court Fees Act, 1872, the court-fees to be paid on any plaint filed before a Family Court shall be rupee one for any kind of suit.

PUNJAB AMENDMENT

Substitute "rupees fifteen for rupee one".

Punjab Act 14 of 1973, S. 9.

1. **Appeal, Court-fee on.** This section applies to plaints only Court fee on appeal under this Act is to be paid *ad valorem* under section 7, Court Fee Act.[21]

Condonation of delay. The Muslim Family Laws Ordinance does not embody any provision making section 5 of the Limitation Act applicable to it. The mere fact that the said Ordinance does not expressly exclude application of section 5 of the Limitation Act to proceedings under the said Ordinance would, by itself, not extend the application of section 5 of the Limitation Act to such proceedings. Non-existence of any provision in the said Ordinance excluding application of section 5 of the Limitation Act would have been of some consequence if section 5 had also been mentioned in clause (*a*) of sub-section (2) of section 29 of the Limitation Act but since that has not been done, the non-existence of the aforementioned provision is of no avail to the petitioner seeking condonation of delay in filing an application for revision. Therefore a time-barred revision application cannot be admitted by applying to it the provisions of section 5 of the Limitation Act.[22]

20. *Investment of powers of Magistrate on Judges.* Government may invest any Judge of a Family Court with powers of Magistrate First Class to [23][make order for maintenance] under section 488 of the Code of Criminal Procedure, 1898.

Synopsis

1. Scope.
2. Maintenance of wife under Muslim Law.
3. Maintenance of children under Muslim Law.
4. Maintenance of children under section 488, Cr. C P.

1. **Scope.** The Family Court may exercise the jurisdiction of an

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20. PLJ 1979 Lah 26=PLD 1979 Lah. 217=1979 Law Notes 53.
21. PLD 1978 Lah. 716 (DB)+Law Notes 1974 Lah 654.
22. 1982 Law Notes 86 (Lah).
23. Subs. by W.P. Ordinance, X of 1966, S. 13.

ordinary Civil Court and order the payment of maintenance to the wife or child of a man. This is unlike the Union Council which can grant maintenance to the wife alone.

The Family Court if so empowered under section 20 may also act as a Criminal Court under section 488, Cr. P.C. and order the payment of maintenance to the wife and children under that section. It must, however, be noted that though a Family Court can act under section 488 yet a Magistrate cannot so act. Section 5 read with section 20 of West Pakistan Family Courts Act, 1964 has ousted the jurisdiction of the Magistrates to deal with applications under section 488, Cr. P.C.[24] In fact the provision as contained in section 488, Cr, P.C. has become redundant and the question of conferring powers upon the Family Court under that provision may not arise at all. The Family Court has now exclusive jurisdiction to entertain, hear, or adjudicate upon the matter relating to maintenance.[1]

2. **Maintenance of wife under Muslim Law.** Under Muslim Law it is the duty of the husband to maintain his wife. She is not entitled to maintenance when she refuses to go to her husband's house without sufficient cause or is otherwise disobedient. However, if the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty, the husband is not absolved of the duty to maintain the wife because separate maintenance can be claimed by the wife when the husband has turned her out or the treatment or misunderstanding between them is such that it is irremediable and her return to the husband's house is likely to give rise to fresh troubles and disputes.[2] But she is entitled to a decree for past maintenance, unless the claim is based on a specific agreement.[3]

Delay in coming to Court The mere fact that a neglected wife has been hesitant in promptly coming to the Court or has been pursuing alternate remedies out of Court cannot in all fairness be so construed as to deprive her of the right of maintenance from the day when the cause of action accrued to her. The Court have the jurisdiction to grant such maintenance subject to consideration of limitation and the relevant circumstances of each case.[4]

Maintenance cannot be claimed under section 488, Cr. P.C. The provision as contained in section 488, Cr. P.C. has become redundant and question of conferring powers upon the Family Court under that provision may not arise at all. The Family Court has now exclusive jurisdiction to entertain, hear, or adjudicate upon the matter relating to maintenance.[5] A comparison of provisions of section 488, Cr. P.C. and of the West Pakistan Family Courts Act, 1964, indicates that the

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24. PLD 1969 Pesh. 62+PLD 1969 S.C. 187=21 DLR S.C. 123.

1. PLD 1981 Lah. 761=PLJ 1981 Lah. 424+PLD 1969 SC 187=21 DLR (SC) 123.
2. PLD 1971 Lah. 866=Law Notes 1971 Lah. 601 (DB).
3. (1881) 6 Cal. 631.
4. PLD 1966 (W.P.) Lahore 703 (DB).
5. PLD 1981 Lah. 761=PLJ 1981 Lah. 424+PLD 1969 SC 187=21 DLR (SC) 123.

provisions of West Pakistan Family Courts Act are of a more beneficial nature which enlarge not only the scope of the enquiry but also vest the Court with powers of giving greater relief with a right of appeal. Furthermore, the combined effect of sections 5 and 20 of the Act is clearly to give exclusive jurisdiction to the Family Courts without, in any way, diminishing or curtailing rights already possessed by a litigant with regard to the scheduled matters. It has been held that looking at the provisions as a whole it is therefore, clear that the Family Courts Act has only changed the forum, altered the method of the trial and empowered the Court to grant better remedies. It has, thus, in every sense of the term, brought about only procedural changes and has not affected any substantive right. It has been held that according to the general rule of interpretation, therefore, a procedural statute is to be given retroactive effect unless the law contains a contrary indication, and there being no such indication in the Family Courts Act, the Act affects also pending proceedings and the Magistrates have no longer any jurisdiction either to entertain, hear or adjudicate upon a matter relating to maintenance.[6]

3. Maintenance of children under Muslim Law. A father is bound to maintain his sons till they have attained the age of puberty and his daughters till they are married. The law permits the children to claim maintenance even after attaining of the age of majority, if they are unable to maintain themselves.[7] He is bound to maintain them even when they are in the lawful custody of some one else. If however the children have independent means of their own the father is not bound to maintain them. If he be poor he can charge their maintenance on their property. A father is not bound to maintain his adult sons unless they are disabled by infirmity or disease.[8]

Age of the puberty. In the matter of maintenance the age of puberty and not the age of majority under Majority Act, 1875, is to be considered.

Disabled by infirmity or disease. Though one is actually able to work, yet if the work he can procure is not suitable or proper for him, he is held to be weak and unable to maintain himself.[9]

Maintenance or 'hizanat'. The father who is natural guardian of his minor child is responsible for providing funds for the child's maintenance although the *hizanat* or custody of the child belongs to the mother[10] or the maternal-grandmother of the child.[11] Even where a wife in her application for maintenance did not expressly demand maintenance for the children, the Court allowed maintenance for them.[12]

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6. PLD 1981 Lah. 761=PLJ 1981 Lah. 424.
7. PLD 1967 Dacca 575.
8. Baillie 459 and 462 + Hedaya 148.
9. Baillie 462.
10. PLD 1961 Lah. 768+PLD 1954 Pesh. 13.
11. AIR 1935 Oudh 492=158 I.C. 581.
12. PLD 1961 Kar. 12=PLR 1960 (1) W.P. 473.

If the father has any right of custody of his children, he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not deprive them of their right to claim or recover maintenance from their father.[13] It was held in an earlier case that if the father has the right to the custody of the child and he refuses to maintain the child unless he is given into his custody, the refusal would not be considered unjustified and maintenance for the child cannot be decreed.[14] But in another case it was held that it would be cruel to refuse to give maintenance to a child who was living with his mother after the termination of the period of *hizanat* of the mother. The father's responsibility to maintain the child should not be restricted to condition of his staying with the person who might be entitled to the *hizanat* according to Muslim Law. As long as the child is with the mother she must be provided with sufficient means to maintain it. If the father has the right to the custody of the child he can at any time institute proceedings for that purpose. A father may be according to Muslim Law entitled to the custody of the child but the Court in a proper case may refuse to give the custody to him in case it comes to the conclusion that it would not contribute to the welfare of the minor if he be removed from the custody of the mother and handed over to the father.[15] Where the mother has a right to the custody of the child, the father is bound to maintain the child when she is in her custody. Therefore, even where the mother is wilfully living apart from the husband, the latter is liable to maintain the children living with her. He cannot refuse to do so on the ground that the wife should come back and live with him.[16]

Daughter living away from father. The daughter does not have an unrestricted right to live as and where she likes and to impose an obligation on her father to provide separate maintenance for her even though he may be willing to keep her in his house and maintain her,[17] but maintenance may be decreed where circumstances are such that the daughter is justified in living away from the house of the father,[18] or where the Court gives the custody of the child to some one other than the father.[19] Where the petitioner's right to custody has been rejected by the Guardian Judge, the matter stands concluded and order of maintenance is to be enforced notwithstanding the fact that the girl has attained puberty.[20]

Where the child has means of his own. A child having means of his own is not entitled to any maintenance from his father. The obligation to maintain children extends only to such children who are in need of

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13. PLD 1961 Lah. 733 (DB)+AIR 1941 Mad. 582=198 I.C. 870.
14. PLD 1957 Lah. 220+PLD 1969 Lah. 62.
15. PLD 1969 AJ & K 42+1968 P. Cr. L J. 1701 (Kar.)+PLD 1961 Lah. 733 (DB).
16. PLD 1965 Karachi 187.
17. PLD 1958 Lah. 596+AIR 1945 Bom. 390=47 Bom. L.R. 345.
18. AIR 1941 Bom. 369.
19. PLD 1957 Lah. 220+PLD 1958 Lah. 596.
20. PLD 1969 Pesh. 134=21 DLR (W.P) 288.

maintenance.[21] Where it was proved that the child was an "able bodied" person, who could earn his livelihood, and had, in fact, been earning his livelihood, independently, the Court refused to grant maintenance as his case was not covered by this section.[22]

Daughter-in-law. It is incumbent on a father to maintain his son's wife, when the son is young, poor, or infirm[23] but there is no such obligation in the case of the widow of a son.[24]

Among Kutchi Memons governed by Hindu Law in succession and inheritance, a daughter-in-law widowed after the death of her father-in-law is not entitled to maintenance out of the estate left by the father-in-law to his heirs. The condition precedent attaching to the moral liability of a father-in-law to maintain his daughter-in-law is the predecease of his married son.[25]

Where child is being maintained voluntarily by another. A child, who is being already voluntarily maintained by another and therefore does not stand in need of food, clothing or lodging, cannot require his father to pay him maintenance. Similarly a person maintaining the child of another voluntarily without reference to his father would not be entitled to claim his maintenance from the father.[1]

Past maintenance. Even decreed maintenance, if allowed to remain in arrears for some time, cannot be recovered from a non-absent father, on the ground that maintenance is due only when the claimant, other than a wife, is in a actual need of it and the fact that it was not claimed indicates that it was not needed.[2]

Compromise as to maintenance. The right of a minor to receive maintenance under section 488 is inalienable. A minor cannot contract himself out of the statutory right of maintenance under that section either himself or through any other person including his mother for the short and sensible reason that the minor is incompetent to enter into a contract.[3] But a compromise amongst the parents of a child on the question of maintenance of the child though not binding on the minor, will be binding on them.[4]

Mother's obligation. When the father is poor and the mother is rich, she is bound to maintain the children, with a right of recourse against the father.[5]

Paternal-grandfather's obligation. When the father and mother of the child are poor and the child's paternal-grandfather is rich, he is

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21. PLD 1958 Lah. 569.
22. PLD 1969 Pesh. 62=PLR 1970 (1) W.P. 537.
23. Baillie 462.
24. AIR 1950 Bom. 245.
25. PLD 1950 Sind 131=PLR 1948 Sind 17 (DB).
1. PLD 1958 Lah. 596=PLR 1959 (1) W.P. 1050.
2. PLD 1958 Lah. 596=PLR 1959 (1) W.P. 1050.
3. PLD 1966 Pesh. 56=18 DLR (W.P.) 42.
4. PLD 1960 Karachi 409=PLR 1960 W.P. 179.
5. Baillie 461.

obliged to maintain the child with a right of recourse to his father for it.[6] Where the child was maintained by the mother who did not contract a second marriage after the death of her husband and maintained the child during the period of *hizanat* when she had obviously the right to his custody, his grandfather cannot escape liability for payment of past maintenance.[7]

Paternal-uncle's obligation. When the father is poor and he has a rich brother the latter may be ordered by the Court to maintain the child, with a right of recourse against the father.[8]

4. **Maintenance of children under S. 488, Cr. P. C.** A father may be compelled to pay maintenance to his children under section 488 of Criminal Procedure Code. The Court may make an order, to pay maintenance up to a sum of rupees four hundred per mensem to the child. The age of the child is not very material. If a child having attained the age of majority is unable to earn his living due to lack of physical and mental development, the father is liable to maintain it. For the purposes of S. 488 of the Code, a child whatever his age may be, remains a child so long as he is unable to maintain himself.[9] The legal requirement is that the child must be unable to maintain himself. This inability may be due to a variety of reasons including minority. It could also be due to protracted illness or engagement in studies.[10] The inability of the child to maintain itself has reference to the absence of sufficient physical and mental development in the child rendering it unable to earn his living by his own efforts.[11] In different communities and different circumstances these words may mean different things. Among the labouring classes it may even be possible to hold that a healthy boy aged 16 is not unable to maintain himself. The Legislature purposely omitted reference to any particular age. It is a question to be decided on the evidence in each case whether a particular child is or is not able to maintain itself. For that, regard must be had to the particular circumstances obtaining in each family and its status.[12] Therefore in answer to a claim for maintenance the child's capacity to earn a complete livelihood by itself must be established.[13] Thus an infirm or descrepit or deformed son or daughter may be entitled to claim maintenance even up to a very advanced age, while an able-bodied son or daughter might be deprived of the right if he/she has already found suitable gainful employment and is in a position to maintain himself or herself.[14] In this connection it may be noted that the capacity

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6. Baillie 461.
7. PLD 1971 Lah. 151 (DB).
8. Baillie 462.
9. PLD 1970 S.C. 75=22 DLR S.C. 192+PLD 1961 Lah. 199+PLD 1965 Lah 260+PLD 1950 Lah. 441+AIR 1965 All 125.
10. PLD 1968 Kar. 211=20 DLR (W.P.) 104+PLD 1965 Pesh 134=21 DLR (W.P.) 288.
11. PLD 1970 S.C. 75=22 DLR S.C. 192+AIR 1941 Lah. 92.
12. PLD 1970 S.C. 75=22 DLR S.C. 192+AIR 1941 Lah. 92+AIR 1950 Nag. 231+AIR 1965 All 125.
13. PLD 1969 Pesh. 62+AIR 1925 Rang. 197.
14. PLD 1970 S.C. 75=22 DLR (SC) 192.

to earn must be by moral and legal means. Adoption of prostitution as a means of livelihood, or earning money by child labour will not be considered because it is opposed to public policy.[15]

Provision for education. The word maintenance not having been defined in the Criminal Procedure Code would include the cost of living as well as proper education according to the status of the family to which the petitioner belongs.[16]

Means of father. If a man does not work or does not earn enough to support his children, that in itself is no ground to justify his omission to supply them with reasonable maintenance because having brought them forth in the world, it is his bounden duty to provide for their maintenance.[17]

Means of mother. The ability of the mother to maintain the child is no reason to refuse order for the maintenance of a child by the father.[18]

Amount of maintenance of child. The word "maintenance" not having been defined in the Criminal Procedure Code would include the cost of living as well as proper education according to the status of the family to which the petitioner belongs.[19] What is necessary to decide in this connection is the degree of education to be attained by the child having regard to the status and other circumstances of his family, to enable it to earn a complete livelihood by honest and decent means. Thus it may not be sufficient to say that the child of a tradesman can maintain itself by working as a cooly or by thieving. What is required is that the child must be maintained until it is in a position to earn its own livelihood in an honest and decent manner in keeping with his family status.[20] But the guardian cannot claim for more than the minimum education. If he or she wants more, they must have recourse to a civil suit.[21] The present view is that the expenses of a college education are not to be considered outside the scope of this section.[22]

Maintenance for more than one person. The sum of Rs. 400 mentioned in section 488 of the Code of Criminal Procedure is the maximum that can be allowed to each applicant, and if the application is made by more than one person, each of them could be awarded maintenance allowance at the rate of Rs. 400.[23] In such cases the order should direct

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15. AIR 1941 Mad. 594.
16. PLD 1965 Lah. 260+PLD 1964 Lah. 442.
17. 1972 P. Cr. L.J. 1286 (Lah).
18. AIR 1914 Upp. Bur. 1.
19. PLD 1970 S.C. 75+PLD 1968 Kar. 21+PLD 1965 Lah. 260 (AIR 1933 Lah, 1026 *Diss*)+PLD 1964 Lah. 442=AIR 1941 Sind 214+AIR 1939 Rang. 95.
20. PLD 1970 S.C. 75=22 DLR (SC) 192.
21. AIR 1919 Rang. 95.
22. PLD 1965 Lah. 260+PLD 1964 Lah. 442.
23. PLD 1957 (W.P.) Lahore 441.

payment of maintenance at specified rates in favour of each of the persons entitled to maintenance. An order directing a consolidated payment to be made for the benefit of several persons entitled to maintenance is irregular.[24] Where no apportionment has been made between different persons, the High Court can, in its revisional jurisdiction, make the apportionment.[25]

Compromise as to maintenance of children. The right of a minor to receive maintenance under section 488 is inalienable. A minor cannot contract himself out of the statutory right of maintenance under that section either himself or through any other person including his mother for the short and sensible reason that the minor is incompetent to enter into a contract.[1] The child's claim for maintenance cannot be negatived on the ground that by the divorce deed, the father has absolved himself from any liability to maintain the child. This is so when there is no express provision to that effect in the document and even if there is one, unless adequate provision for his maintenance has been made, it cannot bind the minor child.[2] The fact that a lump sum has been paid for the maintenance of a child is not a complete answer to future application by the mother. The section enforces a continuing obligation on the father to maintain his child.[3]

Illegitimate child. A child whether legitimate or illegitimate, is entitled to maintenance from the father. A finding as to the factum of marriage between the alleged father and the mother of the child is not, therefore, absolutely necessary, though the fact of marriage may raise a strong presumption of paternity which is the sole question for decision in such cases.[4] The fact that Muslim Law makes no specific provision for granting or prohibiting the grant of maintenance to an illegitimate child against the father does not lead to the inference that the Family Court has no jurisdiction to grant such maintenance. The provisions of Code of Criminal Procedure are a part of the general law of the land which is in the absence of any contradictory provision in the Muslim Law, as binding on Muslims as on other citizens of the country.[5]

21. *Provision of Muslim Family Laws Ordinance to be applicable.* (1) Nothing in this Act shall be deemed to affect any of the provisions of the Muslim Family Laws Ordinance, 1961, or the rules framed thereunder and the provisions of sections 7, 8, 9 and 10 of the said Ordinance shall be applicable to any decree for the dissolution of marriage solemnized under the Muslim Law, maintenance or dower, by a Family Court.

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24. AIR 1954 Bom. 546+AIR 1957 Pepsu 24+AIR 1953 Bom. 366.
25. AIR 1960 Ker. 66.
1. PLD 1967 Dacca 575+PLD 1966 Pesh. 56+AIR 1952 Hyd. 157.
2. AIR 1959 Ker. 366.
3. AIR 1937 Rang. 246.
4. 16 Cal. 781.
5. AIR 1963 Allahabad 143.

(2) Where a Family Court passes a decree for the dissolution of a marriage solemnized under the Muslim Law, the Court shall send by registered post within seven days of passing such decree a certified copy of the same to the appropriate Chairman referred to in section 7 of the Muslim Family Laws Ordinance, 1961 and upon receipt of such copy, the Chairman shall proceed as if he had received an intimation of *Talaq* required to be [6][given] under the said Ordinance.

(3) Notwithstanding anything to the contrary contained in any other law, a decree for dissolution of a marriage solemnized under the Muslim Law shall —

(*a*) not be effective until the expiration of ninety days from the day on which a copy thereof has been sent under sub-section (2) to the Chairman ; and

(*b*) be of no effect if within the period specified in clause (*a*) a reconciliation has been effected between the parties in accordance with the provisions of the Muslim Family Laws Ordinance, 1961.

PUNJAB AMENDMENT

For section 21, the following section shall be substituted :—

21. *Provisions of Muslim Family Laws Ordinacne, 1961 not affected.* (1) Nothing in this Act shall be deemed to affect any of the provisions of Muslim Family Laws Ordinance, 1961, or the rules made thereunder.

Punjab Ord. 24 of 1971 enforced on 23-6-1971.

1. **Dissolution of marriage, copy of decree must be sent to chairman.** Sub-section (3) of section 21 provides that a decree for dissolution of marriage shall not be effective until the expiry of ninety days, from the date when the copy of the decree is sent to the Chairman under sub-section (2) and will be completely ineffective if reconciliation has been effected between the parties in accordance with the provisions of the Ordinance. This is clearly a reiteration of the provisions of S. 7 (4) of the Ordinance and is not a new provision. Evidently it has been added merely to emphasise that the period of ninety days after which the decree will be effective, will start not from the date of notice, if any, given by any party to the suit, to the Chairman but from the date the certified copy is sent to the Chairman by the Court. The intention of Legislature that under section 8 of the Ordinance notice to Chairman is to follow the Court's decree, becomes amply clear from section 21 (3) of

6. Subs. by W. Pakistan Ordinance (X of 1966), S. 14.

the Family Courts Act.[7] However, the requirement relative to the time within which it has to be sent is directory, for no consequence is provided if the copy of such a decree is not sent within 7 days. Therefore, nothing will turn on the delay in sending the certified copy, for under sub-section (3) of section 7 of the Ordinance, it is in fact the date on which the copy is received by the Chairman that will be material in computing the period of 90 days.[8]

Procedure of Chairman. The Chairman must send a notice of the decree to the parties and summon them to attempt reconciliation between them. If in spite of his attempt to secure attendance of the parties, the Chairman is not successful in making them attend the meetings of the council, and ninety days elapse without any reconciliation, the divorce becomes effective. Having regard to the above provisions the effectiveness of the decree after the expiry of 90 days is absolute. There is nothing in the Ordinance or the Act to make it ineffective in an event where an attempt is made but no service can be effected for the purpose of reconciliation.[9]

22. *Bar on the issue of injunctions by Family Court.* A Family Court shall not have power to issue an injunction to, or stay any proceedings pending before, a Chairman or an Arbitration Council.

23. *Validity of marriages registered under the Muslim Family Laws Ordinance, 1961, not to be questioned by Family Courts.* A Family Court shall not question the validity of any marriage registered in accordance with the provisions of the Muslim Family Laws Ordinance, 1961, nor shall any evidence in regard thereto be admissible before such Court.

1. Validity of marriage when may be challenged. Section 23 does not prevent a party to the marriage from leading evidence to show that a marriage did not in fact take place as alleged or that fraud had been perpetrated against the party or that his/her signature on the alleged *Nikahnama* was also forged. Fraud vitiates even the most solemn transaction. A marriage which is otherwise void, for example, because it was solemnized between persons within the prohibited degrees, cannot be beyond challenge in a Family Court, merely because it was registered by Nikah Registrar in accordance with the provisions of section 5 of the Muslim Family Laws Ordinance, 1961.[10]

24. *Family Courts to inform Union Councils of cases not registered under the Muslim Family Laws Ordinance, 1961.* If in any proceedings before a Family Court it is brought to

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7. PLD 1973 B.J. 36+PLD 1971 Kar. 118.
8. PLD 1971 Kar. 118.
9. PLD 1971 Kar. 118.
10. 1979 CLC 462=PLJ 1980 Kar. 17.

the notice of the Court that a marriage solemnized under the Muslim Law after the coming into force of Muslim Family Laws Ordinance, 1961, has not been registered in accordance, with the provisions of the said Ordinance and the rules framed thereunder, the Court shall communicate such fact in writing to the Union Council for the area where the marriage was solemnized.

25. *Family Court deemed to be a District Court for purposes of Guardians and Wards Act, 1890.* A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890, and notwithstanding anything contained in this Act, shall in dealing with matters specified in that Act, follow the procedure prescribed in that Act.

Synopsis

1. Scope.
2. Proceedings under Guardians and Wards Act.
3. Appeal against order.
4. Revision.

1. Scope. Section 17 of the Family Courts Act which excludes the application of the Evidence Act and the Code of Civil Procedure to proceedings thereunder does not also govern proceedings under S. 25 thereof, for, the latter takes effect notwithstanding anything else contained in the said Act.[11]

2. Proceedings under Guardians and Wards Act. Under section 25 of the West Pakistan Family Courts Act, the Family Courts have to follow the procedure laid down in Guardians and Wards Act in matters of guardianship and custody of minors.[12] This is an exception to the procedure otherwise laid down by this Act. The main reason for this exception is that the Court's powers and duties in appointment of guardians or in respect of custody of the minors are in the nature of parental jurisdiction, the main question to be considered by the Court being the welfare of the minor. All that the Court is required to see is that in passing an order the Court might also consider the personal law to which the minor is subject, but the paramount consideration is always the one regarding the minor's welfare and protection of his interest. No case under the Guardians and Wards Act with regard to the custody or guardianship of a minor can be decided merely by consent of the parties or by giving effect to any compromise. Under these circumstances a pre-trial hearing, to induce the parties to effect a compromise in respect of questions connected with the guardianship or custody of minor children, is not only unnecessary but even undesirable.[13]

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11. PLD 1967 S.C. 402.
12. PLD 1981 S.C. 454=PLJ 1981 S.C. 816+PLD 1976 Kar. 506 (DB).
13. PLD 1976 Kar. 506=PLJ 1976 Kar. 203 (DB).

Issues, framing of. Provision regarding the framing of issues is merely a directory provision and therefore the provision would not become void merely because issues have not been framed by the Court.[14]

Jurisdiction. The Administrative Civil Judge was invested with the powers of the Family Court but he could not directly entertain an application under section 25 of the Guardians and Wards Act, Rule 7 regulates the institution of suits relating to the custody and guardianship of children. They have to be instituted in the Court of the District Judge who may either hear and try the suit himself or may transfer the same to any of the Courts subordinate to him; of course not below the rank of a Civil Judge, First Class (Additional). Where the application was filed by the respondent directly in the Court of the Administrative Civil Judge, and it did not come to him on transfer by the District Judge, the inevitable consequence was that the entire proceedings culminating in the impugned order were without jurisdiction and had to be struck down.[15]

Transfer of cases. The provisions of section 9 of the Guardians and and Wards Act read with section 25 of this Act will not have the effect of enlarging the scope of section 25-A so as to enable the High Court to transfer a case from one Court to another and thereby conferring jurisdiction as against section 9 of the Guardians and Wards Act. Sub-section (3) of section 25 of the West Pakistan Family Courts Act calls upon Judge Family Court to allow the procedure as laid down in that Act.[16]

Parties to proceedings. Where the dispute relates to custody of children the parents of the children are the only parties concerned. A paterna-luncle of the children has no *locus standi* to ask for being impleaded as a party when the father is living, even when the latter could not be served and his attendance before the Family Court could not be secured.[17]

3. **Appeal against order.** Section 25 has been enacted only in order to regulate the mode of the trial before the Family Judge. It would defeat the intention of the Legislature if we were to enlarge the ordinary meaning of the word "procedure" so as to include "the provisions relating to appeal".[18] Therefore an appeal against a decree or decision of a Family Court under the Guardians and Wards Act, when its presiding Judge is not a District Judge or a Judge of equivalent rank, lies to the District Court and not to the High Court.[19]

Limitation. Limitation for an appeal against an order passed on an

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14. PLD 1976 Kar. 506=PLJ 1976 Kar. 203 (DB).
15. Law Notes 1966 Lah. 56.
16. 1980 CLC 865 (Lah).
17. 1976 SCMR 261.
18. PLD 1981 SC 454=PLJ 1981 SC 816.
19. PLD 1981 SC 454=PLJ 1981 SC 816+PLD 1972 Kar. 410 (DB).

application for guardianship before a Family Court is governed by section 14 and limitation for appeal is 30 days.[20]

4. Revision. One view is that a revision to High Court under section 115, C.P.C. is competent against an order of a Family Court passed under this section.[21] But the other view is that no revision is competent in such case.[22]

PUNJAB AMENDMENT

After section 25 of the said Act the following new sections shall be added :

"25-A. *Transfer of cases.* Notwithstanding anything contained in any law the High Court may, either on the application of any party or of its own accord, by an order in writing ;

(*a*) transfer any suit or proceeding under this Act from one Family Court to another Family Court in the same district or from a Family Court of one district to a Family Court of another district ; and

(*b*) transfer any appeal or proceeding under this Act from the District Court of one district to the District Court of another district.

(2) A District Court may, either on the application of any party or of its own accord, by an order in writing, transfer any suit or proceeding under this Act from one Family Court to another Family Court in a district or to itself and dispose it of as a Family Court.

(3) Any Court to which a suit, appeal or proceeding is transferred under the preceding sub-sections, shall, notwithstanding anything contained in this Act, have the jurisdiction to dispose it of in the manner as if it were instituted or filed before it :

Provided that on the transfer of a suit, it shall not be necessary to commence the proceedings before the succeeding Judge *de novo* unless the Judge, for reasons to be recorded in writing, directs otherwise.

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20. PLD 1973 Kar. 503=PLJ 1973 Kar. 68=Law Notes 1973 Kar. 835.

21. PLJ 1975 Lah. 334=PLJ 1975 Lah. 89.

22. PLD 1975 Kar. 448=PLJ 1975 Kar. 114.

Synopsis

1. Scope.
2. Transfer of case from Court which has no jurisdiction to try it,
3. Convenience of parties.
4. Suits for dissolution of marriage and restitution of conjugal rights.
5. Personal danger to party.
6. Earlier and later suits.
7. Restitution of conjugal rights, suits for.
8. Guardianship cases.
9. Custody of minor children.
10. Objection to territorial jurisdiction.
11. Agreement between parties as to place of trial.
12. Transfer to other Province.

1. Scope. This section is wider in scope than section 24, C.P.C. Therefore a case may be transferred notwithstanding challenge to jurisdiction of the Court in which it is pending.[23]

Ex parte decree passed in suit. Where a stay order was issued but the Court passed an *ex parte* decree, the decree is a nullity and the suit is deemed to be pending notwithstanding the decree, and the suit can still be transferred under this section.[24] Where, however, there is no stay order and an *ex parte* decree has been passed in the suit, no order of transfer can be passed and the Court should direct the petitioner to get the *ex parte* decree set aside before seeking transfer of the suit.[25]

Appearance of party before filing petition for transfer. A suit can be transferred by the High Court either on the application of a party or of its own accord. There is nothing in section 25-A to suggest that a suit cannot be transferred at the request of a party thereto unless that party enters appearance before the Court from which the suit is sought to be transferred.[1]

Notice of application for transfer refused by party. Where notice of petition for transfer of the case was sent to the respondent through his counsel. As per report of the process-server he refused to accept the service. It was, however, served on the respondent's father. It was held that refusal by the respondent's counsel would amount to service.[2]

2. Transfer of case from Court which has no jurisdiction to try it. It is legitimate to presume that it was in view of the interpretation in several rulings of the language used in section 24, C.P.C. that the Legislature thought it fit not only to exclude the use of word "pending" but also to add sub-section (3) a new provision in section 25-A. The clear purpose was to confer powers on the transferring and transferee Courts, in those cases as well where the jurisdiction and competency of the Court trying the matter (from which it is sought to be transferred) is challenged in the transfer application. Moreover the Legislature must have kept in view the incalculable harm which could be caused to

23. PLD 1978 Lah. 518.
24. PLJ 1980 Lah. 281=1980 CLC 2091.
25. NLR 1981 Cr. C. 453.
1. PLJ 1981 Lah. 134=PLD 1980 Lah. 51.
2. 1981 CLC 1213 (Lah).

family set up, in case of conflicting judgments on the same issues by different Courts.[3]

3. **Convenience of parties.** In deciding applications for transfer of cases the Court should look to the convenience of the parties.[4] But the deciding factor in such cases should be the convenience of the female. The law relating to family disputes exhibits far greater solicitude and concern for the convenience of the females than for the convenience of the males. This is made clear by provision to rule 6 of Family Courts Rules.[5] Where the husband who is a well to do businessman has filed a suit at *G*, whereas the wife who is a school teacher has filed a suit at *R*, justice demands that both the suits should be heard at *R*, the place of suit by the wife.[6] Where two suits, one for dissolution of marriage and other for recovery of dowry was filed by the wife at *F*. Subsequently, suit for dissolution was withdrawn and a fresh suit was instituted in Family Court at *L*. The other suit was pending at *F* and the wife sought the transfer of the suit to *L*. It was held, that circumstances of the case demand transfer of the suit for recovery of dowry from *F* to a Court of competent jurisdiction at *L*.[7]

4. **Suits for dissolution of marriage and restitution of conjugal rights.** Suits for dissolution of marriage and restitution of conjugal rights between the same parties have to be tried by one and the same Court to avoid a conflict of judgments.[8] Where the husband has filed a suit for restitution of conjugal rights and the wife has filed a suit for dissolution of marriage, the Courts prefer that in view of the difficulties which a woman faces in the matters of litigation, the cases should be consolidated and heard at the place where the wife resides.[9] In such cases the filing of suit by husband for restitution of conjugal rights earlier in time, is not an impediment in the way of transfer of his suit where the wife filed the suit for dissolution of marriage subsequently.[10] But where there is evidence to show that the male party is likely to suffer more inconvenience by transferring his case to the place where the wife resides both the cases may be heard at the place where the male party resides.[11]

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3. Law Notes 1976 Lah. 412.
4. 1982 CLC 7.
5. NLR 1982 Civ. 317+PLD 1982 Lah. 350=1982 Law Notes 214+NLR 1982 Civ. 317.
6. 1982 CLC 7.
7. NLR 1981 UC 629 (Lah).
8. PLD 1982 Lah. 455.
9. PLD 1982 Lah. 455+NLR 1982 Civ. 317+NLR 1982 Civ. 320=PLD 1982 Lah. 350=1982 LN 214+1981 CLC 996+PLJ 1981 Lah. 296 (Wife having no one to accompany her to Court and her suit being earlier in time=Both suits transferred to place where wife resides)+ 1981 Law Notes 449+NLR 1981 UC 630+1981 CLC 816+NLR 1981 UC 631+ NLR 1978 Civ. 521+NLR 1978 Civ. 596+NLR 1978 Civ. 608=PLD 1979 Lah 34.
10. PLD 1982 Lah. 455.
11. 1980 CLC 351 (Male party suffering from blindness).

Agreement about place of trial. Where the husband filed his suit for restitution of conjugal rights at one place and the wife filed her suit for dissolution of marriage at another place, but they subsequently agreed that their suits may be heard at yet another place, the Court transferred the cases to that place.[12]

5. **Personal danger to party.** Where the wife seeks transfer of the case instituted by her husband to the place where she resides on the ground that she apprehends personal danger if she appears in the Court at the place, the Courts would ordinarily transfer the cases to a Court where she resides.[13] Even where both husband and wife alleged that they apprehend personal danger if they appear in a Court at the place of residence of the opposite party, the Court should give preference to the plea of the wife and transfer the case to the Court at her place of residence.[14] Where the husband only makes a plea that he apprehends danger in appearing in a Court at the place of residence of the wife, the Court would not ordinarily transfer the case.[15] But where it is clear that the wife has made the plea *mala fide* and that she was not even resident at the place where she had filed the suit, the case of the husband cannot be transferred to that place.[16]

6. **Earlier and later suits.** Where the wife had filed a suit for dissolution of marriage and the husband subsequently filed a suit for restitution of conjugal rights at a different place just to harass the wife, his suit was transferred to the Court where wife had filed her suit because the latter was earlier in time.[17]

7. **Restitution of conjugal rights, suits for.** A suit for restitution of conjugal rights by the husband should be transferred to the place where the wife resides.[18] The Court may transfer such suit *ex parte* to the Court at the place where the wife resides.[19] But where the wife seeks the transfer *mala fides* as she is not residing at the place where she claims to be residing, the suit cannot be transferred on her petition.[20]

8. **Guardianship cases.** The provisions of section 9 of the Guardians and Wards Act read with section 25 of the West Pakistan Family Courts Act will not have the effect of enlarging the scope of section 25-A so as to enable the High Court to transfer a case from one Court to another and thereby conferring jurisdiction as against section 9 of the Guardians and Wards Act. Sub-section (3) of section 25 of the West Pakistan

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12. 1982 CLC 533.
13. NLR 1981 CLJ 91=1981 Law Notes 645+PLJ 1981 Lah. 134=PLD 1980 Lah. 51+NLR 1980 UC 303.
14. NLR 1981 UC 91 (1).
15. NLR 1981 UC 628.
16. NLR 1979 Civ. 124.
17. 1981 CLC 820+NLR 1978 Civ. 144=PLD 1978 Lah. 993 (2).
18. NLR 1979 Civ. 585.
19. NLR 1978 Civ. 855.
20. 1981 Law Notes 643.

Family Courts Act calls upon the Judge Family Court to follow the procedure as laid down in that Act.[21]

Suits filed by husband and wife. Where the husband files a suit for guardianship at one place and the wife at another. The Court should transfer the husband's suit so that both may be heard together by the Court in which suit by the wife is pending.[22] The more so where the minor to whom the guardianship application pertains is residing with his mother.[23]

9. Custody of minor children. Where a suit is filed by the mother for the custody of her child who is residing with her and subsequently the father of the child also files a similar suit, both the suits should be consolidated and heard together by the Court in which the mother had filed her suit.[24] Where after the dissolution of marriage of the parents of the minors, a suit for the minor girl is filed by her father at *D* and by her maternal-grandmother at *M*. The suit pending at '*D*' should be transferred to *M*, where both the suits should be heard together.[25]

10. Objection to territorial jurisdiction. A suit by the wife cannot be transferred on the petition of the husband merely because he has taken objection to the institution of the suit on the ground of territorial jurisdiction. The objection can only be decided after recording evidence in the matter.[1]

11. Agreement between parties as to place of trial. Suits by husband and wife pending at different places may be transferred to a place agreed to by both parties.[2]

12. Transfer to other Province. Under section 25-A, the High Court cannot withdraw a suit from a Family Court of another Province and entrust the same to a Family Court of the Province of the Punjab.[3]

PUNJAB AMENDMENT

25-B. *Stay of proceedings by the High Court and District Courts.* Any suit, appeal or proceeding under this Act, may be stayed :

(*a*) by District Court, if the suit or proceeding is pending before a Family Court within its jurisdiction ; and

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21. 1980 CLC 865 (Lah).
22. NLR 1979 Civ. 302.
23. NLR 1978 Civ 883=NLR 1978 Civ. 1132.
24. NLR 1980 CLJ 88 + PLD 1979 Lah. 50=NLR 1978 Civ. 521.
25. NLR 1981 UC 338 (1).
1. NLR 1981 UC 628.
2. NLR 1978 Civ. 143=PLD 1978 Lah. 993 (1).
3. 1981 CLC 548=PLJ 1981 Lah. 215=1981 L.N. 231.

(*b*) by the High Court, in the case of any suit, appeal or proceeding."

Punjab Ord. 24 of 1971 enforced from 23-6-1971

26. *Power to make rules.* (1) Government may, by notification in the official Gazette, make rules to carry in effect the provisions of this Act.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the rules so made may, among the other matters, provide for the procedure, which shall not be inconsistent with the provisions of this Act, to be followed by the Family Courts.

SCHEDULE

(*See* section 5)

1. Dissolution of marriage.
2. Dower.
3. Maintenance.
4. Restitution of conjugal rights.
5. Custody of children.
6. Guardianship.
7. [4][Jacitation of marriage.]

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4. Ins. by W.P. Act 1 of 1969, S. 8.

WEST PAKISTAN FAMILY COURTS RULES, 1965

(Gazette of West Pakistan, Extraodinary, 2nd November, 1965)

No. Integ, 10.31/64 (ii). In exercise of the powers conferred by section 26 of the West Pakistan Family Courts Act, 1964 (Act No. XXXV of 1964), the Government of West Pakistan is pleased to make the following rules, namely :—

1. These rules may be called the West Pakistan Family Courts Rules, 1965.

2. In these rules, unless there is anything repugnant in the subject or context :

(*a*) "Act" means the West Pakistan Family Courts Act, 1964 (Act XXXV of 1964) ;

[5][(*b*) "Court" means the Family Court established under the Act].

(*c*) "form" means a form appended to these rules, [6][****].

(*d*) "section" means a section of the Act ; and

[7][(*e*) 'suit' includes an application for the custody of children or guardianship under the Guardians and Wards Act, 1890].

[8][3. The Courts of the District Judge, the Additional District Judge, the Civil Judge, the President of the Majlis-e-Shoora, Kalat, and the Qazi appointed under the Dastur-ul-Amal Diwani, Riasat Kalat, shall be the Family Courts for the purposes of the Act].

4. (1) A plaint under sub-section (1) of section 7 shall be in writing, signed and verified by the plaintiff, it shall be presented to the Court having jurisdiction under Rule 5 of these Rules by the plaintiff or through a Counsel, and where the plaintiff is a female, by her agent.

(2) The plaint under the sub-rule (1) shall also contain the following particulars :—

(*a*) name of the Court in which the suit is brought and the facts showing that it has jurisdiction ;

(*b*) the name, description and place of residence of the plaintiff ;

(*c*) the name, description and place of residence of the defendant so far as can be ascertained ;

(*d*) where the plaintiff or the defendant is a minor or a person of unsound mind a statement to that effect ;

(*e*) the facts constituting the cause of action and the place where and date when it arose ; and

(*f*) the nature of the claim and valuation of the claim with particulars in brief and relief claimed.

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5. Subs. by Notification No. Integ. 10-31-64/II dated 5-4-1966.

6. Omitted by *ibid*.

7. Inserted by Notification No. Integ. 10-31/64/II, dated 5-4-1966.

8. Notification No Integ 10-31/64, dated 19-3-1969.

COMMENTS

1. **Appearance through Agent or Counsel.** The rules for appearance of the counsel and the agent on behalf of the plaintiff are not repugnant to any of the provisions of the Family Courts Act, 1964.[9]

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5. Where a plaint is presented to a Court not having jurisdiction—

(*a*) the plaint shall be returned to be presented to the Court to which it should have been presented ;

(*b*) the Court returning the plaint shall endorse thereon the date of its presentation to it and its return, the name of the party presenting it and a brief statement of the reasons therefor.

COMMENTS

1. **Fresh plaint presented after return of plaint.** Where a plaint was returned to be presented to the Court having jurisdiction. But the party instead of presenting that plaint to the new Court presented a new plaint to the Court. It was held that the act of the party was not illegal as C. P. Code was not applicable to the proceedings.[10]

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6. The Court which shall have jurisdiction to try a suit will be that within the local limits of which

(*a*) the cause of action wholly or in part has arisen, or

(*b*) where the parties reside or last resided together :

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction.

COMMENTS

Synopsis

1. Dissolution of marriage. 2. Custody of children.

1. **Dissolution of marriage.** The wife may institute a suit for dissolution of marriage at any place where she has the intention to reside permanently.[11] Therefore where a wife had been thrown out by her husband and she was compelled to live with her parents at *M*, she was entitled to bring a suit for dissolution of marriage at *M* although neither she was married nor did she last reside there with her husband.[12]

2. **Custody of children.** The Courts at places stated in clauses (*a*) and (*b*) of the Rules have territorial jurisdiction to entertain proceedings. The jurisdiction would not shift with the plaintiff. Thus where the marriage took place at *K* and the parties resided at *K* but the wife subsequently shifted to *S* and made an application for custody of children at *S*. The High Court refused to accede to the argument that the mother had a right of custody and that, therefore, wherever she happened to be she has a right to the custody of the minor and in that

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9. PLJ 1979 Lah. 26=PLD 1979 Lah. 217=1979 Law Notes 53.

10. PLJ 1981 Lah. 513.

11. PLD 1977 Kar. 733 (DB)+PLD 1976 Kar. 978=PLJ 1976 Kar. 388 (DB).

12. NLR 1979 Civ. 654 (SC).

sense the cause of action arose wherever she was. It was held that only Courts at *K* had jurisdiction to entertain the application.[13]

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[14][7. (1) Suits triable under the Act shall be instituted in, and be heard and tried by the Court of the Civil Judge having jurisdiction as provided in rule 6, and where in any District there is no such Court, such suits shall be instituted in, and be heard and tried by the Court of the District Judge or the Additional District Judge.

(2) Notwithstanding anything contained in sub-rule (1), the Court of the District Judge may send for the record and proceedings of any suit pending for trial in any Court in the District and hear and try the suit itself or refer it for trial to any other Court within the District, and thereupon the Court of the District Judge or the Court to which such suit is so transferred, as the case may be, shall have jurisdiction to hear and try the suit.]

PUNJAB AMENDMENT

Sub-rule (2) of Rule 7 shall be deleted and sub-rule (1) of Rule 7 shall be re-numbered as Rule 7.

Notification No. Legis 4 (24)/72, dated 7-4-1972.

COMMENTS

1. Forum for suit for custody. A suit for custody of children may be instituted in the Court of a Civil Judge acting as a Family Court. It need not be filed in the Court of the District Judge.[15]

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8. The Court of the District Judge may, for reasons to be recorded in writing, stay the proceedings of any suit, pending in the Court of the Civil Judge of any class.

PUNJAB AMENDMENT

Rule 8 shall be deleted.

Notification No. Legis 4 (24)/72 dated 7-4-1972.

9. On transfer of a case from one Court to another it shall not be necessary to commence the proceeding before the succeeding Judge *de novo* unless the Judge, for reasons to be recorded in writing directs otherwise.

PUNJAB AMENDMENT

Rule 9 shall be deleted.

Notification No. Legis 4 (24)/72 dated 7-4-1972.

10. (1) The Court may, where it deems fit, direct that the whole or any part of the proceedings under the Act be held *in camera*.

(2) Where both the parties to the suit request the Court to hold the proceeding *in camera*, the Court shall do so.

[16][10-A. (1) The evidence of each witness shall be taken down

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13. PLD 1973 Kar. 237.
14. Subs. by Notification No. Integ. 10-31/64, dated 17-4-1969.
15. NLR 1980 Civ. 100 (BJ).
16. Ins. by W. Pakistan Notification No. Integ. 10-31/64, dated 21-2-1967.

in writing, in the language of the Court by the presiding officer of the Court, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the presiding officer of the Court.

(2) When the evidence of a witness is given in English, the presiding officer of the Court may take it down in that language with his down hand and unless the parties request the Court otherwise, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(3) When the evidence of a witness is given in any other language, not being English, than the language of the Court, the presiding officer of the Court may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

(4) In cases in which the evidence is not taken down in writing by the presiding officer of the Court, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes ; and such memorandum shall be written and signed by the presiding officer of the Court with his own hand, and shall form part of the record.

(5) As the evidence of each witness taken down is completed, it shall be read over to him, and shall, if necessary, be corrected.

(6) If the witness denies the correctness of any part of the evidence when the same is read over to him, the presiding officer of the Court may, instead of correcting the evidence, make a memorandum thereon of the objections made to it by the witness, and shall add such remarks as he thinks necessary.

(7) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

(8) When the Court has recorded the evidence of a witness, it shall also record such remarks (if necessary) as it thinks material respecting the demeanour of such witness whilst under examination.]

11. Where the parties agree to a compromise or conciliation effected between them under sub-section (3) of section 10 or sub-section (1) of section 12, the Court shall pass a decree or give decision in the suit in terms of the compromise or conciliation agreed to between the parties, as the case may be.

12. (1) Where the plaintiff or his pleader, makes default in appearing before the Court, the suit may be dismissed in default.

(2) The Court may restore a suit dismissed in default on sufficient cause shown, on application made to it within thirty days of the dismissal in default.

13. *Ex parte* decree or proceedings may, for sufficient cause shown be set aside by the Court on application made to it within thirty days of the passing of the decree or decision.

14. Every judgment or order shall be written by the presiding Judge or from the dictation of such Judge in the language of the Court or in English and shall be dated and signed by the Judge in open Court at the time of pronouncing it.

(2) Judgments and orders which are appealable shall contain the point or points for determination, the decision thereon and the reasons in brief for the decision.

Registers of Cases, Decrees, Orders, etc.

15. When a plaint has been filed its particulars shall be entered in a register to be kept in the form prescribed for civil suits under Code of Civil Procedure, 1908.

16. In every suit, on passing the judgment, a decree shall be drawn up in Form I and shall be signed by the presiding Judge. The decree shall bear the seal of the Court.

17. The Court shall maintain a register of decrees and orders in the form prescribed for decrees and orders under the Code of Civil Procedure, 1908.

18. Wherever any fine is paid under section 15 or section 16 or money or property deposited with or realized by the Court under the Act or these rules, a receipt shall be given in Form II which shall be serially numbered and the counterfoil thereof shall be kept in the Court.

19. All fines, monies, or property deposited or realized and disbursed by the Court shall be entered in a register in Form III.

20. Where the Court receives any amount payable to a party it shall cause a notice thereof to be served on the party entitled to receive it and shall pay it to the party concerned within four days, so far as may be of his applying therefor.

21. The records of the Court, including its registers, shall be preserved for such period as is provided under the rules of the High Court applicable to Civil Courts.

Appeals

22 [17][(1) An appeal under section 14 shall be preferred within thirty days of the passing of the decree or decision excluding the time required for obtaining copies thereof:

Provided that the Appellate Court may, for sufficient cause, extend the said period].

(2) The appeal shall be in writing, shall set out the grounds on which the appellant seeks to challenge the decree or decision, shall contain the names, description and addresses of the parties, and shall bear the signature of the appellant or his counsel.

(3) A certified copy of the decree and decision of the Court where a decree is passed, and a copy of the decision where only an order is passed, shall be attached with the appeal.

[18][(4) Any order passed by the Appellate Court shall, as soon as may be, be communicated to the Trial Court which shall modify or amend the decree or decision accordingly and shall also make necessary entries to that effect in the appropriate column of the register of decrees.]

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17. Subs. by W. Pakistan Notification No. Integ. 10-31/64, dated 21-2-1967.

18. Subs. by. W.P. Notification No. Integ. 10-31/64, dated 21-2-1967.

COMMENTS

1. *Limitation for appeal.* Where an application under Guardians and Wards Act is made under section 7, Guardians and Wards Act to the District Judge, an appeal against the decision would lie to the High Court under section 14 of the Act. In such a case limitation for appeal would be 30 days as provided by this rule and not 90 days as provided by section 47, Guardians and Wards Act.[19] Where the appellant seeks extension of time for filing an appeal,he must show that his conduct throughout the period from the passing of the judgment until the filing of the appeal has been one of reasonable diligence and if, despite such reasonable diligence, he has not been able to file an appeal in time then a Court can and should condone the delay.[20]

Records and their inspection

23. (1) The Court shall, on the application of any party to a dispute, allow inspection of the records of the Court relating to the dispute on payment of a fee of fifty paisa.

(2) On the application of any party to a suit, certified copies of the decree or decision or other proceedings or entry in any register maintained under these rules or of any portion thereof shall be supplied on payment of a fee calculated at the rate of 25 paisa for two hundred words or part thereof.

PUNJAB AMENDMENT

In rule 23—

(*a*) in sub-rule (*1*), the brackets and figure "(1)" ; and

(*b*) sub-rule (2)

shall be deleted.

Notification No. O. P. 8(I)/71, dated 7-8-1971.

24. (1) There shall be kept in the office of every Court a seal of the Court which shall be circular in shape and shall have thereon the inscription 'Family Court' and the name of the District.

(2) The seal of the Court shall be used on all summonses, orders, decrees, copies and other documents issued under the Act or these rules.

FORM I

(*See* Rule 16)

Form of Decree

In the family Court.....

1. Case No.....

2.....Petitioner/Plaintiff

Versus

.....Defendant/Respondent

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19. PLD 1973 Kar. 503=PLJ 1973 Kar. 68=LN 1973 Kar. 835 (*But see* PLD 1972 Kar. 1)+Law Notes 1969 Lah. 56 (*a*).

20. PLD 1973 Kar. 503=PLJ 1973 Kar. 68=Law Notes 1973 Kar. 835.

3. Claim for.....

This suit coming this day for final disposal before this Family Court, it is hereby ordered that.....

Date.....

Seal of the Court.

Signature of the Judge
Family Court at.....

FORM II

(*See* Rule 18)

Receipt of Fine, Money or Property

1. Name of the Family Court.....
2. Name of the payer.....
3. Amount of fine, money or property paid.....
4. Particulars of the case and purpose of payment.....
5. Date of payment.....

(Seal).....

Signature of the Judge
Family Court.....

FORM III

(*See* Rule 16)

Register of Receipts and Disbursement

FAMILY COURT OF.....

Serial No.	Name and address of the payer.	Amount or property paid, realized or deposited.	Particulars of the case.	Date of receipt.	No. of receipt in Form II	Signature of the Judge, Family Court.	Date of disbursement with the name of the person to whom the money or property is paid or delivered.	REMARKS
1	2	3	4	5	6	7	8	9

DOWRY AND BRIDAL GIFTS (RESTRICTION) ACT
(ACT No. XLIII of 1976)

An Act to provide for restrictions on dowry and bridal gifts

WHEREAS it is expedient to provide for restrictions on dowry and bridal gifts and for matters connected therewith or ancillary thereto ;

It is hereby enacted as follows :—

1. **Short title, extent and commencement.** (1) This Act may be called the Dowry and Bridal Gifts (Restriction) Act, 1976.

(2) It extends to the whole of Pakistan and applies to all citizens of Pakistan.

(3) It shall come into force at once.

2. **Definitions.** In this Act, unless there is anything repugnant in the subject or context,—

(a) "bridal gift" means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include *Mehr* ;

(b) "dowry" means any property given before, at or after the marriage, either directly or indirectly, to the bride by her parents in connection with the marriage but it does not include property which the bride may inherit under the laws of inheritance and succession applicable to her ;

(c) "marriage" includes betrothal, *nikah* and *rukhsati* ;

(d) "parents" includes the guardian of a party to a marriage and any person who provides for dowry or bridal gifts and, in the case of a party to a marriage who has no parent, or whose marriage is solemnized in circumstances in which, or at a place at which, no parent is present, such party ;

(e) "present" means a gift of any property, not being a bridal gift or dowry, given before, at or after the marriage, either directly or indirectly, to either party to a marriage in connection with the marriage or to the relatives of the bride or bridegroom but does not include *neundra* and *salami* ;

(f) "property" means property, both movable and immovable, and includes any valuable security as defined in the Pakistan Penal Code (Act XLI of 1860) ; and

(g) "Registrar" means a *Nikah* Registrar licensed under the Muslim Family Laws Ordinance, 1961 (VIII of 1961), and such other person as may be designated from time to time to perform the functions of the Registrar.

3. **Restriction on dowry, presents and bridal gifts.** (1) Neither the aggregate value of the dowry and presents given to the bride by her parents nor the aggregate value of the bridal gifts or of the presents given to the bridegroom shall exceed five thousand rupees :

Explanation. The ceiling of five thousand rupees specified in this sub-section does not in any way imply that the dowry, bridal gifts and presents of a lesser amount may not be given.

[21][(1-A) No person shall give or accept, or enter into an agreement to give or to accept dowry, bridal gifts or presents of a value exceeding the aggregate value specified in sub-section (1)].

[22][(2) No dowry, bridal gifts or presents may be given before six months or after one month of *nikah* and, if *rukhsati* takes place some time after *nikah* after one month of such *rukhsati*].

4. **Restriction on presents.** No person shall give to either party to the marriage and present value of which exceeds one hundred rupees :

Provided that the limit of one hundred shall not apply to the presents given to the bridegroom by the parents of the bride under sub-section (1) of section 3 :

Provided further that the President, the Prime Minister, Federal Minister, Chief Minister, Minister of State, Adviser, Governor, Speaker, Deputy Speaker, the Chairman or the Deputy Chairman of the Senate, Parliamentary Secretary, Member of the Senate, National Assembly or Provincial Assembly, Government servant or an official serving in any corporation, industry or establishment owned, controlled or managed by Government shall not receive any present in connection with his marriage or the marriage of his son or daughter except from his relations (*khandan*) :

Provided further that this restriction shall not apply to a Government servant or official serving in the scale below National Pay Scale 17 not exercising in any manner judicial, revenue or executive authority.

5. **Vesting of dowry, etc in the bride.** All property given as dowry or bridal gifts and all property given to the bride as a present shall vest absolutely in the bride and her interest in property however derived shall hereafter not be restrictive, conditional or limited.

6. **Expenditure on marriage.** The total expenditure on a marriage, excluding the value of dowry, bridal gifts and presents, but including

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21. Added by Ord. 36 of 1980 S. 2.

22. Subs. by Ord , 36 of 1980, S. 2.

the expenses on *mehndi*, barat and *valima*, incurred by or on behalf of either party to the marriage shall not exceed two thousand and five hundred rupees.

7. **Display of dowry, etc.** Omitted by Ord. 36 of 1980, section 3,

[23][8. **Declaration regarding expenditure to be submitted to Registrar.** (1) The father of the bridegroom or any other person who arranges the marriage shall, within fifteen days of the expiry of the period fixed under sub-section (2) of section 3 for giving dowry, bridal gifts and presents, submit a declaration to the Registrar solemnly affirming that the total expenditure on the marriage including dowry, bridal gifts, presents and entertainment did not exceed the limits laid down in this Act.

(2) The Registrar shall forward the declaration submitted under sub-section (1) to the Deputy Commissioner within fifteen days of receipt of such declaration.

8-A. **Complaints against violation of the Act.** If any person attending a marriage ceremony is satisfied that the provisions of this Act or the rules made thereunder has been contravened in respect of such ceremony, he may submit a complaint, giving full particulars of the contravention, to the Deputy Commissioner].

9. **Penalty and Procedure.** (1) Whoever contravenes, or fails to comply with, any provision of this Act or the rules made thereunder shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine [24][which shall not be less than the amount proved to have been spent in excess of the maximum limit laid down in this Act] or with both, and the dowry, bridal gifts or presents given or accepted in contravention of the provisions of this Act shall be forfeited to the Federal Government to be utilized for the marriage of poor girls in such a way as may be prescribed by rules made under this Act :

Provided that if both the parents of a party to the marriage contravene, or fail to comply with, any provision of this Act or the rules made thereunder, action under this section shall be taken only against the father :

Provided further that if the parent who contravenes, or fails to comply with, any provision of this Act or the rules made thereunder is a female, shall be punishable with fine only.

(2) Any offence punishable under this Act shall be triable only by

23. Section 8 Subs. and S. 8-A added by Ord. 36 of 1980, S. 3.

24. Subs. by S. 5 of Act, 36 of 1980, S. 5.

a Family Court established under the West Pakistan Family Courts Act, 1964 (W.P. Act No. XXXV of 1964).

(3) No Family Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by, or under the authority of, the Deputy Commissioner within [25][three] months from the date of *nikah*, and if *rukhsati* takes place some time after *nikah*, from the date of such *rukhsati*.

(4) While trying an offence punishable under this Act, a Family Court shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 1898), for the trial of offences by Magistrates.

[1][10. **Power to make rules.** The Federal Government, in respect of the Islamabad Capital Territory, and a Provincial Government, in respect of the Province, may, by notification in the official Gazette, make rules for carrying out the purposes of this Act].

11. Omitted by Ord. 27 of 1981.

DOWRY AND BRIDAL GIFTS (RESTRICTION) RULES, 1976

[Gazette of Pakistan, Extraordinary, Part II, 17th August 1976]

S R.O. 822(I)/76.—In exercise of the powers conferred by section 10 of the Dowry and Bridal Gifts (Restriction) Act, 1976 (XLIII of 1976), the Federal Government is pleased to make the following rules, namely :—

1. *Short title and commencement.* (1) These rules may be called the Dowry and Bridal Gifts (Restriction) Rules, 1976.

(2) They shall come into force at once.

2. *Definitions.*—In these rules, unless there is anything repugnant in the subject or context,—

(*a*) "Act" means the Dowry and Bridal Gifts (Restriction) Act, 1976 (XLIII of 1976);

(*b*) "Form" means a form appended to these rules ;

(*c*) "*Jahez Khana*" means a stock room where property forfeited under the Act is deposited ; and

(*d*) "*Khatib*" means an *Alim* appointed as *Khatib* by the Auqaf Department of a Province, or by the Federal Government.

3. *Valuation of property given or received as dowry, etc.*—(1) The valuation of property given or received by either party to a marriage will

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25. Subs. by Ord., 36 of 1980, S. 5.

1. Snbs. by Act, 36 of 1980, S. 6.

be assessed at the prevailing market price at the place where, and on the date when, such property was so given or received.

(2) Where the property is such that it involves wear and tear or is susceptible to depreciation, the assessment of value will be made after deducting the cost of such wear and tear or depreciation as has taken place up to the date on which such preperty is given or received.

(3) The cost of expenditure incurred in connection with a marriage shall be the market cost of the items of the expenditure prevailing at the place where, and on the date when, such expenditure was incurred.

4. *Submission of lists of dowry, etc.* (1) Lists of dowry and presents given or received in connection with the marriage shall be furnished by the parents of the bride in Form D-I.

(2) Lists of bridal gifts and presents given or received in connection with the marriage shall be furnished by parents of the bridegroom in Form D-II.

(3) The details of expenditure incurred in connection with a marriage shall be furnished in Form D-III by the parents of each party to the marriage.

(4) The lists referred to in sub-rules (1) and (2) and the details of expenditure referred to in sub-rule (3) shall, in the case of Muslims, be furnished by parents of each party to the marriage to the Registrar of the area of which the bride is ordinarily resident :—

(*a*) directly in case the marriage has taken place in Pakistan ; and

(*b*) through the Consular Section of the Pakistan Mission abroad located nearest to the place where the marriage has taken place.

(5) Where the marriage between non-Muslims takes place in Pakistan the lists referred to in sub-rules (1) and (2) and the details of expenditure referred to in sub-rule (3) shall be furnished directly by the parents of each party to the marriage to the Deputy Commissioner of the area of which the bride is ordinarily resident in Pakistan, or where the bride is not a citizen of Pakistan, to the Deputy Commissioner of the area of which the bridegroom is ordinarily resident in Pakistan.

(6) Where the marriage between non-Muslim citizens of Pakistan takes place outside Pakistan, the lists referred to in sub-rules (1) and (2) and the details of expenditure referred to in sub-rule (3) shall be furnished by the parents of each party to the marriage to the Deputy Commissioner of the area of which the bride is ordinarily resident through the Consular Section of the Pakistan Mission abroad nearest to the place where the marriage has taken place.

(7) On receipt of Forms D-I, D-II and D-III, the Registrar shall, after retaining one copy of each form, forward the same to the Deputy Commissioner concerned.

(8) The Deputy Commissioner shall, on receipt of Forms D-I, D-II and D-III, either directly from the parents of each party to marriage or

through the Registrar, duly record and index them and preserve the forms for two years.

5. *Restriction on certain proceedings.* No proceedings against any person referred to in the second proviso to section 4 of the Act shall be initiated without the prior approval in writing of the Federal Government.

6. *Investigation into complaints regarding violation of the Act.* (1) Complaints, if any, alleging violation of any provisions of the Act may be made in writing by any person other than a Registrar, under his signature or thumb-impression within nine months of the date on which the marriage or *rukhsati* has taken place giving in specific terms the following :—

(*a*) Full particulars of the marriage to which the complaint relates.

(*b*) The facts as known to him.

(*c*) The nature of alleged violation.

(*d*) Evidence—documentary or oral—with complete particulars relied upon by him.

(*e*) Full name, address and telephone number, is any, of the complainant.

(2) All complaints should by addressed to the Deputy Commissioner to whom the lists of dowry, bridal gifts and presents and details of expenditure are required to be sent under rule 4.

(3) On receipt of a complaint, if the Deputy Commissioner, after such investigation as he may deem necessary, if satisfied that a *prima facie* case exists and after obtaining prior approval of the Federal Government where required, he may make a complaint in writing to the Family Court :

Provided that the Deputy Commissioner shall not take any action on anonymous complaints.

7. *Procedure for the utilization of forfeited property.* The following procedure is prescribed for the utilization of the property forfeited to the Federal Government under section 9 of the Act ;

(*i*) The Family Court shall, immediately after passing an order forfeiting any property under the Act, send an intimation to this effect to the Federal Government in the Ministry of Religious Affairs, Minority Affairs and Overseas Pakistanis (Auqaf Wing), Islamabad, giving particulars of the property so forfeited and the location of such property and a copy thereof shall be endorsed to the Deputy Commissioner who had made the complaint.

(*ii*) On receipt of intimation from the Family Court, the Federal Government shall authorise a person, hereafter in this rule referred to as authorised person, to receive from the Court the forfeited property on

its behalf and to deposit the said property in the *Jahez Khana* at a place to be specified in the authorisation.

(*iii*) The authorised person shall prepare a complete inventory, in duplicate, of all items of the forfeited property giving serial number, full particulars of each item, that is to say, its cost and condition stating whether it is new, used, repaired or depreciated in value with appropriate remarks and get both copies signed and stamped by the Court.

(*iv*) The authorised persons shall deposit the forfeited property in the *Jahez Khana* given one copy of the inventory to the person incharge of the *Jahez Khana*, shall arrange to enter the particulars in the stock register of the *Jahez Khana* and obtain a receipt from the person incharge thereof on the other copy.

(*v*) The authorised person as well as the person incharge of "the *Jahez Khana*" shall take all possible care to see that the property under their charge is not mishandled or destroyed in any way and shall take all possible steps to see that the items of the property which are fragile are properly handled and special care is taken in the case of negotiable instruments and the like.

(*vi*) The poor girls or their parents who need help from Government in their daughter's marriage shall submit their applications to the Federal Government duly certified by the *Khatib* of the area where such persons ordinarily reside to the effect that the applicant is a poor person and the request for dowry goods is genuine.

(*vii*) A certificate of income duly attested by an officer not below Grade 17 in the National Pay Scales or Khatib of the area, on verification of two responsible persons, shall also be attached with the application mentioned in clause (*vi*).

(*viii*) If the applicant is a parent, he shall also state the number of his sons and daughters and state as to how many sons and daughters are the earning members of his family and how many daughters have already been married.

(*ix*) The Federal Government shall then consider each application and pass orders thereon which shall be final.

(*x*) The Federal Government shall communicate its order to the incharge of the *Jahez Khana* and endorse a copy thereof to the applicant.

(*xi*) On receint of the order of the Federal Government, the person incharge of *Jahez Khana* will arrange to deliver the property specified in the order to the applicant concerned against receipt and make necessary entries in the stock register.

[*Note.*—For Forms D-I to D-III, please *see* Gazette of Pakistan, Extraordinary, Part II, 17th August 1976, pp. 1665 to 1667].

INDEX

In this Index

B. Stands for Dowry and Bridal Gifts Ordinance.
C. Stands for Child Marriage (Restraint) Act.
D. Stands for Dissolution of Muslim Marriages Act,
F. Stands for W.P. Family Courts Act.
M. Stands for Muslim Family Laws Ordinance.
N. Stands for Note under Rule or section.
R. Stands for Rule.
S. Stands for section.

———

Act, FR 2(*a*).

Arbitration Council, MS 2 (*a*), MS 2, N 1, MS 7, N 13, FS 2 (*a*), N 1.

Chairman of—, appointed by Government, MS 2, N 3.
Constitution of—, MS 6, N 7, MS 9, N 12.
Failure of conciliation by—, MS 7, N 14.
Jurisdiction of—, MR 3.
Nomination of representative to—, MR 6.
Non-Muslim Chairman—, MS 2, N 4.
Procedure for proceedings of—, MR 5.
Proceedings to be held *in camera*, MR 5.
Protection to proceedings before—, MS 7, N 7.
Prejudiced or interested Chairman, MS 2, N 6.
Substitution or replacement of representative, MS 2, N 2.
When convened, MR 6.

Bridal Gift, BS 2 (*a*).

Chairman, MS 2 (*b*), FS 2 (*a*), N 2.

Appointed by Government—, MS 2, N 3.
Inability of—, to act, MS 2, N 5, FS 2 (1) (*a*), N 2.
Non-Muslim—, MS 2, N 4, MR 4.
Notice of *talaq* to—, MS 7, N 11.
Prejudiced or interested—, MS 2, N 6, MR 6-A, FS 2 (1) (*a*), N 2.
Union committee and—distinction, MS 2 (*d*), N 1.

Child, CS 2 (*a*).

Child marriage, CS 2 (*b*).

Proof of age CS 2, N 1.

Child Marriage Restraint Act

Complaint under—

Compensation for false—, C Pre, N 3, CS 2, N 2.
Dismissal of—, CS 10, N 3.
Personal appearance of person complained againt, CS 12, N. 2.

Child Marriage Restraint Act—concld.
Preliminary inquiry into, CS 10, N 2.
Revision against order, CS 10, N 4.
Contravention of provisions of—
Liability of parents for—, CS 6, N 3.
Punishment for—, CS 4, CS 7.
When both parties are minors, CS 6, N 5.
Cognizance of offence under—, CS 9, N 1.
Limitation for—, CS 9, N 2.
Definitions in—, CS 2.
Expenses of marriage in contravention of, CS 4, N 3.
Extra-territorial operation of—, CS 1, N 1.
Injunction to prohibit child marriage, CS 12.
Jurisdiction to try—, CS 8.
Male above eighteen years marrying a child, CS 4.
Marriage not arranged by parents, CS 6, N 2.
Mistake as to age, CS 4, N 2.
Offence under—
Abetment of—, CS 6, N 4.
Deterrent sentence for, CS 4, N 5.
Essential of—, CS 5, N 2.
Female party is not guilty of—, CS 4, N 4.
Parent's liability under, CS 6, N 3.
Performance of child marriage, C Pre N 2, CS 5, N 3.
Place of trial, CS 8, N 2.
Presumption of nationality under, CS 1, N 2.
Procedure under, CS 4, N 1, CS 5, N 5, CS 6, N 6, CS 8, N 3.
Punishment for contravention of —, CS 4, CS 7.
Sentence under, CS 5, N 4, CS 6, N 7.
Validity of marriage is not affected by, C Pre, N 1, CS 4, N 6.
Constitutional jurisdiction, FS 14, N 10, MS 1, N 4.
Contempt of Court, FS 16.
Contingent divorce, MS 8, N 5.
Contracting party, CS 2 (*c*).
Court, FS 2 (*b*).
Custody of children, FS 5, N 4.
Forum of suit for, FR 6, N 2, FR 7, N 4.
Transfer of cases of—, FS 25A, N 9.
Dissolution of marriage, *See also talaq*.
Appeal against order of—, FS 14, N 4, MS 2, N, 15.
Copy of decree to be sent to Chairman, FS 21, N 1.
Forum of suit, FR 6, N 1, MR 3, N 1-N 2, FS 5, N 6.
Grounds for—, DS 2.
Additional wife, taking of, DS 2, N 5, DS 2, N 9.
Apostasy from Islam, DS 2, N 10.
Charge of adultery against wife, DS 2, N 11.
Conversion to other faith, DS 4.
Cruelty to wife, DS 2, N 9.
Desertion of wife, DS 2, N 6.
Disposal of wife's property, FS 14, N 6, DS 2, N 9.
Husband's whereabouts not known, DS 2 (i), DS 3.

Dissolution of Marriage—concld.
Impotence of husband, DS 2, N 12.
Incompatibility of temperament, DS 2, N 11.
Khula, DS 2, N 12.
Neglect and failure to maintain wife, DS 2, N 4.
Repudiation of marriage by wife, DS 2, N 8.
Venereal disease in husband, DS 2, N 7.
Khula, MS 8, N 3, DS 2, N 11.
Option of puberty, DS 2, N 8.
Notice to Chairman of suit for—, S 7, N 1.
Pleadings in suit for—, DS 2, N 13.
Suit for—, FS 7, N 3.
Transfer of case of—, FS 25-A, N 4.

Dissolution of Muslim Marriages Act

Act is not exhaustive, D Pre, N 2.
Change in Muslim Law by—, D Pre, N 3.
Courts act as *qazis* under—, DS 2, N 3.
Forum of suit under—, DS 2, N 2.
Object of, D Pre, N 1.
Procedure under—, D Pre, N 4.
Retrospective effect of—, DS 2, N 1.
Right to dower not affected by, DS 5.

Dower, MS 10.

Adjustment of—and *zar-i-khula*, FS 13, N 3.
Mode of payment not specified, MS 10, N 2.
Prompt and deferred—, MS 10, N 1.
Recovery of—, MS 6, N 10.
Suit for—forum for, MR 3, N 3, FS 5, N 8, FS 7, N 3, FS 13, N 2.
Surety for payment of, FS 2 (*d*), N. 1.

Dowry, BS 2 (*b*).

Submission of list of, BR 4.
Valuation—, BR 3.
Vesting of—in bride, BS 5.

Dowry and Bridal Gifts Act.

Investigation into complaints, BS 6.
Penalty and procedure for, BS 9.
Restriction on proceedings under, BS 5.
Rules under, BS 10.
Utilization of property forfeited under, BS 7.
Violations of—, BS 8-A.
Evidence, recording of, FS 11.
Closure of—, FS 11, N 1.
Existing marriage, MS 6, N 2.

Family Court, FR 3, FR 7, FS 2 (*b*).

Advocate right of to appear before, FS 18, N 1.
Appealable order, FS 14, N 3.
Appeal against decree of—, S 14.
Court fee on—, S 19, N 1.
Forum for—, FS 14, N 2.

Family Court—concld.
Limitation for, FS 14, N 12, FR 22.
Validity of provision for—, FS 14, N 1.
Appearance through agent in—, FS 18, N 2, FR 4, N 1.
Compromise in—, FR 11.
Conclusion of trial by—, FS 12.
Consolidation of suits by—, FS 10, N 5.
Contempt of—, FS 16.
Court fee for proceedings in—, FS 19.
Custody of children, power of – to give, FS 5, N 4.
Deemed to be District Court for guardianship proceedings, S 25.
Decree of—
Adjustment of dower and *zare khula*, FS 13, N 3.
Enforcement of, FS 13, S 13, N 1.
Muslim Family Laws Ordinance applies to, FS 21,
Payment by instalments, FS 13, N 4.
Dissolution of marriage by, FS 5, N 6.
Dowr, suit for, S 5, N 8.
Establishment, of—, FS 3.
Evidence recording of—, FS 11, FR 10-A.
Closure of evidence, FS 11, N 1.
Party failing to adduce evidence, FS 17, N 4.
Ex parte decree by—, FR 13.
Guardianship proceedings, FS 25.
Appeal against order, FS 25, N 3.
Revision against order, S 25, N 4.
In camera proceedings, FR 10.
Injunction, bar on issue of—, S 22.
Inspection of record, FR 23.
Institution of suits in—, FS 7.
Intimation of defendant by—, FS 8.
Jacitation of marriage, suit for—, FS 5, N 7.
Judges of—investment of powers of Magistrates on, FS 20.
Judgment or order of—to be in writing, FS 17, N 9, FR 14.
Jurisdiction of—, FS 5, FS 5, N 9.
Maintenance, jurisdiction to grant—, FS 20, FS 5, N 3.
Nature of—, FS 3, N 2.
Non-appearance by parties or council, FR 12.
Non-registration of marriage to be reported by—, FS 24.
Oaths Act, applicability to—, FS 17, N 7.
Ouster of jurisdiction of ordinary Courts by –, FS 5, N 1.
Pecuniary jurisdiction of—, FS 3, N 3, FS 5, N 2.
Place of sitting of—, FS 6.
Plaint for—, FR 4.
Presented to Court without jurisdiction, FR 5.
Presence of parties before, FS 10, N 6, FS 12, N 1.
Pre-trial proceeding in—, FS 10, N 2.
Procedure in –, FS 10, N 1.
Appointment of guardian—, FS 10, N 3.
Civil Procedure Code & Evidence Act are not applicable, S 17.
Conclusion of trial, FS 12.
Framing of issues—, FS 10, N 4.
Fresh plaint, filing of, FS 17, N 5, FR 5, N 1.

Procedure in—concld.
Impleading heirs of deceased party, FS 17, N 2.
Proof of documents, FS 17, N 3.
Recording of evidence, FS 11, FR 10.
Written statement in—, FS 9.
Qualifications of judges of—, FS 4, N 1.
Record of Court, FR 23.
Registers to be maintained by—, FR 15-21.
Restitution of conjugal rights, suit for, FS 5, N 5.
Revision against order, FS 14, N 11, FS 17, N 8.
Seal of Court, FR 24.
Stay of proceedings in—, FS 25-B, FR 8.
Summoning of witnesses by, FS 15.
Territorial jurisdiction of—, FR 6, FS 7, N 2.
Objection to, FS 25-A, N 10.
Transfer of cases from —, FS 17, N 6, FS 25-A.
Validity of marriage registered under M. F. L. Ord. not to be challenged before, FS 23.
When may be challenged, FS 23, N 1.
Forms, FR 2 (*c*), MR 2 (*a*).

Guardianship cases
Appeal in—, FS 14, N 7.
Transfer of—, FS 25-A, N 8.
Government, def., FS 2 (*c*).
In camera proceedings, MS 3, N 5.
Inheritance – *See* Succession.
Interlocutory orders, appeal against, FS 14, N 8.
Jacitation of marriage, FS 5, N 7.
Jahez Khana, BR 2 (*c*).
Jurisdiction of Civil Courts, bar of, FS 5, N 1.
Jurisdiction of Family Court, FS 5, N 9.
Kalat, FS 3, N 1.
Khatib, BR 2 (*d*).
Khula, MS 8, N 3.
Maintenance of wife, MS 9, MS 9, N 1.
Application to Chairman for, MS 9, N 1.
Divorce, plea in suit for, MS 9, N 3.
Fectum of marriage must be proved, MS 9, N 2.
Family Court may fix—, FS 5, N 3.
Forum for application for, MS 9, N 11.
Means of husband, MS 9, N 6.
Means of wife, MS 4, N 5.
Muslim Law—under, FS 20, N 2.
Nature of—, DS 2, N 4.
Notice to husband, MS 9, N 10, MR 6, N 1.
Past—, MS 9, N 6.
Quantum of—, MS 9, N 6
Reconciliation after order of—, MS 9, N 9.
Recovery of—, MS 9, N 8.
Revision against order for—, MS 9, N 13.
Right to—, MS 9, N 4.
Second marriage, MS 9, N 6.
Under S. 488, Cr. P. C., FS 20.

Maintenance of children, MS 9, N 7.

Under Muslim Law, FS 20, N 3.
Under S. 488, Cr. P. C., FS 20, N 4.

Marriage, BS 2 (*c*).

Dissiolution of—*See* Dissolution of Marriage
Existing—, MS 6, N 2.
Expenditure on—, BS 6.
Declaration regarding—to be submitted, BS 8.
Registration of—*See* Registration of Marriages
Re-marriage after *talaq*, MS 7, N 17.
Repudiation of, by minor wife, MS 7, N 10, DS 21, N 8.
Second marriage—*See* Second Marriage

Minor, CS 2, (*d*).
Mubarat, MS 8, N 4.

Muslim Family Law Ordinance.

Applicability of—, MS 1, N 1.
Complaint of offences under—, MR 21.
Date of enforcement, MS 1, N 2.
Expeditious disposal of case under, MS 3, N 4.
In camera proceedings under, MS 3, N 5.
Muslim Law not covered by—, MS 1, N 2.
Overrides other laws, MS 3.
Payment of fees under, MR 20.
Power to make rules under—, MS 11.
Procedure under—, MS 3, N 3.
Prosecution for offences under, MR 21.
Registration of marriages under—, MS 3, N 2.
Non-registation to be reported by Family Court, FS 24.

Nikah Registrar

Application for appointment as—, MR 7.
Appointment and removal of—, MS 5, N 6.

Duties of—, MR 10
Fees payable to—, MR 9.
Grant of licence to—, MR 7.
Prosecution of—, MS 5, N 7.
Qualifications for—, MR 7.
Registers for—, MR 8.

Oaths Act, Applicability to Family Courts, FS 16, N 7.

Option of puberty, MS 8, N 6, MS 7, N 10.
Ordinance, def., MR 2 (*b*).
Parents, BS 2 (*d*).
Party, def., FS 2 (*d*).

Polygamy, MS 6, MS 6, N 1.

Application for permission for, MS 6, N 3.
Complaint for, MS 6, N 9.
Ground for permission for—, MS 6, N 4, MR 14.
Revision against, S 6, N 5.
Prohibited in Islam, MS 6, N 1.

Prosecution for, MS 6, N 8.
Presents, BS 2 (*e*).
Property, BS 2 (*f*).
Registration, BS 2 (*g*).
Prescribed, MS 2 (*c*), FS 2 (1) (*e*).
Procedure under Muslim Family Laws, MS 3, N 3.
Records, W.P. Rules relating to, MR 17, 18, 19.

Registers of Nikah, MS 5, N 8, MR 2 (*e*).

Fees for inspection and copies of, MS 5, N 10.
Interpolation in, MS 5, N 7, MR 7, N 1.

Registration of marriages, MS 3, N 2, MS 5, MS 5, N 1.

Effect of registration, MS 5, N 2.
Fees for—, MS 5, N 9.
Marriage in foreign country, MS 5, N 3, MR 12, 13.
Marriage not solemnised by *Nikah* Registrar, MS 5, N 4, MR 11, 13.
Marriage solemnised by foreign national, MS 5, N 5.
Repeals by Muslim Family Laws Ord., MS 3, N 1.

Restitution of conjugal rights, D Pre 22, N 5, FS 5, N 5.

Appeal against decree of, FS 14, N 5.
Transfer of case of—, FS 25A, N 7.
Restriction on Dowry, presents and bridal gifts, BS 3.
Restriction on presents, BS 4.
Revision, FS 14, N 11.
Against order of maintenance, MS 9, N 3.
Against order permitting second marriage, MR 16.
Application for—, MR 16.
Condonation of delay, MR 16, N 1.
W.P. Rules relating to—, MR 16.
Second appeal, FS 14, N 9.

Second marriage, application for permission for, MS 6, N 3.

After dissolution of first marriage, DS 2, N 14.
Section, def., FR 2 (*d*).

Succession, MS 4.

Foreign heirs of Muslim citizen, MS 4, N 5.
Illustrations as to—, MS 4, N 7.
Opening of, MS 4, N 8.
Per stripes distribution, MS 4, N 7.
Principles of inheritance, MS 4, N 2.
Property outside Pakistan —to, MS 4, N 3.
Propositus domiciled out of Pakistan, MS 4, N 4.
Propositus not national of Pakistan, MS 4, N 6.
Termination of limited interest, MS 4, N 9.
Validity of provisions as to, MS 4, N 1.
Suit—, FR 2 (*e*)

Talaq, MS 7, MS 7, N 1.

Ahsan, MS 7, N 8.
Biddat, MS 7, N 8.

Talaq—concld,

Christian wife, *talaq* to, MS 7, N 16.
Contingent—, MS 8, N 5.
Dissolution of marriage otherwise than by—, MS 8.
Form of—, MS 7, N 8.
Hasan, MS 7, N 8.
Notice to chairman of—, MS 7, N 11.
When may be given, MS 7, N 12.
Notice to wife of—, MR 3A, N 1, MS 7, N 10.
Object of provision as to—, MS 7, N 6.
Pronouncement of—, MS 7, N 4.
Pregnant woman—to, MS 7, N 15.
Recognition of—, in England MS 7, N 16.
Remarriage of same parties after—, MS 7, N 17.
Revocation of—, MS 7, N 9.
Tafviz, MS 8, N 2.
Talaq in writing, MS 7, N 5.
Validity of—, MS 7, N 3.
Validity of provision as to, MS 7, N 2.
When becomes effective, MS 7, N 10.

Transfer of cases, FS 25A.

Agreement as to place of trial, FS 25A, N 11.
Convenience of parties to be looked to, FS 25-A, N 3.
Court which has no jurisdiction—from, FS 25-A, N 2.
Custody of children, cases of, FS 25A, N 8.
Earlier and later suits, FS 25A, N 6.
Guardianship cases, FS 25A, N 8.
Personal danger to party, FS 25-A, N 5.
Proceedings not to be *de novo* on, FR 9.
Restitution of conjugal rights, suit for, FS 25A, N 7.
Suits for dissolution of marriage and restitution of conjugal rights, FS 25-A, N 4.
Territorial jurisdiction, objection to, FS 25A, N 10.
To other Province, FS 25A, N 12.

Trial, agreement between parties as to place of, FS 25A, N 11.

Union Council, MS (*d*), MS 2, N 7, CS 2 (*e*).

W. Pakistan Family Courts Act

Applicability of—, FS 1, N 1.
Definitions, FS 2.
Retrospective operation of—, FS 1, N 2.
Rules, power to make under, FS 26.

Ward, MS 2, (*e*), MS 2, N 8.
Witnesses, power to summon, FS 15.
Writ jurisdiction, MS 1, N 4.
Written statement, FS 9.