Shaping Women’s Lives
Laws, Practices and Strategies in Pakistan

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* The views presented in this volume are those of the contributors and do not necessarily represent Shirkat Gah’s point of view.
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Glossary

Ahadith
Ahmadi/Qadiani

Sayings of the Holy Prophet (pbuh)
Minority religious sect, declared non-Muslims in Pakistan

Arsh

Compensation to be paid to the victim in the matter of qisas and diyyat (see below)

Batil

Void

Biradari

Clan, tribe

Chaddar & Chardivari

‘The veil and four walls’ idiomatically used for the institution of purdah (see below)

Daman

The compensation determined by the court to be paid by the offender to the victim for causing hurt in matters of qisas and diyyat (see below)

Diyat

Bloodmoney payable to the heirs of a victim in case of murder

Ejab-o-qabool

Proposal and acceptance

Faislo

Variously used in Sindhi for the resolution of a dispute, a decision and a judgment; also used to describe the traditional system of adjudication/settlement

Fasid

Irregular

Fatwa

Publicly pronounced opinion/declaration of a religious scholar, often translated as edict

Hadd

In law, punishment, the limits of which have been prescribed in the Qur’an or Sunnah

Hanafi

Of the Sunni school of thought derived from the teachings of Imam Abu Hanifa

Hilala

Compulsory intervening marriage for a woman seeking to remarry her ex-husband – under Pakistani law applicable only after a third consecutive divorce of the same couple becomes effective.

Hizanat

Custody of minor children
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
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<tbody>
<tr>
<td>hudood</td>
<td>plural of hadd (see above)</td>
</tr>
<tr>
<td>iddat</td>
<td>compulsory waiting period for a woman whose marriage has been terminated, either through divorce or death, during which she cannot remarry</td>
</tr>
<tr>
<td>ila</td>
<td>vow of continence – when a husband abstains from sexual relations with his wife for a period of not less than four months in pursuance of such a vow</td>
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<tr>
<td>jehez</td>
<td>dowry</td>
</tr>
<tr>
<td>jirga</td>
<td>tribal council</td>
</tr>
<tr>
<td>karo-kari</td>
<td>refers to honour killings where the victims are accused of illicit sexual relationships (karo being the man, kari being the woman)</td>
</tr>
<tr>
<td>khoonbaha</td>
<td>blood-money</td>
</tr>
<tr>
<td>khula</td>
<td>redemption, in law dissolution on the initiation of the wife through court</td>
</tr>
<tr>
<td>li'an</td>
<td>accusation on oath of adultery by husband against wife and wife’s denial on oath resulting in a dissolution of marriage by the judge</td>
</tr>
<tr>
<td>mahr mithl/misl</td>
<td>proper dower</td>
</tr>
<tr>
<td>mahr/mehr</td>
<td>dower</td>
</tr>
<tr>
<td>Majlis-e-Shoora</td>
<td>consultative council; in Pakistan since March 1985, the Parliament is officially called the Majlis-e-Shoora</td>
</tr>
<tr>
<td>Maliki</td>
<td>of the Sunni school of thought derived from the teachings of Imam Abu Abdi’ Illah Malik ibn Hanas</td>
</tr>
<tr>
<td>marz-ul-maut</td>
<td>deathbed or final stages of a terminal illness</td>
</tr>
<tr>
<td>mehram</td>
<td>a relative within the prohibited degrees of marriage</td>
</tr>
<tr>
<td>mubarat</td>
<td>divorce mutually agreed upon by the husband and wife</td>
</tr>
<tr>
<td>mut’a</td>
<td>temporary marriage (acceptable only to the Shia school)</td>
</tr>
</tbody>
</table>
**nikah**
literally conjunction, in law denotes the marriage contract

**nikahnama**
marriage contract deed

**Nizam-e-Mustafa**
system prescribed by the Prophet Mohammad (pbuh)

**purdah**
literally a curtain, denotes the institution of gender segregation and the seclusion of women; sometimes also the veil

**Qanun-e-Shahadat**
The Law of Evidence

**qazf**
false accusation of *zina* (any extra-marital sexual relationship)

**qazi**
judge

**qisas**
retribution for murder and bodily hurt, e.g., an eye for an eye

**riwaj**
custom, tradition

**sahih**
correct, valid

**Shafei**
of the Sunni school of thought derived from the teachings of Imam Muhammad ibn Idris ash-Shafei

**Sharia**
the law, including both the teachings of the Qur’an and the traditions of the Prophet (pbuh)

**Shariat**
according to Sharia

**Shia**
the minority sect of Islam, literally ‘followers’, denoting followers of Hazrat Ali

**Sunnah**
literally ‘the path’, within Muslim discourse, the tradition(s) set by the Prophet Mohammad (pbuh)

**Suni**
the majority sect of Islam, literally ‘one of the path’, the path being the example of the Prophet

**talaq**
unilateral repudiation (divorce) by the husband

**talaq-i-tafweez**
delegated right of *talaq* (under Pakistani law, the husband may grant wife or a third person the unconditional or conditional right of *talaq* at any time)

**talaqnama**
divorce deed
tazir
any punishment, other than hadd, in matters relating to qisas and diyat, discretionary punishment awarded by the court other than qisas, diyat, arsh or daman

ulema
plural of alim or learned person, denoting religious scholars

ummah
a people or nation, used to refer to the people/nation of Islam

wali
various meanings: guardian as in marriage or heir in the matter of qisas and diyat (see above)

zar-i-khula
literally ‘price of khula’, in law the compensation to be given by the wife to the husband when seeking dissolution through khula

zihar
injurious assimilation – in law, when the husband compares his wife to any of his female relation within the prohibited degrees of marriage and vows to treat her like such a relation

zina
extra-marital sex, includes both adultery and fornication
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ANP</td>
<td>Awami National Party</td>
</tr>
<tr>
<td>APWA</td>
<td>All Pakistan Women’s Association</td>
</tr>
<tr>
<td>CII</td>
<td>Council of Islamic Ideology</td>
</tr>
<tr>
<td>COI</td>
<td>Commission of Inquiry for Women (1997)</td>
</tr>
<tr>
<td>DC</td>
<td>Deputy Commissioner</td>
</tr>
<tr>
<td>FATA</td>
<td>Federally Administered Tribal Areas</td>
</tr>
<tr>
<td>IJI</td>
<td>Islami Jamhoori Ittehad</td>
</tr>
<tr>
<td>MNA</td>
<td>Member of National Assembly</td>
</tr>
<tr>
<td>MPA</td>
<td>Member of Provincial Assembly</td>
</tr>
<tr>
<td>MQM</td>
<td>Mohajir Qaumi Movement (the party subsequently split with the main faction now called Muttehida Qaumi Movement)</td>
</tr>
<tr>
<td>MRD</td>
<td>Movement for the Restoration of Democracy</td>
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<tr>
<td>NAP</td>
<td>National Awami Party</td>
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<td>NPA</td>
<td>National Plan of Action for Women</td>
</tr>
<tr>
<td>NWFP</td>
<td>North West Frontier Province</td>
</tr>
<tr>
<td>PATA</td>
<td>Provincially Administered Tribal Areas</td>
</tr>
<tr>
<td>PML(N)</td>
<td>Pakistan Muslim League (Nawaz Group)</td>
</tr>
<tr>
<td>PNA</td>
<td>Pakistan National Alliance</td>
</tr>
<tr>
<td>PPP</td>
<td>Pakistan Peoples Party</td>
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<tr>
<td>SG</td>
<td>Shirkat Gah</td>
</tr>
<tr>
<td><strong>Law-Related</strong></td>
<td></td>
</tr>
<tr>
<td>AIR</td>
<td>All India Reporter</td>
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<tr>
<td>CLC</td>
<td>Civil Law Cases</td>
</tr>
<tr>
<td>Cr.P.C.</td>
<td>Criminal Procedure Code</td>
</tr>
<tr>
<td>DMMA</td>
<td>Dissolution of Muslim Marriages Act, 1939</td>
</tr>
<tr>
<td>FSC</td>
<td>Federal Shariat Court</td>
</tr>
<tr>
<td>Kar.</td>
<td>Karachi</td>
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<tr>
<td>Lah.</td>
<td>Lahore</td>
</tr>
<tr>
<td>LHC</td>
<td>Lahore High Court</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
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<tr>
<td>MFLO</td>
<td>Muslim Family Laws Ordinance, 1961</td>
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<tr>
<td>MIA</td>
<td>Moor's Indian Appeals</td>
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<tr>
<td>MLD</td>
<td>Monthly Law Digest</td>
</tr>
<tr>
<td>NLR</td>
<td>National Law Reporter</td>
</tr>
<tr>
<td>PCO</td>
<td>Provisional Constitutional Order</td>
</tr>
<tr>
<td>Pesh.</td>
<td>Peshawar</td>
</tr>
<tr>
<td>PLD</td>
<td>Pakistan Legal Decisions</td>
</tr>
<tr>
<td>PLJ</td>
<td>Pakistan Law Journal</td>
</tr>
<tr>
<td>P.P.C.</td>
<td>The Pakistan Penal Code</td>
</tr>
<tr>
<td>SC</td>
<td>Supreme Court</td>
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<tr>
<td>SCMR</td>
<td>Supreme Court Monthly Review</td>
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Introduction

Many years in the making, this volume is the fruit of a lengthy if unevenly paced labour. In 1991 the international network of information, solidarity and support, Women Living Under Muslim Laws (WLUML), took its first concrete steps towards converting into reality its dream of conducting an international action-research programme on Women and Law in the Muslim World. The observations, experiences and analyses of women linked through the network informed the Women and Law (W&L) Programme. The Programme started from an understanding that in much of the Muslim world, women’s lack of knowledge about statutory provisions and the sources of the customs and practices applied in their immediate community impedes their ability to change their circumstances. The determinative role of societal norms and customs in setting the parametres of women’s lives ensured that customary practices were a major research component. The W&L was designed to elucidate how customs, law and culture intertwine to define women’s lives and how the dynamics of religion and politics intersect with this. Underlying the W&L is an understanding that women internalise the imposed definition of womanhood and, furthermore, presuming this to have religious sanction, believe it to be the final and only possible definition of being a woman. In a Muslim context this composite definition then becomes the definition of a ‘Muslim woman’.

Apprehensions about the rising trend of essentialist policies and politics (commonly labelled ‘fundamentalisms’) in which women’s rights are trampled upon in the scramble for political power and the increased use of Islam in this process in the Muslim world, guided the programme. Other aspects informed the activist perspective beyond the research: concerns about how the deliberately promoted myth of one homogenous Muslim world prevents women from even dreaming of an alternative reality for themselves; an acute awareness of the inadequate information available to and support accessible by women; finally, a consciousness of the - all too frequent - isolation in which women are obliged to wage their struggles. The W&L programme therefore set out to document existing customary practices, to research legal trends and to unravel the linkages between customs, law and politics from the perspective of women’s lives. It was also designed to gather and share
through strengthened linkages, the various strategies used by individuals and groups to increase women’s rights and space through legal cases, individual action or social movements.

One of the main aims of the WLULM network and specifically of the W&L Programme is to demystify both the content of the law and the sources of law so that women can be aware of the options under law as well as see the differences between the customs applied to them and the law. Another objective is to facilitate a critical understanding of the sources and process of law so that people can start to question the status quo and then initiate changes. An important tool for demystification is the ability to show just how different laws classified as ‘Muslim’ in fact are, and how, depending on the political, social and cultural context, the same subject is treated differently both historically and in various geographical locations. Another is by demonstrating that customary practices traditionally assumed to be ‘Muslim’ in one context not only do not exist in other Muslim contexts, but other Muslims may see these as antithetical to religious doctrine. Making available concrete examples of the different options open to women in different parts of the world is a means of shaking the belief that what is imposed on women in any given society is divine and/or unchangeable; sharing strategies and establishing support systems is a way of strengthening local initiatives.

Research on women in the family was of primary importance for at least two reasons. It is in the family that women most immediately experience the imposed definitions of gender appropriate roles on a daily basis and it is in the family that the converging influences of customs, culture and law most vividly come together. Second, in contrast to laws governing other matters usually adopted from other sources (e.g. the colonial past), personal status law is an area in which laws are most frequently justified by reference to religion. Consequently, it is here that the culturally specific articulation of patriarchy is most visible in the Muslim world, be it through formal laws or customary practices. Issues relating to women in the family therefore constitute a critical area for the network.

A second area of concern in the W&L Programme was to review the status of women as citizens by reference to the constitutional
framework, the right to work, education and economic activities. The third theme related to aspects of bodily integrity, and included issues of sexuality and penalties imposed by the state, society and the family for transgressions.

Blissfully ignorant of the sheer amount of data that would be generated and collected, and of the difficulties that would present themselves in getting country projects off the ground, the international W&L coordination committee set out to capture the diversity in the Muslim world. Some two dozen country projects were planned to ensure that major situational differences were covered: communities where Muslims are a minority and Muslim majority states; countries where Islam is the state religion and those that have secular laws; situations where citizens can choose to be governed by either religious or civil personal law and those where there is no choice; diverse political contexts. A common methodology was evolved. Each team determined its own priorities, reviewing women in the family, women as citizens, and individual and bodily rights as these relate to women. In each country project, the teams built in the best means of transforming research findings into the most appropriate interventions. The international programme has materialised in fits and starts, depending on available resources and teams for undertaking research and outreach activities as well as on the constraints dictated by the operative context. Some were completed in 1994, others were only just starting in 1997. The sheer magnitude of information gathered was never foreseen nor that, in some places, the outreach would start simultaneously with, or soon after, the research components. The challenging task of synthesizing the cross-cultural research findings started in 1995, the first collective publication being *Special Dossier: Shifting Boundaries in Marriage and Divorce in Muslim Communities*.

In Pakistan, the Women and Law (W&L) country project started in 1992 and was conducted by Shirkat Gah – Women’s Resource Centre. The research phase had several components. A team of lawyers carried out archival legal research, reviewing almost 50 years of case law in the superior courts (1947-1992). Political archival research examined the proceedings of the central legislatures focusing on women’s participation and debates specifically relating to women’s rights. Field research concentrated on capturing the customary practices existing in
different parts of the country and, finally, the strategies of the women’s movement were documented and analysed. The research components were staggered and, while awaiting the completion of other aspects, two of the research papers were published by Shirkat Gah as *Special Bulletins*. A few of the papers in this collection were first published elsewhere. Other research papers and finding were converted into tools of information and training. Hence the substantial legal research on personal status law was first converted into a *Handbook on Family Law in Pakistan*. Likewise, the findings from the field research have been used to produce a major manual as well as other training materials. A number of the papers in this volume were prepared for the W&L country project in its early stages and have been updated for this volume, some within the text, others as a preface, and some as notes of new case law. Other papers are based on the research that has continued even as the Shirkat Gah team has built and expanded its Outreach programme as an integral part of its Women Law and Status Programme established at the conclusion of the original W&L country project.

Unfortunately, due to limited resources, the bulk of the legal research carried out had to be limited to the Muslim majority. However, the field research did explore the situation of other religious groups and Shirkat Gah has joined others in activism aimed at comprehensive legislative reforms for all communities. Subsequent to the formal closure of the W&L project in 1994, the Women Law and Status programme of Shirkat Gah has researched various aspects of the personal status law of different communities. The findings are included in its Outreach activities and, to some extent, in its paralegal training programme. This part of the research is not, however, included in the present volume. Nor has Shirkat Gah been able to convert the bulk of rich material collected on customary practices into papers. Instead, the findings are summarized in an action manual. Similarly, the strategies for expanding women’s rights discussed here are largely limited to the collective and public forms of engagement. Shirkat Gah has collected women’s strategies at the grassroots, but these have been published separately.

This volume is divided into three parts: The Political and Legal Context; Implementation: Laws and Practices; and, Women’s Activism.
Part I presents the general context in which laws and customs impact on women, in large part determining the scope and, not infrequently, the nature of activism in Pakistan. Democratic traditions that allow citizens to participate in defining policies and framing legislation have been sadly lacking. For half of its existence, Pakistan has lived under military or quasi-military rule when laws have been made behind well-guarded doors and forcibly imposed. Eight of the twelve national legislatures have been dismissed (starting in 1954 and continuing until 1996). Pakistan has had three constitutions; the third and current Constitution of 1973 having been amended so frequently and so essentially that it is difficult to recognise its original intent.

In this part, Nausheen Ahmad examines some of these changes to the Constitution in the context of the superior judiciary’s approach to cases on women’s rights and discusses how attitudes have vacillated with the changing political climate. Shaheen Sardar Ali and Kamran Arif look at how the formal legal framework in fact consists of parallel legal systems and discuss the implications this has for justice. Farida Shaheed highlights the parallel existence of customary practices and formal law and examines the interface of customs, culture and law. Kamran Arif presents a brief overview of the evolution of Muslim personal law in Pakistan. Asma Jahangir examines the process by which legislation relating to personal status law has been based on religion. Pointing to the implications this has for women’s rights, she examines the failure of liberal elements to respond to the changes instituted at the time. Additionally, an extremely useful summary of legislative history has been provided by Khawar Mumtaz in Annex 1 of her paper in Part III.

Part II, Implementation: Laws and Practices reflects the general W&L Programme focus on personal status law. The majority of the papers in this part of the volume are based on research led by Shaheen Sardar Ali for the W&L Project reviewing almost half a century of case law in the superior courts. Shaheen Sardar Ali and Rukhsanda Naz identify the trends in the superior courts in matters pertaining to marriage, dower and divorce; Shaheen Sardar Ali and Mohammad Nadeem Azam review case law on custody and guardianship; and Kamran Arif and Shaheen Sardar Ali examine the limited number of cases on inheritance in reported case law.
In the Pakistani context, the W&L team and human rights activists in general, have been especially concerned about the impact of the new laws either passed by General Zia-ul-Haq's military regime (1977-1988) as part of the so-called 'Islamisation' process, or initiated in this period. Of those most immediately affecting women, the most important were the zina sections of the Hudood Ordinances 1979 that now govern all sexual offences, and those relating to bodily harm including murder under the Qisas and Diyat Act. Based on more recent research, Sohail Akbar Warraich and Cassandra Balchin analyse the contradictory and unstable trends visible in the courts on matters pertaining to women's rights in matters of dissolution of marriage and the impact of the Hudood Ordinances on such cases. Underscoring the shortcomings within the law, they address the practical problems women face in litigation. Using the example of the settlement system of faislo in the province of Sindh, Nafisa Shah examines the intersection of traditional systems of adjudication and the formal state system in areas now covered by the new laws. She highlights the manner in which the two parallel systems have influenced each other, and what this means for justice. In the final article in this part, Hassam Qadir Shah traces the evolution of the law of Qisas and Diyat and presents some thoughts on the practical application of the law by examining some case law.

Significantly, this volume is being published at a time when the lower house of parliament has already passed the 15th Constitutional Amendment Bill, mobilising democratic forces to pool their energies and thwart the incumbent government's intention to totally change the spirit of the Constitution. Part III of this volume, Women's Activism, is devoted to women's responses to the situations they find themselves in. Starting with an overview of the political and social context in which women have waged their struggles by Farida Shaheed and Sohail Akbar Warraich, this part touches upon selected aspects of women's struggles. Reviewing proceedings of the central legislatures (1947-1988) Khawar Mumtaz analyses the role of women legislators in different periods and investigates the nature and proponents of some of the critical debates on issues specifically relating to women and their rights. Shahla Zia looks at the women's movement, its success and shortcomings in the light of the various strategies adopted, and presents a number of issues confronting the movement today. Concentrating on
the Zia years, Farida Shaheed's paper explores women's perceptions of religion and patriarchal controls in their everyday lives and highlights what appears to be a gap between the issues and style adopted by the women's movement and women's needs for change in their daily existences. This collection closes with a paper by Amtul Naheed and Shahnaz Iqbal who critically review Shirkat Gah's Outreach programme which emerged as a direct result of the W&L country project. The paper presents the development of the Outreach programme, the lessons learnt in the process and the questions that remain unresolved for the future.

Other publications of the W&L Project and Programme published by Shirkat Gah.


*Qatherey se Gohar Honay Tak – Haqiqi Zindigi se Akhz-karda Kahaniyen (From a Seed to a Pearl: True Stories from the Field)*, (1998) Lahore: Shirkat Gah.
Part I

The Political and Legal Context
The Superior Judiciary: Implementation of Law and Impact on Women

Nausheen Ahmad

Abstract: In its fifty years existence, the superior judiciary in Pakistan has never been independent of the executive and save in rare circumstances has generally not asserted its autonomy. Discussing some of the landmark cases on women’s rights decided by the superior judiciary in this backdrop, this paper looks at how the judiciary has limited itself to playing a paternalistic role, confining itself to rights accorded in religion, instead of assuming a more pro-active approach in giving women their rights as granted by the Constitution or by the international concepts of women’s rights.

It is often the way with discriminatory practice that it’s victims know full well what is happening whilst those who perpetrate it are oblivious.*

Introduction

Not many women are seen in court, whether as judges, lawyers, litigants or accused. Yet the routine processes of law making and enforcement of law touch not only their external, public lives but even mould their position in private within the most intimate sphere of the family. This paper seeks to review the treatment of women in relation to law enforcement in particular by the superior judiciary in Pakistan. There are allegations on both sides of the divide: that women are treated more leniently or that they are treated harshly. Women activists have used celebrated cases like Safia Bibi or the more recent Saima case to argue that Pakistani courts are not sensitive to gender rights and in fact actively discriminate against women. Defenders of the judiciary have said on the other hand that decisions such as in the Shirin Munir case show the judiciary’s proactive stance on the issue of enforcement of women’s rights. This paper seeks to sift the evidence provided by

decisions of the Pakistani courts to come to some conclusions on the
treatment of women by the courts particularly in the 1990's; has the
judiciary moved forward in its view on women since the 1980s and is
there a difference in the treatment to women meted out by the Federal
Shariat Court as opposed to the civil courts.

Any review of Pakistani case law has to be done keeping in mind that
Pakistan is a declared religious State with a pluralistic legal system. We
are all aware that Pakistan was created as a home for the Muslims of
India and despite Jinnah's later pronouncements that religion is not the
business of the State the religious genesis of the country was reinforced
in the Objectives Resolution and successive Pakistani Constitutions.
The Pakistan Constitution of 1973 (referred to hereinafter as the
Constitution) stated that "Islam shall be the State religion of Pakistan"
(Article 2). The infamous Eighth Amendment to the Constitution
inserted with effect from 2 March 1985 the Objectives Resolution as a
substantive part of the Constitution. Significantly the Objectives
Resolution states "Whereas sovereignty over the entire universe
belongs to almighty Allah alone and the authority which He has
delegated to the State of Pakistan, through its people for being
exercised within the limits prescribed by Him is a sacred trust;" and
thus all power is to be exercised within the Islamic framework.

The Supreme Court reaffirmed this basis for the state by saying, "there
cannot be any doubt that the ideology of Pakistan is based on Muslim
nationhood and includes Islamic Ideology which in clear terms in the
Constitution means injunctions of the Holy Qur'an and Sunnah and was
the principal factor in the concept of Muslim nationhood". Chief Justice
Haleem even went as far as to say that, "morality is part and parcel of
Islamic Ideology of Pakistan and included in the expression 'integrity'
of Pakistan," *Benazir Bhutto vs. Federation of Pakistan*. With
pronouncements such as these, it is submitted that the courts accept the
position that the state and religion cannot be conceptually separated and
that the enforcement of Islam and the morality flowing from this are
also part of the business of the state. Therefore, since the ordering of
women's lives is central to the enforcement of such morality it
necessarily also means that any debate on women's rights by the
judiciary must take place within the narrow confines of Islamic Ideology.
Implementation of Law and Impact on Women

It is also significant that during Pakistan's history the issue of gender has had political connotations and the state has attempted to institutionalise discrimination through legislation. Examples of such legislation are the Qanun-e-Shahadat Order 1984 and the five laws known as the Hudood Ordinances. Under these Ordinances, hadd punishment requires the testimony of adult male witnesses (for zina four are required and for other Hudood offences two are required) which discriminates against women and minority citizens of Pakistan.

It is a matter of debate whether the courts have attempted to redress the imbalance caused by differential legislation and policy through their judgments, and in fact whether they have acted independently at all times given that the courts themselves have also been the subject of coercive treatment by the state on occasion. A further question is whether the superior judiciary has been supportive to women, despite its own difficulties, or whether this institution has acted in concert with the other arms of the state to enforce state policy.

Independence of the Judiciary

Pakistan's judicial history shows many instances of interference with the judiciary by the executive. The Constitution itself allows for such interference. The proviso to Article 200 provides that the President can dispense with the consultation requirement stipulated with regard to transfer of judges, if such transfer is for a period not exceeding one year at a time. In 1985 this period was increased from one year to two years. This meant that a judge could effectively be transferred against his will for a period of two years. By an ancillary provision inserted in 1985 it also became possible to transfer a judge to the Federal Shariat Court without his consent, for a period of two years. The amendment introduced in 1985 also inserted Article 200(4) which stated "A judge of a High Court who does not accept transfer to another High Court under clause (1) shall be deemed to have retired from his office...". A similar provision already existed for appointment to the Federal Shariat Court. This caused the International Commission of Jurists to comment "the executive retains the power to punish or reward members of the judiciary". The executive has misused its power from time to time to pack the benches with hand-picked judges, to appoint acting judges and even acting chief justices and to transfer judges from the High Court to
the Federal Shariat Court. The International Commission of Jurists has observed in its report on Pakistan that the appointment of acting judges is inconsistent with international principles of judicial independence. In 1997 the Supreme Court attempted to redefine Articles 177 and 193 of the Constitution in terms of the consultation requirements for appointment of judges. The Supreme Court stated categorically that:

consultation is defined as effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. Recommendations made by the Chief Justice of the High Court and the Chief Justice of Pakistan in respect of appointments of judges in the High Court are to be accepted by the President/Executive in the absence of very sound reasons to be recorded. Acting Chief Justices are not consultees within the Constitutional Scheme. Adhoc and Acting judges can be appointed in the Supreme Court only after the sanctioned strength is exhausted.

Despite the length and clarity of this judgment the tension between the executive and the judiciary has not abated. This was manifested in an embarassingly lengthy disagreement in 1998 between the Prime Minister and the Chief Justice of Pakistan over the consultation requirements for appointment of judges which eventually culminated in the resignation of the Chief Justice of Pakistan and the President of Pakistan.

Neither is the judiciary any closer to its goal as laid down in Article 175(3) of the 1973 Constitution that the judiciary should be progressively separated from the executive within a period of fourteen years.

The courts recognise the importance of having an independent judiciary which can act as a watchdog to ensure that fundamental rights are not breached. In Sharaf Faridi vs. Federation of Pakistan the High Court stated

[i]n a set up where the Constitution is based on trichotomy of power the judiciary enjoys a unique and supreme position within the organs of the state and also checks the excessive
and arbitrary exercise of power by the executive and legislature. \footnote{8}

The executive’s need to maintain control over the judiciary also arises from the nature of the post-colonial state which did not grow out of civil society but was imposed from above. The state therefore is authoritarian but weak in its ability to mobilise the population: it does not operate by hegemony but by coercion. The leader becomes important, distributing vast patronage and generally standing beyond the law. In this sort of structure “law itself becomes a commodity that only the state may mobilise and manipulate. Law has a very low status in the eyes of politicians, the bureaucracy and the public” (Stewart 95). This view of the Third World state shows that hierarchically differentiated relations coupled with coercion are inherent characteristics that form the basis of all state action. According to this view the law and the legal system are not independent and are seen to support the coercion of the state rather than to exercise some form of balance between various institutions of state.

The ability of the judiciary to withstand pressure from executive action is not, therefore, an academic debate especially in relation to women’s rights which have over the years become a political issue. We have seen that law has been used by the state to harass or intimidate sections of the population e.g. women and minority citizens. In these instance, the courts have not always stood up for citizens’ rights. In 1974 for example the Ahmadi (Qadiani) community in Pakistan was declared non-Muslim through an amendment to the Constitution. In 1984 legislation further prohibited them from calling themselves Muslims or declaring their place of worship a masjid.\footnote{9} There are many reported cases of the arrest and detention of Ahmadis under the 1984 Ordinance yet the amendment to the Constitution and the 1984 Ordinance were upheld by the Federal Shariat Court as being necessary for the maintenance of law and order.\footnote{10} Subsequently, the Supreme Court also justified the legislation as being just to preserve law and order. It stated “any community however vocal, organised, affluent or influential it may be would not be allowed to cheat others of their faith or rights, usurp their heritage and to deliberately and knowingly do such acts or take such measures as may create law and order situation”.\footnote{11} Minority citizens (in particular Christians) have also been persecuted under the
Blasphemy laws. There have been death sentences awarded in Pakistan under the Blasphemy laws by the trial courts though no such sentence has been carried out to date but in almost all cases these have been overturned by the High Court.

The desire for interference by the executive also arises because increasingly the judiciary under its power of judicial review has been called upon to make decisions which have had significant political consequences. In the 1954 Moulvi Tameezuddin Khan case Governor General Ghulam Mohammad’s dissolution of the Constituent Assembly was upheld by the Federal Court of Pakistan. In 1977 in the Nusrat Bhutto case, the Doctrine of Necessity was put forward to legitimise General Zia-ul Haq’s amendment to the Constitution. In the Haji Saifullah case, the dissolution of Prime Minister Mohammad Khan Junejo’s Government by President Zia-ul-Haq was declared unconstitutional in 1989. No relief, however, was given as elections had been announced within ninety days of the dissolution as prescribed by the Constitution. In 1990 when Benazir Bhutto’s government was dissolved by the President, this dissolution was upheld. Approximately two years later, in similar circumstances the dissolution of the next elected government by the President was declared unconstitutional. The Supreme Court in Pakistan has therefore had the opportunity to wield enormous political power. As Makhdoom Ali Khan has said “in exercising their discretion, in keeping executive power within check, in interpreting the laws passed by Parliament the judges, whatever they may say to the contrary, are constantly engaged in making political choices” (Khan 96).

Parallel Judicial Systems

One of the strategies adopted to maintain the judiciary in a subordinate position, has also been the introduction of parallel judicial systems (see Ali and Arif, this volume). This has not only fragmented the judiciary and weakened the control of the Supreme Court over the components of the judicial system, but has also enabled the executive to use these parallel forums to directly enforce state policy.

The Constitution of 1973 proposed one system of courts which culminated in one apex court - the Supreme Court of Pakistan. This
hierarchy mirrored that seen in other common law systems e.g. in the United Kingdom or the United States of America. Although the Constitution protected the concept of personal laws (pertaining to marriage, divorce and succession) based on religion, these laws were to be enforced through a system of civil and not religious courts.

This unified structure was subsequently amended to create parallel Shariat Courts and a Shariat Appellate Bench within the Supreme Court, martial law courts during periods of martial law and more recently Special Courts to try certain criminal offences. Special Courts presently function under the provisions of the Suppression of Terrorist Activities (Special Courts) Act 1975, the Special Courts for Speedy Trials Ordinance 1987 and Article 212-B of the Constitution which was inserted in 1991.\textsuperscript{19} Cases on Article 212-B show that in respect of proceedings before the Special Courts for Speedy Trials and the Supreme Appellate Court, the ordinary courts and the Supreme Court cannot interfere. In one case where a petitioner contended that a murder case could not be transferred from the ordinary Criminal court to the Speedy Trial Court, it was held that no court would exercise any jurisdiction whatsoever in relation to any proceedings before an order or sentence passed by a Special Court or a Supreme Appellate Court constituted under a special law except as provided in such law. The only circumstance in which such interference could be possible would be an unusual case of jurisdictional defect (\textit{coram non-judice}).\textsuperscript{20}

In the case of \textit{Mehram Ali vs. Federation of Pakistan}, the Supreme Court itself has pointed to a number of sections of the Anti-Terrorism Act 1997 which it is stated militate against the concept of the independence of the judiciary.\textsuperscript{21} The Supreme Court, however, states that its judgment in this case will not affect trials already conducted and convictions accorded under the Anti-Terrorism Act 1997. In a number of cases, the Supreme Court has accepted writ petitions in matters being decided by the Special Courts. It has also stated that judges to these Courts should be appointed in consultation with the Chief Justices. However, it is submitted that these cases are all classic examples of the tension which does exist between the parallel elements of the judicial system and the hierarchy of courts which culminate in the Supreme Court.
It is not within the scope of this paper to discuss the functioning of these courts in detail, however for the purposes of analysis it is sufficient to say that these courts do not function under the supervision or administrative control of the Supreme Court of Pakistan, but come within the ambit of the Federal Government which has far ranging discretion in the appointment of judges to these courts and the transfer of cases. Human rights activists have also expressed grave reservations about the changes in procedure made under the Anti-Terrorism Act 1997. The establishment of Special Courts in Pakistan shows clearly the Executive's intention to erode the power of the judiciary. These courts have been used also to advance the political motives of the government of the day.

Religious Courts

It is in this vein that this paper now turns to a review of the religious courts and submits that these courts were constituted in order to implement the then government's political agenda of Islamisation. Since this agenda impacted on the more vulnerable segments of society and included the institutionalisation of discrimination against women and minorities, these courts were also coercive vis a vis women and minorities.

In a report on Pakistan, Asia Watch states of the period 1977-1987, "the effect of Islamization was to bring more people, particularly women, into contact with an already abusive and corrupt criminal justice system and, to increase the state's power over the lives and liberties of its citizens" (Women's Rights Project 92). In 1979 the Hudood Ordinances were promulgated and cases were to be tried by the ordinary criminal courts. Appeals and revisions against criminal convictions under the Ordinances lie to the Federal Shariat Court (except for minor offences tried by Magistrates and where appeal/revision lies in the initial instance to the Sessions Court). Appeals from the Federal Shariat Court are heard by the Shariat Appellate Bench of the Supreme Court.

The interaction of women with the courts especially as accused increased dramatically after the promulgation of the Hudood Ordinances 1979. As the offence of *zina* is cognisable and non-bailable,
the number of women as pre-trials, under-trials, and convicts has increased dramatically. According to data collected in 1982 by the Women’s Division, Government of Pakistan, there were a total of seventy female convicts in the whole of Pakistan. In 1989 Newsline magazine reported that the number of women imprisoned under the Zina Ordinance alone was approximately 6,000. A corresponding number of men have not been imprisoned under this Ordinance nor has there been the same percentage increase in the male prison population over the years.

The Zina Ordinance covers the crimes of fornication, adultery and rape. Under the new definition both men and women may be guilty of rape. It is now possible for a minor girl even as young as 13 years to commit zina. Adultery has been made a cognisable, non-compoundable, non-bailable offence with the hadd (maximum) punishment of stoning to death. The hadd penalty is to be imposed in the event either of a confession by the accused or if there is the evidence of four adult, pious, male Muslim witnesses to the act of penetration. If the evidence falls short of this hadd requirement then the accused is sentenced to the lesser tazir punishment, which in the case of adultery is stipulated as a maximum of ten years and with whipping of 30 stripes and also liable to fine.

As the figures show, after 1979 scores of cases have been filed under the Zina Ordinance in the special criminal courts trying Hudood cases. Judges at this level are ill trained and ill equipped to deal with cases. They have been criticised on numerous occasions for being corrupt or at the least negligent. The Hudood cases tried by them are therefore prime examples in most instances of the miscarriage of justice. Furthermore, the fact that the law deals with moral issues has allowed judges to bring their personal prejudices to the fore when deciding cases, a trend which has received silent sanction from the state. The Asia Watch Report stated:

We found as noted that the courts continue to exhibit a bias against women victims and defendants and their testimony is not accorded equal weight with that of men... this bias has three main results: (a) women find it extremely difficult to prove rape and, if they cannot prove rape, are themselves
vulnerable to prosecution for fornication or adultery; (b) men accused of rape often receive unfairly reduced charges; and (c) women are often wrongfully prosecuted for Hudood offences and are provided with limited protection from such ill founded accusation (Asia Watch 92:54).

As Jahangir and Jilani point out, in the common law system consent leads to the acquittal of the accused in a rape case; in Pakistan however under Hudood, consent on the part of the woman amounts to zina and leads to punishment of the victim (Jahangir and Hina Jilani 90).

In Pakistan, the lower courts have awarded stoning to death as punishment for adultery in a few cases. However no such sentence has been carried out to date as the convictions have been overturned on appeal by the Federal Shariat Court mainly due to the defective nature of the evidence relied upon by the lower court. These cases are the celebrated ones involving publicity and public pressure and the Federal Shariat Court cannot redeem itself based only on these decisions. Generally far from redressing the imbalance caused by a defective law, the Federal Shariat Court has compounded the disadvantage of women through its decisions which were often either biased or contradictory. In many reported cases the accused woman has been a minor. In a case decided in 1986 involving an allegation of kidnapping and rape, the complainant who was 13 years old was found to be a willing party.25

In a 1982 case the Federal Shariat Court ruled that if the accused are living together as husband and wife, then zina is established.26 However in another case it was stated that the mere fact of living together was not sufficient there has to be further proof.27 In rape cases there are many Federal Shariat Court judgments on the issue of consent which require the victim to resist forcibly and suffer visible injury if consent is not to be held. This is despite the assertion in Section 6(1)(c) of the Zina Ordinance which says that there would be no consent if obtained "by putting the victim in fear of death or of hurt". In one case, for example, as there was no injury to the victim’s private parts the court concluded that the victim had not put up real resistance.28 In another case it was alleged that the accused persons had persuaded the victim (who was 13 years old) to go on a shopping trip with them and then had gang raped her. The Federal Shariat Court on appeal said that the
conduct of the 13 year-old suggested that she was a willing party. The accused had therefore committed adultery with the consent of the abductee.\textsuperscript{29}

The disturbing aspect of Federal Shariat Court decisions in zina cases is the moral judgment which the court seems to be making about the woman victim/accused. The language is negative and value loaded and the court does not show any sensitivity or understanding of the gross violation which a rape victim has suffered. Some of the terms used by the court are "loose character," "a habitual case of enjoying sexual intercourse," "shady person," "willing party" and "woman of easy virtue."\textsuperscript{30} In 1984 the Supreme Court while reviewing a case under the Zina Ordinance cautioned judges to try and understand the conditions and social circumstances out of which such cases arise. However the Supreme Court hastened to add that "so as to avoid impressions of approval or otherwise, no further comment is necessary."\textsuperscript{31}

Recent decisions of the High Court show that in zina cases the court's view is becoming less harsh and it is submitted, more rational.\textsuperscript{32} This change in attitude does not evidence a major shift in the view of Pakistani judges on women but it shows that judges have become sensitised to the fact that public opinion reacts against harsh judgments in Hudood cases which are now seen to be violative of Fundamental Rights. Thus, courts have become more careful in the sorts of judgments which are handed down. These decisions also reflect the fact that many members of the judiciary in the 1990s were lawyers during the Zia years and are reacting against the discrimination and miscarriage of justice during those years. Reference has already been made to the case of Rani vs. the State.\textsuperscript{33} In Akhtar Parveen vs. the State\textsuperscript{34} it was observed that cases of zina affecting the good reputation of women should only be registered by a family member or affected party, and the police should only register such cases with the permission of senior officers. In Khurshid Akhtar vs. SHO\textsuperscript{35} it was stated that zina was not committed as the accused girl in this case was \textit{sui juris} and had admittedly contracted marriage of her own will and lack of consent by her father would not invalidate the marriage. Since 1987 there has also been no award of the stoning to death penalty for adultery.
The history of the Federal Shariat Court was discussed in great detail in a judgment in 1987. Originally pursuant to P.O. 22 of 1978 Shariat Benches were created in the High Court and the Supreme Court. On 27 May 1980, P.O. 1 of 1980 substituted Chapter 3A of the Constitution and under Article 203-C of this Chapter constituted a new court called the Federal Shariat Court. This has in addition to judges (who are, or are qualified to be judges of the High Court), an aalim judge who is required to be well versed in Islamic Law. Article 203-E stipulates that a party to any proceeding under Article 203-D (1) may be represented by a lawyer with at least 5 years standing as an advocate of the High Court and who is Muslim. He may also be represented by an “aalim who in the opinion of the Court is well versed in Shariat”. Article 203-D specifies the revisional jurisdiction of the Federal Shariat Court. It states, “the court may either of its own motion or on the petition of a Citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Qurʾan and Sunnah of the Holy Prophet”. In relation to laws so declared repugnant it is stated:

If any law or provision of law is held by the court to be repugnant to the injunctions of Islam;

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor...... shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant,

cease to have effect on the day on which the decision of the court takes effect.

It was, for example, as a consequence of the exercise of this revisional jurisdiction that parts of the penal Code were declared un-Islamic and the Qisas and Diyat Ordinance was promulgated (See Qadir Shah this volume). A new Article 203-GG was added to say that the decisions of
the Federal Shariat Court shall be binding on a High Court and all the courts subordinate to it.

The Federal Shariat Court has looked at a number of cases involving women's rights:

(i) A case challenging the institution of dancing and singing girls held this institution was repugnant to the Injunctions of Islam. However the Federal Shariat Court could not take action in individual cases and the petitioner's purpose could only be served if legislation banning the institution were enacted. The court did not recommend or direct that such legislation should be enacted.\(^\text{38}\)

(ii) A petition was filed which objected to non-observance of *purdah* by women and the coeduction of males and females. The court did not decide the issue on the basis that the petitioners did not show that the Federal Shariat Court had jurisdiction in the matter.\(^\text{39}\)

(iii) Objection taken to a government circular allowing a female of *figa Jafria* (Shia) to proceed on *Haj* (pilgrimage) without company of a *mehram* (male blood relative). The court held that since a law was not being infringed the court was not required to decide the matter.\(^\text{40}\)

It is submitted that the court was essentially saying in these petitions that it would not comment on practices even if these were repugnant to Islam as practices did not come within the definition of the law in Article 203-B(c).

(iv) Again in 1983, in a case filed by Ansar Burney, the Federal Shariat Court side stepped the issue of whether it is un-Islamic for women to appear in public without *purdah* on the basis that since there was no law, custom or usage on seclusion of women this did not come within the definition of law in Article 203-B(c) and the Federal Shariat Court was therefore not required to decide the issue. On the second question raised in the petition, i.e., whether women could be appointed as *qazis* (judges), the Federal Shariat
Court stated that they could. The petitioner's contention was that since evidence of two women was equated to that of one man, and a woman's share in inheritance is equal to one half of that of her brother at least two female judges would be required to decide a case. During the hearing of the case, the Attorney General reported the views of the Council of Islamic Ideology on this matter. The Council had come to the conclusion that a lady can be appointed in family law matters only subject to her being over 40 years of age and subject to the condition of the observance of purdah. It was also mentioned that the Council had considered the Shafi and Hanbali view which was that the Holy Prophet had condemned the appointment of a female ruler. The Federal Shariat Court did not agree with the view of the Council of Islamic Ideology.  

These cases show the broad ranging ambit of the Federal Shariat Courts' power. In deciding these cases, the court was under severe pressure. The punishment of rajm (stoning to death) was initially declared un-Islamic in a suo moto case by the Federal Shariat Court in 1981. However, in a subsequent petition in which the Zia-ul-Haq regime had a direct interest, the court reviewed and retracted its earlier stand and declared that rajm was in fact an Islamic punishment and the Zina Ordinance did not therefore require amendment.  

The power of the Federal Shariat Court to review law was curtailed by the definition of law stated in the Constitution. However, in a few cases decided by a single judge in the Sindh High Court it was contended that the High Court would have the power to review those laws which the Federal Shariat Court was barred from reviewing. This case dealt with the validity of Section 7 of the Muslim Family Laws Ordinance 1961. It was contended by the wife that her husband had not validly divorced her because he had not conformed to the requirements of Shia law to pronounce the talaq before witnesses, even though he had sent notice under Section 7 of the Muslim Family Laws Ordinance. Justice Tanzil ur Rahman's decision is significant because he said that even those laws which are protected under the Constitution have to conform to a double test: the first to be in conformity with the Constitution and the second to be in conformity with the Holy Qur'an
and Sunnah. If a provision within a law which is protected is found to be in derogation of the Holy Qur’an and Sunnah, the courts would be bound to ignore and overstep such provision. He said that such an interpretation was necessary because the Objectives Resolution had been made a substantive part of the Constitution.

In his view, Section 7 of the Muslim Family Laws Ordinance 1961 violated the principles of social justice in the Qur’an and Sunnah. The implication in this judgment was that Section 7 in some way attacked the concept of the family in Islam which, Justice Tanzil ur Rahman emphasised “is a basic social institution and cornerstone of the development of human society”.\textsuperscript{44} In an earlier case Justice Tanzil ur Rahman even went to the extent of saying that the Objectives Resolution could be regarded as a supra-constitutional document.\textsuperscript{45}

Very recently in November 1998, a petition has been filed before the Federal Shariat Court in which the petitioners have sought to challenge the Muslim Family Laws Ordinance as not being in conformity with the Holy Qur’an and Sunnah. The petitioners may seek to rely on two decisions of the Supreme Court. In one 1994 decision the Supreme Court stated that the petitioner’s plea that Section 4 of the MFLO was against the injunctions of Islam could not be entertained by the Supreme Court. The Court stated:

\begin{quote}
the only forum which can entertain such a plea is the Federal Shariat Court which in exercise of its jurisdiction under Article 203-D of the Constitution can go into the question of whether the said provisions of the Muslim Family Laws Ordinance are contrary to the Injunctions of Islam or not. This Court (Supreme Court) in the exercise of its normal jurisdiction cannot declare a provision of the statute to be invalid on the ground of its inconsistency with the Islamic Injunctions.\textsuperscript{46}
\end{quote}

This judgment does not explain its reasoning in detail, however in the case of \textit{Dr. Mahmood-ur-Rehman Faisal vs. Government of Pakistan}\textsuperscript{47} it states that the expression ‘Muslim Personal Law’ used in Article 203-B(c) which excludes the jurisdiction of the Federal Shariat Court under Article 203-D of the Constitution refers to the personal law of each sect of Muslims based on the interpretation of Qur’an and Sunnah by
that sect. Therefore, the decision argues that all other codified or statute laws which apply to the general body of Muslims will not be immune from scrutiny by the Federal Shariat Court in exercise of its powers under 203-D. Using this line of argument, the Supreme Court said that the Zakat and Ushr Ordinance 1980 did not fall in the category of Muslim Personal Law and therefore could be scrutinised by the Federal Shariat Court. It was also stated obiter dictum that a restrictive interpretation would reduce the effective role of the FSC which could not be the intention of the Constitution.

This radical view has not gained much ground in Pakistan to date and challenging the Muslim Family Laws Ordinance 1961 in court has not been successful so far. However, women continue to feel vulnerable about the validity of this law which protects their interests as many attempts have been made to have it declared repugnant to the injunctions of Islam.

The record of the Federal Shariat Court and of the subordinate criminal courts in enforcing the Hudood laws places them firmly on the side of the executive in enforcing state policy which is clearly discriminatory both substantively and in practice. It is arguable, however, whether this is totally by design. While not absolving these two arms of the judiciary of their responsibility for making the position of women in Pakistan even more vulnerable with regard to the criminal justice system, it must be pointed out that the negative decisions in Hudood cases have arisen out of a law which is defective in the first place and allows for misuse in order to subordinate women. Bad law, it could be said, makes for bad court decisions also. The judiciary’s gross failure to protect citizen’s rights in this area as well as under the Blasphemy laws also arises from the poor quality of judges who are selected and trained for the lower judiciary. In a majority of cases these are the courts of first resort and these are the courts which have sentenced persons to death under either the Hudood or the Blasphemy laws. By the time the matter is brought to the attention of the superior judiciary the damage has already been done and the superior court’s efforts to mitigate the damage at the appeal stage or when giving conceptual decisions on rights issues, does little to improve the image of the judicial system at that late stage.
Decisions of the Supreme Court

Compared to the decisions of the Shariat Courts on women, the High Courts and the Supreme Court have maintained a relatively progressive stance. Some significant cases decided by the Supreme Court are:

(i) *Shirin Munir vs Govt of Punjab.*\(^4^8\) The court declared that the restriction of medical college seats for women violated Article 25 of the Constitution, which guarantees freedom from discrimination on the grounds of sex alone. In this groundbreaking judgment, the Supreme Court laid down certain principles which would be applied under Article 25 (a) Discrimination involving unfavourable bias or an adverse distinction would offend Article 25. (b) However, Article 25 does allow the state to take protective measure for women. Thus Article 25 would permit affirmative action. (c) Article 25 would also allow single sex institutions on the basis of reasonable and intelligible classification but in a co-education institution it would not be possible to reserve seats for men though a minimum (but not a maximum) could be reserved for women. (d) The above interpretation of Article 25 would be consistent with the Principles of Public Policy stated in the Constitution.

(ii) *Abdul Rahim vs. Shahida Khan.*\(^4^9\) The Supreme Court took an extremely broad view of the reasons for *khula* (dissolution) which a wife would be required to show. The court stated that *khula* was possible on the ground that a husband and wife had a fixed aversion to each other and felt it to be a torture to live together. The court could order *khula* even if the husband opposed it. However, the court qualified its view by stating that *khula* “is not an absolute right by which the wife can herself dissolve the marriage but is a controlled right.”\(^5^0\)

(iii) *Ghulam Ali vs. Ghulam Sarwar Naqvi.*\(^5^1\) The case involved relinquishment of inheritance rights without consideration by a female co-sharer. The Supreme Court stated firstly, that different considerations applied in the case of a *pardanashin* (veiled) lady as opposed to adult
male co-sharers. The court also observed that on marriage a Muslim woman’s individuality is not lost, her property remains her absolute right, she can alienate or transfer property without her husband’s intervention and her earnings cannot be touched by her husband. The court whilst comparing various systems of inheritance quotes freely from texts which state that the Islamic system of inheritance is ideal. It is also stated that a woman can claim protection and maintenance from her men folk as a right. Enforcing a woman’s Islamic inheritance rights would be important because she requires protection but also because strict enforcement of the laws of inheritance is an accepted method in Islam of ensuring circulation of wealth.

(iv) Habibur Rahman Siddiqui vs. Govt. of Pakistan.52 The case was referred on appeal to the Shariat Appellate Bench of the Supreme Court. The petitioner stated that the holding of women’s games in which the general public would be spectators was repugnant to the injunctions of Islam. However, in 1980 the Government had already initiated a directive in which it was stated that no tournament of women’s sports would be open to the public; that girls and women should be encouraged to attend these events; that sportswomen (including non-Muslim sportswomen) must wear shalwar and kameez (traditional baggy pants and long shirt) or full track suit. Significantly, the court stated that since that Government’s directive fulfilled the petitioner’s contention, the petition was therefore infructuous. The court therefore tacitly accepted that the Government’s directive and the petitioner’s contention in relation to women’s sports was correct and did reflect the Injunctions of Islam. In the 1980s, given the political climate which prevailed, the court did not go on to speak about the obligations of equality imposed either by the Constitution (which was suspended at the time because of marital law) or by the general principles of Islam (as affirmed by the court in other cases).53 The political backdrop in the 1990s is admittedly very different and drawing from that the court was able in the Shirin
Munir case to give a progressive judgment on Article 25 without fear of political backlash.\textsuperscript{54}

(v) \textit{Hafiz Abdul Waheed vs. Asma Jahangir}.\textsuperscript{55} Mst Saima Waheed was a student of fourth year in college. She married Muhammad Arshad without her family’s knowledge or consent. Initially, it was decided that a marriage without consent of the guardian would be invalid. Thereafter her father alleged that she had been abducted by Arshad and was lodged in Dastak, a refuge in Lahore, and he filed a \textit{habeas corpus} petition against Asma Jahangir of AGHS Legal Aid Cell which runs Dastak. This case has become a landmark case in the arena of women’s rights. It has raised issues of morality, of women’s free will, of how much liberty a woman should be allowed in an ‘Islamic’ society. The petitioner \textit{inter alia} raised the following issues: (a) whether the parents of a girl have the right to be obeyed and whether this right is judicially enforceable. (b) whether the permission of the \textit{wali} is one of the main conditions of a valid \textit{nikah} (marriage). The advocate for the petitioner stated “that a virgin girl stepping out of her house without the consent of the parents can be asked to go back at the moment in Islamic countries clash of two civilisations is quite prominent because some negligible number of Muslims are playing the role assigned to them by the vested interest from the West. The purpose is to shake foundation of Muslim Society....”.\textsuperscript{56} The petitioner contended that it is against the norms of Islam for a woman to arrange her own marriage because this would entail her “freely mixing with males and then selection one of them as her future husband” and Islam does not allow that the sexes should have free access to each other. The petitioner also made numerous references to the importance of the family and the implication was that if women are allowed to exercise choice in matters of marriage this would lead to the breakdown of the family unit which was at the core of Islamic society. The respondent relied on a score of decisions of the Supreme Court and the Federal Shariat Court which stated that a \textit{sui juris} girl could contract a valid
marriage without her guardian's consent. The Lahore High Court by a majority of 2:1 agreed with the respondent's point of view however the tenor of the judgment shows that the court was deeply disturbed by the issue and while making a decision wanted to keep well within what the court perceived were the injunctions of Islam. Justice Khalil-ur-Rahman Ramday who represented the majority opinion had a relatively more liberal view of the position of women in Islam. He stated that: (a) a woman was granted recognition as an independent, social and legal entity: (b) a woman was declared worthy of the same honour and respect to which a man was entitled: (c) a woman was permitted the same social and legal status which was due to a man except in certain specified spheres which distinction had been created by Allah not to lower the prestige of a woman but for the smooth and proper running of society.

Thus even when taking a liberal view the court felt it important to qualify its position with reference to Islam and to say that absolute equality was not possible under the Islamic framework. Notably the court was also uncomfortable with the free exercise of choice by women. Justice Khalil-ur-Rahman Ramday states that "husband-shopping" cannot be viewed with favour. The elders of the family should be an important part of the process of selection of a spouse. He says "let the elders of the family - males or females do the search and even research and then whatever is available be put before the boy or the girl, as the case may be, who should then have final choice in the matter".

Justice Ihsan ul Haq Chaudhury who dissented from the majority opinion had a more restrictive view. He stated firstly that children were bound to obey their parents and that such obedience could be enforced through the court. He said that it is the duty of parents to marry their children especially girls "at the earliest point of time". He said that this was essential "to preserve the purity of the home and this is why much emphasis has been laid by the Islam (sic) that females should not mix up with males". 57
Conclusion

The cases in which superior courts have had to decide issues dealing with women show the following trends:

(i) Whether it is the Supreme Court, the High Court or the Federal Shariat Court any reference to women’s rights immediately involves a reference to Islam. The courts are clear that women’s issues must be decided within the context of the Injunctions of Islam and women’s status in Pakistani society must conform to the rights granted to them by religion. The danger in taking this narrow view is that women’s rights may be curtailed with reference to a restrictive interpretation of Islam. This paper catalogues sufficient instances of these using reported case law and, though there may not have been a major erosion of women’s rights by the superior judiciary, the threat is there and will remain as long as the courts restrict themselves to ‘Islamic injunctions’ in this area of rights.

(ii) The courts seem to have tacitly accepted the position that after the insertion of Article 2-A in the Constitution, law has to fulfill two tests - one of the Constitution and the other of Islam. Thus any reference to international concepts in the area of women’s rights is done only to show that an enlargement of rights in this area (as has been done in the West) will lead to a breakdown of the moral fabric of society. Though feminists have, of necessity, argued a number of cases involving women’s rights before the courts they have not been able to take up these issues on a secular basis and have had to base their arguments also on the Qur’an and Sunnah. It is submitted that religious considerations are not in the forefront in the same way when the court is considering cases of infringement of other fundamental rights. It is further submitted that the religious context is used both by the Federal Shariat Court as well as the ordinary superior courts (High Court and Supreme Court) and their views on women’s issues are therefore not far apart.
(iii) Women's rights issues arise mainly under either the Muslim Family Laws Ordinance or the Hudood laws. As personal law and criminal law (Hudood law) is religious in nature, courts have regressed further into the religious quagmire in interpreting women's position under these laws. Even when taking a liberal approach, the emphasis in enforcing these laws is to afford women who are deemed to be more vulnerable, some protection. This is a paternalistic view which supports those women who conform to the role laid down for them by Islamic society as defined by some. There is therefore judgmental bias evident in court decisions where the court is dealing with those women who have not conformed e.g. in Hudood cases, who are then considered to be beyond the pale, immoral women not requiring the protection of the court or of society.

(iv) In deciding cases on women's rights the courts have not, it is submitted been apolitical. The tenor of the judgments in Hudood cases is much harsher in the 1980s as compared to the 1990s. When the Blasphemy laws became a political issue, the courts did not act as a bulwark against harassment of citizens under these laws. The courts have entertained many petitions on women's rights which in the twentieth century can only be seen to be frivolous given the advancement that women have made in all spheres internationally. Yet the courts in these petitions (seclusion of women, women's games etc.) have not ruled squarely in favour of women. They have side stepped the issue using technical arguments.

As long as the courts accept that the issue of women's rights is to be viewed within the framework of religion, they will always be constrained to decide such cases in a restrictive manner. Furthermore, the law continues to provide avenues for frivolous objections against women and their continued harassment. The fact that the judiciary cannot be said to be independent of Executive interference is also a matter of great concern given the stance that courts have taken on these issues in the past, and the differential legislation which continues to exist on our statute books.
The case of Shirin Munir has been feted in legal circles as being a great step forward in women's rights. However, in this context Justice Sabhiuddin Ahmad's recent paper is extremely instructive. Justice Sabhiuddin rightly points out that one decision cannot alleviate centuries of discrimination. What should the role of the courts be in the circumstances? Are they the helpless on-lookers of social inequality, waiting for the legislature to take measures for the benefit of women? Justice Sabhiuddin disagrees. He says such a view means that the court is only interested in nominal or legal equality rather than real or social equality. This would not be in consonance with the Constitution which contains not only Fundamental Rights but also Principles of Policy. Chief Justice Haleem stated "therefore the authors of the Constitution, by enumerating Fundamental Rights and the Principles of Policy, apparently did so in the belief that the proper and rational synthesis of the provisions of the two parts would lead to the establishment of an egalitarian society under the rule of law".

Thus, what the court should be striving for is genuine equality. Such a view would give the courts a wider power when reviewing legislation and allow them to be more pro-active in enforcing Fundamental Rights. Justice Sabhiuddin states "when the directive principles commit to participation of women in all spheres of national life the question of sex discrimination has to be viewed from that angle and not from the stand point of my individual notions as to the role of women. In purely political issues the courts have already charted for themselves a broad role, they should do the same in relation to enforcement of fundamental rights". If the courts decide to take such a pro-active approach in implementing the objects of the Constitution, women would benefit. However in treading this path the courts would have to acknowledge not, just as Justice Sabhiuddin has said, that "throughout history social and legal systems have oppressed women but that historically religion has sanctified the subordination of women". Thus, if genuine equality is to be achieved, the courts must go beyond the religious parameters to decide on questions involving, women's rights.
Endnotes

1 Benazir Bhutto vs. Federation of Pakistan PLD 1988 SC 416 at p.522.
2 Article 17(2)(a) of the Qanun-e-Shahadat Order 1984: states “in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women so that one may remind the other, if necessary, and evidence shall be led accordingly”.
3 The Hudood Ordinances are five laws relating to theft, fornication, adultery (zina) and rape, false testimony (qazaf), prohibition of intoxication (drugs, alcohol, etc.) and whipping. These are entitled (i) Offences against Property (Enforcement of Hudood) Ordinance 1979 (ii) Offence of Zina (Enforcement of Hudood) Ordinance 1979 (iii) Offence of Qazaf (Enforcement of Hadd) Ordinance 1979 (iv) the Prohibition (Enforcement of Hadd) Order 1979, (v) Execution of Punishment of Whipping Ordinance 1979.
4 Proviso inserted in 1976 by the Constitutional Fifth Amendment Act.
6 Al Jehad Trust vs. Federation of Pakistan PLD 1996 SC 324 and PLD 1997 GC 84.
7 Ibid.
8 PLD 1989 Karachi 404 at p.444.
9 Anti Islamic Activities of Qadiani Group (Prohibition and Punishment) Ordinance 1984.
10 PLD 1985 FSC 8.
11 1993 SCMR 1718 at p.1772.
13 PLD 1955 FC 240.
14 PLD 1977 SC 657. The Supreme Court whilst distinguishing the earlier case of Asma Jilani vs. Government of Punjab PLD 1972 SC 657 stated at P733 HH “Ours is an ideological state of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the objectives resolution with emphasis on Islamic Laws and concept of morality. In our way of life we do not and cannot divorce morality from law. Therefore the pure theory of law is not suited to the genesis of this state. It has no pace in our body politics and is unacceptable to the judges charged with the administration of justice in this country.”
15 PLD 1989 SC 166 (Haji Muhammad Saifullah).
16 Khwaja Ahmad Tariq Rahim vs. Federation of Pakistan PLD 1992 SC 646.
17 Mian Muhammad Nawaz Sharif vs. President of Pakistan PLD 1993 SC 473.
18 The Federally and Provincially Administered Tribal Areas (FATA and PATA) are governed under a separate set of laws, although, subject to the Constitution, acts of Parliament and the Provincial Assembly can be extended to FATA and PATA.
19 Constitution (Twelfth Amendment) Act 1991. This states “212-B(1) In order to ensure speedy trial of cases of persons accused of such of the heinous offences specified by law as are referred to them by the Federal Government or any authority or person authorised by it in view of their being gruesome brutal and sensational in character, or shocking to public morality, the Federal Government may by law constitute as many Special Courts as it may consider necessary”.
20 1993 SCMR 1951. Also see PLD 1998 Lah 275. A scheduled offence pending before an ordinary criminal court would get automatically transferred to a special court by operation of law and no order was required.
24 This arises because an adult has been defined under the Ordinance to be a person who has attained puberty.
25 PLD 1986 FSC 196. Also see PLD 1983 FSC 183 - the victim was 13 years old. She alleged rape. The accused were acquitted while the victim was convicted of adultery because of proof of pregnancy. However also see the recent case PLD 1996 Karachi 316 in which it was held that mere pregnancy alone is not sufficient to convict a woman for *zina* especially when she claims the pregnancy to have been caused due to her being raped. Even if the accused were acquitted the prosecution would have to bring on record positive and independent evidence that the victim committed adultery of her own free will; proof of pregnancy would not be sufficient.
26 PLJ 1983 FSC 95.
27 PLJ 1983 FSC 103.
28 PLD 1987 FSC 11.
29 PLD 1986 FSC 174.
30 PLD 1983 FSC 200, PLD 1982 FSC 241, PLD 1986 FSC 174. It should also be mentioned that under Section 151(4) of the Qanun-e-Shahadat Order a man accused of rape may as part of his defence show that the victim was of ‘generally immoral character’.
31 PLD 1984 SC 101 at p.130.
32 The High Court has an inherent jurisdiction under Section 561-A of the CrPCC. Also see 1990 SCMR 211 in which the Supreme Court states at p.213 “As far Article 203DD of the Constitution, it deals with the revisional powers of the FSC in Hudood cases but evidently does not bar the inherent jurisdiction of the High Court under Section 561-A CrPC pending against anyone in a court of the criminal jurisdiction.”
33 *Rani vs. the State* PLD 1996 Kar 316.
34 *Akhtar Parveen vs. the State* PLD 1997 Lah 390.
35 *Khurshid Akhtar vs. SHO* PLD 1997 Lahore 389.
36 PLD 1987 FSC 51.
37 Review of laws as to whether these conform with the injunction of the Holy Qur’an and Sunnah.
38 PLD 1982 FSC 227.
39 PLD 1983 FSC 13 (1).
40 PLD 1983 FSC 13(2).
41 PLD 1983 FSC 73.
42 PLD 1983 FSC 255.
43 The definition contained in Article 203-B(c) states “law includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure.”
44 Qamar Raza vs. Tahira Begum PLD 1988 Kar 169.
46 1994 SCMR 681.
48 Shirin Munir vs Govt of Punjab PLD 1990 SC 292.
49 Abdul Rahim vs. Shahida Khan PLD 1984 SC 329.
50 PLD 1984 SC 329 at p.333.
52 Habibur Rahman Siddiqui vs. Govt. of Pakistan PLD 1981 SC 17.
53 c.g. PLD 1988 SC 416.
54 Shirin Munir vs. Govt of Punjab PLD 1990 SC 292.
55 Hafiz Abdul Waheed vs. Asma Jahangir PLD 1997 Lahore 301.
56 PLD 1997 Lahore 301 at p.313.
57 PLD 1997 Lahore 301 at p.343.
59 PLD 1988 SC 416.

References


Parallel Judicial Systems in Pakistan and Consequences for Human Rights

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Abstract: This paper discusses the concept of equality before law and equal protection of law and give examples of societies where parallel judicial systems have been used to ensure equal protection of marginalised communities before reviewing the emergence of parallel legal systems in Pakistan, and their implications and consequences for human rights. The paper takes up each of the parallel judicial systems operating in Pakistan detailing their legislative history, main provisions, and whether or not they violate in any way the guarantee of equality before law and equal protection of law contained in the Constitution of Pakistan.

Introduction

The concept of equality i.e., that all persons are equal before the law has been expressed and interpreted differently by different societies and judicial forums. The 1973 Constitution of Pakistan guarantees it as a fundamental right stating in Article 25(1) that:

All citizens are equal before law and are entitled to equal protection of law.

Article 25(1) combines two ideals of equality of different origin. 'Equality before law' \(^1\) is an expression of the English common law whereas 'equal protection of laws' \(^2\) can be traced to the 14th amendment to the Constitution of the United States of America.

Equality before law was an essential component of Dicey's famous exposition of the 'rule of law,' (Dicey 61:203) which he explained as "the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts," i.e., one set of courts administering one set of laws to all the people. Equality before law is a somewhat negative concept implying the absence of any special privilege in favour of any individual and equal subjection of all classes
to the ordinary law. Equal protection of laws, on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in like circumstances. Thus, compared to ‘equality before law,’ ‘equal protection of law’ is a more positive concept implying equality of treatment in equal circumstances. However, both concepts aim at protection against arbitrary discrimination.

Parallel Judicial Systems

Parallel judicial systems can be defined as forums functioning parallel to the ordinary courts. Stated simply it is a complete hierarchy of forums established through a special law under which particular persons or classes of persons are tried or have their civil disputes adjudged under special laws to the exclusion of the ordinary courts of the country. The question then arises: does a dual system of justice invariably contradict the concept of equality? Or is there any valid justification for the resultant hierarchies of citizens, laws, and judicial forums thus created?

It has been argued that every parallel judicial system does not necessarily violate the guarantees of equality. Such discrimination (or application of special laws or forums etc.) is permissible if it is based on a reasonable classification and is related to the objective to be achieved. For instance, a dual system of justice may actually be required in reverse discrimination and affirmative action measures taken in the interest of the less advantaged sections of society. A parallel judicial system may thus be justifiable on the grounds that it is for a valid legal object aimed at facilitating the administration of justice.

Parallel judicial systems have existed in many countries including the UK, the U.S.A and Pakistan. Despite Dicey’s vigorous exposition of one set of courts applying one set of laws, England had two distinct parallel judicial systems co-existing for more than five hundred years i.e., the courts of common law and courts of equity. (Megurry and Baker 65:5) The two systems co-existed for so long because their jurisdiction did not normally overlap as equity usually applied for the omission of common law. But this did not usually benefit the litigants
as they had to run from court to court to obtain relief. Finally, the Judicature Acts of 1873 and 1875 amalgamated the two systems and all courts started dispensing equity as well as common law.

In the United States parallel judicial systems exist in a different context. In addition to the State and Federal Courts, there is a tribal court system with jurisdiction over American Indians.³ Under the Wheeler Howard (Indian Reorganisation) Act, 1934, more than a hundred tribes in the U.S. adopted their own constitution for self-government.⁴ Acts of Congress, though, still regulate some aspects of Indian tribal life such as commerce, interaction with non-Indians, land, etc. Over the years, some Indian tribes relinquished jurisdiction to State Courts; others, such as the Indian tribes of Nevada, decided to retrocede from this decision and set up their own court system in the early seventies. The ambit of operation of the parallel judicial system in the U.S.A. is thus very restricted and applies only where both parties are Indian. In reality the tentacles of the federal law system - in the garb of federal sovereignty - have spread deep into the Indian tribal judicial system narrowing the latter’s jurisdictional ambit. In the case of the U.S.A., therefore, parallel judicial systems developed in an entirely different context to Britain. Imposing a uniform judicial system on American Indians would have been tantamount to the annihilation of their culture and value system, making it subservient to an alien set of rules and regulations. On the other hand, by only partially reviving the Indian legal system and conceding only some areas for adjudication, some people argue that the ‘natives’ have been further marginalised from mainstream American legal institutions.

In multi-cultural/ethnic societies, administration of justice demands a fine balance between general and special laws. Parallel judicial systems, which usually step in through special laws, tend to upset this precarious balance.

On attaining independence in 1947, Pakistan inherited from British India a unified legal system and a complete hierarchy of courts with defined and distinct jurisdiction at each level. However some princely states also acceded to Pakistan, including Bahawalpur, Dir, Swat, and Chitral. These had independent judicial systems administering their own laws.
The tribal or frontier districts also became a part of Pakistan. These had
never been made part of the mainstream British Empire and were
looked upon by the colonial power as a source of perpetual potential
threat to the Imperial Government - hence the need for special laws
aimed at "the suppression of crime" in these districts. For this purpose
the infamous Frontier Crimes Regulation 1901 (F.C.R.) was
promulgated. On becoming an independent sovereign state, the
Pakistan government chose to retain the existing system along with the
F.C.R.

After the 1953 anti-Qadiani riots, martial law was imposed in Lahore.
Parallel judicial systems emerged for the first time in Pakistan, though
temporarily, with the establishment of military courts. Since then,
military courts have existed in the course of each successive martial
law in the country, operating parallel to the ordinary criminal courts.

Presently a number of judicial systems are operating in Pakistan that
may be described as 'parallel judicial systems.' Some of these systems
are exclusively applicable to the tribal areas whereas others are
applicable throughout the country. All have been incorporated into the
Constitution of Pakistan.

The parallel judicial systems applicable to the entire country include
the Federal Shariat Court (F.S.C.) and the Shariat Appellate Bench. The
F.S.C. had as its initial brief to determine whether existing
legislation was in consonance with Islamic injunctions or not. Its
jurisdictional ambit has, however, increased manifold over the years,
threatening to overshadow the High Courts and Supreme Court of
Pakistan.

Although not a 'forum' in itself Article 2-A, introduced through an
amendment to the Constitution has been interpreted by the High Courts
and the Supreme Court in a manner that gives them powers formerly
restricted to the F.S.C. and Shariat Appellate Bench.

Apart from military courts, a parallel criminal court system did not
exist in Pakistan until 1987, when a Special Courts for Speedy Trials
Ordinance (Ordinance 11 of 1987) was promulgated. This has served as
the precursor of a whole series of laws establishing a parallel hierarchy
of criminal courts in the country.
Parallel judicial systems applicable exclusively to the tribal areas include the following: The F.C.R., operating as the only set of laws in the Federally Administered Tribal Areas of Pakistan; the West Pakistan Ordinance I and II of 1968 applicable to some areas of the province of Baluchistan; the (now lapsed) Provincially Administered Tribal Areas Civil Procedure (Special provisions) Regulation 1 of 1975 and the Provincially Administered Tribal Areas Criminal Procedure (Special Provisions) Regulation 11 of 1975 are applicable to the Provincially Administered Tribal Areas (PATA) of the NWFP. These establish a parallel hierarchy of Civil and Criminal jurisdiction alongside the ordinary court system.

With this brief overview, we now take up in detail the foregoing judicial systems, their history, effects and implications for human rights.

The present Constitution, as originally enacted in 1973, did not provide for the establishment of any forum or system that could be termed as a parallel judicial system. Nor did the first seven amendments to the Constitution bring about such a change, although some did curtail civil liberties. The incorporation of such systems into the Constitution began during the martial law of 1977.

The Constitution as it stands today includes two distinct judicial systems that are functioning alongside the ordinary judicial system i.e., the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. Earlier the criminal law forums established under Article 212-B of the Constitution were an additional parallel system. The interpretation of the more recently inserted Article 2-A may cause all the constitutional courts to exercise jurisdiction parallel to and at times overlapping each other and perhaps even to the legislature. But in order to fully comprehend the implications of these constitutional amendments, it is pertinent to discuss briefly the martial law of 1977 and the constitutional developments then onwards.

Although by 1977, martial law was not a new phenomenon in Pakistan, the one imposed by General Zia was in many respects unique. Its legality was based neither on the abrogation of the Constitution nor on any effective change establishing a new legal order. It was recognised by the Supreme Court in the 1977 Nusrat Bhutto case only as an
extra-constitutional step required under the peculiar circumstances of
the country at that point in time and subject to certain specified limits,
including a limited license to amend the Constitution. In the early days
of martial law, this led to continuous confrontation between General
Zia’s desire to perpetuate his rule and the efforts of the superior
judiciary to keep him within the limits drawn up in the Nusrat Bhutto
case. Thanks to a dubious use of his limited powers to amend the
Constitution, and by changing rules in the middle of the game, General
Zia was victorious, but not before the entire constitutional and judicial
system was shattered.

In the Nusrat Bhutto case, the Supreme Court only conditionally
legitimized General Zia’s martial law by describing it as a
“constitutional deviation” justifiable on the principles of “state
necessity” and for the “welfare of the people.” It also decided the
following:

(i) That the Constitution of 1973, although in abeyance, is
still the supreme law of the land.

(ii) That the President and the Supreme Court are to
function under the Constitution.

(iii) That the superior courts have the power of judicial
review to examine the validity of any act or action of the
Martial Law Administrator in the light of rules laid down in
the judgment.

(iv) The Martial Law Administrator, however, was given
limited powers to legislate, including the power to amend
the Constitution, but only for advancing the purposes for
which martial law was validated. It is relevant to mention
here that the Supreme Court also cautioned the Martial Law
Administrator against establishing parallel judicial forums
(such as Military Courts) since the need for “martial law did
not arise owing to the failure of the courts…..”

Needless to say, General Zia did not deem it necessary to remain within
these limits. Military courts functioned throughout this period despite a
few bold attempts by the superior courts to prevent abuses of human
rights and fundamental freedoms. These efforts by the superior courts came to naught when on October 16, 1979, the then Chief Martial Law Administrator amended the Constitution (under Presidential Order 29 of 1979), inserting Article 212-A which provided for the establishment of military courts. This also took away the power of judicial review from the High Courts and abated pending proceedings. Nevertheless, the superior courts held\(^\text{13}\) that despite Article 212-A, judicial review of actions of martial law authorities still vested in the superior judiciary.

In May 1980, Article 199 of the Constitution, dealing with original and writ jurisdiction, was amended by Presidential Order No. 1 of 1980 adding clauses 3A, 3B, and 3C. This amendment had the effect of completely ousting the review power of superior courts insofar as an act or action of the martial law authorities was concerned. But this order was challenged before the Baluchistan High Court which unanimously struck it down.\(^\text{14}\) While the appeal against this judgment was pending, the President proclaimed the Provisional Constitutional Order (P.C.O.) in 1981 providing for a new constitutional set-up for the country. The P.C.O. was tailored to General Zia's needs and judges of the superior judiciary who declined to take oath under this new set-up were simply removed from office. Thus with a single stroke, the General got rid of the dreaded "judicial review" along- with a number of judges he feared could potentially strike down the P.C.O. The judiciary had been dealt its final blow and henceforth it never interfered or questioned the powers of General Zia to legislate or amend the Constitution in any manner.

The Federal Shariat Court and the Shariat Appellate Bench

The Federal Shariat Court (F.S.C.) and the Shariat Appellate Bench of the Supreme Court were incorporated into the Constitution and, to the detriment of other constitutional bodies, given enormous power to strike down legislation. The F.S.C., by the very nature of its functions is unique. Its creation was motivated, ostensibly, by the urgent desire to determine whether a law was in conformity with the injunctions of Islam or not - a function already entrusted to the Council of Islamic Ideology.\(^\text{15}\)
The F.S.C. and its predecessor the Shariat Benches of the High Courts (and the Shariat Appellate Bench) were not established through the mandate of the people. These forums were incorporated into the Constitution by General Zia to counter the effect of the Supreme Court judgment in the Nusrat Bhutto case. In that judgment the Court had included his acts and actions within the purview of judicial review.

Thus, with his martial law only conditionally recognised by the Supreme Court and with no moral justification left for extending his rule, General Zia was badly in need of public support. Islam had been the cry of the Pakistan National Alliance opposing Zulfiqar Ali Bhutto’s Pakistan People’s Party in the 1977 elections and the General decided to raise it again. He embarked on a process of ‘Islamisation’ - the term being coined during this period. The Council of Islamic Ideology (C.I.I.) was reactivated and commissioned to codify the Hudood Laws which were promulgated in 1979 (Mohammad 87:261-262). The General now needed judicial forums to enforce these laws. For this purpose, Chapter 3-A was added to the Constitution under Presidential Order No. 3 whereby Shariat Benches were formed in the High Courts each consisting of three judges. A Shariat Appellate Bench was also constituted in the Supreme Court with an equal number of judges. The functions of these new forums was to decide on petitions before them whether existing laws were in conformity with the injunctions of the Holy Qur’an and Sunnah or not. If these courts decided that a law was not in conformity with the injunctions of Islam, they were given the power to strike it down. In practice, they and later the F.S.C., also ‘advised’ the government on how to re-formulate such laws so as to make them conform to Islamic injunctions.

Since the Shariat Benches formed part of the High Courts they did not fulfill the General’s needs. Thus the Constitutional Amendment Order 1980 (P.O. No. 1 of 1980) was passed. Chapter 3-A of the Constitution was replaced and instead of the Shariat Benches in the High Courts, the F.S.C. was formed; however the Shariat Appellate Bench remained as it was.

Judges of the F.S.C. were to be appointed by the President who could also modify their term of appointment or assign to them any other office. General Zia created a President’s court, and was not above
reconstituting it when its decisions were not to his liking. Thus the F.S.C. became the appellate forum for trial under Hudood laws whereas for grant of bail etc., the High Courts still continue to exercise jurisdiction. In 1982,\textsuperscript{16} the F.S.C. was granted \textit{suo moto} power to review laws - a power unheard of in constitutional history. By the same order, the F.S.C. was also granted jurisdiction to call for and examine the record of any decided case by any criminal court under any law relating to Hudood.

Many judicial systems are presently operating in Pakistan with an adverse bearing on human rights. It has to be said, however, that the one created by the F.S.C. and the Shariat Appellate Bench is singular in that its implications affect each and every Pakistani. It is arguable whether even its architects were aware that a new Leviathan was being created, brandishing in one hand a supra-legislative sword and in the other a supra-judicial one under the shield of executive influence. How and by what justification can legislative, executive and judicial powers be combined in one body which is neither representative of the people nor autonomously constituted, is simply incomprehensible.

Courts have the sacred task of adjudicating upon the rights of citizens. Propriety demands that judicial organs dispensing justice not only between individuals, or between the state and the individuals, but also (as in the case of F.S.C.) carrying out the delicate task of judicial review, must be completely independent and free from all kinds of executive pressures if they are to function properly. The judges of the F.S.C., as we have seen, are appointed by the President and can be removed at his will.

A number of \textit{ulema} also sit on the Benches of the Federal Shariat Court and the Shariat Appellate Bench. These religious scholars may or may not be well versed in law or the intricacies involved therein. Moreover, Pakistani \textit{ulema} are notorious for their misogynistic views and are unlikely to interpret Islamic law in a manner favourable to women’s rights.

Forums such as the F.S.C. and the Shariat Appellate Bench were forced into the Constitution as part of a package that gave legal cover to martial law. No detailed discussion regarding these amendments and additions were ever undertaken. Hence the ensuing confusion within
the Constitution wherein the functions of the C.I.I. have been completely usurped by the F.S.C, rendering the Islamic provisions of the Constitution redundant. Article 227(2) of the Constitution clearly stands contradicted as it states that review of laws to determine their Islamic character can only be made by the C.I.I. and in the manner prescribed in Part IX of the Constitution.

This brings us to a very crucial issue - that of the deadlock between the supra-legislative-cum-judicial powers assumed by the F.S.C. and the Shariat Appellate Bench on the one hand and the Constitution on the other. Which institution/system/law is supreme? If it is the Constitution, then what about Chapter 3-A which creates the F.S.C. and also contradicts many of the Constitution’s own provisions? If, on the other hand, the F.S.C. is superior, then what about the Constitution that gives it legal cover? Either way, for the people of Pakistan it is a no-win situation. Martin Lau puts it rather succinctly:

The immense power of the court led to a curious situation: the court cannot examine the constitution on its religious correctness but it can demand the change of virtually all other legal provisions. The Federal Shariat Court can in practical terms turn the legal system upside down - protected by the constitution but not by its Grund norm amounts to a constitutional self-destruction mechanism. The constitution has made itself meaningless. (Lau:8-9)

The Insertion of Article 2-A in the Constitution

Among the many drastic changes made in the Constitution by the revival of Constitution Order 1985\(^7\) was the introduction of Article 2-A. It reads:

2-A: The principles and provisions set out in the Objectives Resolution reproduced in Annex are hereby made substantive part of the constitution and shall have effect accordingly.

As no legislature had sanctioned this addition and no debates were ever held, it was not clear as to what had warranted this addition, especially since the Constitution had been held in abeyance for the preceding
eight years. Also it was not clear what effects were envisaged by the inclusion of this new section. It soon became clear, however, that the insertion of this clause had the potential to create yet another parallel judicial forum.

Before discussing the legalities and consequences of the insertion of Article 2-A into the substantive part of the Constitution, it would be useful to view the Objectives Resolution (as it was first called) in its historical perspective and to determine whether it was ever intended for the strains placed on it today.

One of the most striking features of the Pakistan movement was that its leaders never discussed in any great detail the constitutional set-up for the new state. It was only the fear of becoming a perpetual political minority in India that united the Indian Muslims in their demand for a separate homeland. Other than this, there was no common focus; indeed they had widely disparate commitments and ideals. Entering into this debate at the time would have diluted the Pakistan movement.

On independence, this state of affairs did not help the first Constituent Assembly entrusted with the task of framing a Constitution for the new state. No progress was possible. In March 1949, the Constituent Assembly passed a Resolution on the "aims and objectives of the Constitution" now known as the Objectives Resolution. This was the first major step towards framing a Constitution (Choudhury 69:35).

A bare reading of the resolution shows that it was a resolve by the first Constituent Assembly to frame a Constitution on the outlines thus provided. The resolution consisted of nine clauses. (The resolution annexed with Article 2-A contains ten clauses - the clause relating to the independence of judges is in addition to the original resolution).

The preamble declared that sovereignty belongs to Allah and is to be exercised by the state through its people within the limits prescribed by Him. It also laid down that the state would exercise its powers and authority through the chosen representatives of the people. Emphasis was laid, among other things, on "the right of minorities to freely profess and practice their religion and to develop their culture and adequate provisions for the safeguard of their legitimate interests and on principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam." (Choudhury 69:35-36).
What the resolution did not contain was any special role or privileges for the clergy (ulema). According to the resolution Pakistan was to be a democratic state and not a theocratic state ruled by the ulema. It further resolved that if Pakistan were to become an Islamic state it would only be so by the free choice of its citizens.

The resolution was criticised by the Assembly’s minority members for laying too much emphasis on Islam and mixing state with religion, and by the orthodox ulema for its emphasis on democracy and minorities (Choudhury 69:39). Nevertheless it was widely welcomed. It was regarded as the foundation of policy which would truly reflect the ideals and aspirations of the people of Pakistan. What it was never intended to be was an instrument above the Constitution.

With minor changes the Objectives Resolution has been the preamble of each successive Constitution of Pakistan during our eventful constitutional history. It was the subject of judicial discussion before its insertion as Article 2-A of the present (1973) Constitution. It came up for the first time for consideration by the Supreme Court in the Asma Jilani case whereby it was held that our Grund norm was enshrined in the Objectives Resolution. 18

After its transformation as Article 2-A, the Objectives Resolution has become the subject of much controversy. The two main interpretations placed on it so far are:

(i) That Article 2-A is a supra-constitutional provision and hence above the other provisions contained in the Constitution. 19

(ii) That Article 2-A is not above the constitution and therefore no law can be struck down by simply invoking it unless a mechanism is provided for this. 20

Such contradictory interpretations have led to conflicting judgments handed down by the superior judiciary in the country. In July 1992, the Supreme Court in a landmark decision held that Article 2-A is not a supra-constitutional provision and its introduction does not control the other provisions of the Constitution, as otherwise it would require the framing of an entirely new Constitution. 21 It was further held that,
being creatures of the Constitution, the courts could not annul any existing constitutional provisions on the plea of repugnancy with the Constitution. Justice Shafiur Rehman went to the extent of declaring that "the accepted principles of interpretation of constitutional provisions should not be lost sight of; ignored or violated in euphoria for instant Islamisation of Constitution, Government and Society."23

Were Article 2-A declared as controlling other provisions of the Constitution, fundamental rights guaranteed in the Constitution would also lose their sanctity as these rights would become subservient to interpretations given in the light of Article 2-A. In fact the Constitution itself would be subservient to an instrument resolving its creation. Judges leaning on its crutches would dispense justice over and above the very Constitution under which they sit. Although, for the moment, we seem to have buried such an interpretation, we can never be certain it will not be dug out of its grave to haunt us again.

Parallel Criminal Judicial System

Until 1987, apart from the military courts functioning parallel to ordinary criminal courts during each successive martial law, the settled areas of Pakistan never had any parallel criminal judicial systems.

Criminal courts with specialized jurisdiction like the courts established under the Suppression of Terrorist Activities Act 1975 have existed for some time, but these were not considered to be parallel judicial forums as they try persons charged with a particular offence, under a special law wherein the ordinary criminal courts do not have jurisdiction. In other words every person charged with an offence under this special law is tried by the same special forum. It is the recent phenomenon of the 'speedy trial courts' that can truly be termed as a parallel criminal judicial system i.e., a system of criminal courts that functions parallel to the ordinary criminal courts, where a person accused of a criminal offence may be tried. Such a system was introduced for the first time through an Ordinance in 1987 which was followed by a series of such laws that culminated with the passage of the Constitution (12th Amendment) Act 1991.
The Federal Shariat Court also exercises appellate criminal jurisdiction (in Hudood cases) which is in some respects parallel to the High Courts as discussed earlier.

The idea of establishing criminal courts for the specific purpose of a speedier trial is neither new nor confined only to Pakistan. India experimented with similar laws immediately after independence. One such law was The West Bengal Special Courts Act 1950 which provided for the establishment of special courts for speedier trials, and empowered the State Government to refer "cases or classes of cases or offences or classes of offences" to such courts. This Act was challenged before the High Court of Salacity as violative of Article 14 of the Indian Constitution. A Full Bench of the Salacity High Court held that the Act was discriminatory and violative of Article 14 in so far as it purported to vest in the State Government an absolute and arbitrary power to refer to a special court 'any cases' which must include individual cases. On Appeal, the Supreme Court of India upheld this decision observing that:

The fact that [the Act] gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoys under the criminal law of the country, is on the face of it discriminatory, and that classification based on speedier trial of offences offended Article 14 of the Constitution. That was the end of such special courts in India and other laws.

In Pakistan, Special Courts for Speedy Trials were first established through the Special Courts for Speedy Trials Ordinance 1987. Since then, similar ordinances with minor modifications were promulgated from time to time. Except for the Special Courts for Speedy Trials Act 1987 (which was to remain in force for two years), no such Ordinance ever enjoyed legislative sanction. The Special Courts For Speedy Trials Act 1987 and later all similar laws empowered the Provincial Governments to establish Special Courts for Speedy Trials and also to refer cases to such courts. All these laws provided for their own procedure to the exclusion of the Criminal Procedure Code (Cr.P.C.).
And, as the emphasis was on speedier trial of offences, each waived certain procedural safeguards provided to an accused under the Cr.P.C., and contained provisions restricting the court's power to grant adjournments. All such laws (including the 12th Amendment) have one common feature. Each was to last for a specified period, Article 212-B was to remain in force for three years.\textsuperscript{28}

The most striking feature of all such laws was that the Provincial Governments were given the discretion to refer cases (or classes of cases or offences or classes of offences) for trial to such special courts if, in the Government's opinion, it was in the public interest that such cases be tried and decided speedily. The term 'public good' was not specifically defined. Provincial Governments, in their discretion, were thus empowered to refer almost every case for speedy trial.

The Ordinance and the later Act of 1987 also provided for trial \textit{in absentia} i.e. in the absence of the accused. The Special Courts For Speedy Trials 1987 was challenged in the Lahore High Court as violative of Article 25 of the Constitution. The LHC held that it did provide for reasonable classification permissible in law. The provisions relating to trial \textit{in absentia} were, however, struck down as being violative of Article 10 of the Constitution and hence void. The decision was upheld on appeal.\textsuperscript{29} Provisions relating to trial \textit{in absentia} were later not included in subsequent Ordinances.

All laws relating to the Speedy Trials Courts provided that the government may specify the manner and the place of execution of any sentence passed under the Ordinance, having regard to the deterrent effect which the execution is likely to have - no doubt a broad hint at public executions. However, when the Government of Punjab decided to publicly hang a man convicted of murder, the Supreme Court took \textit{suo moto} notice of the matter\textsuperscript{30} and stayed the public execution, to decide whether public executions violated the constitutional guarantee of inviolability of the dignity of man. Thus the public execution was not carried out and this provision was not included in Article 212-B.
Insertion of Article 212-B in the Constitution

Article 212-B begins with its own preamble "in order to ensure speedy trial of cases of persons accused of heinous offences...." which shows that the Article was inserted not because the ordinary criminal courts were not functioning properly, but to ensure the speedy trial of a few selected ones. Unlike prior special courts laws, which only provided for a trial forum, Article 212-B provided for a complete judicial system with a Special Court for trials and an appellate forum the Supreme Appellate Court the decision of which is final. Thus completely ousting, at every level, the jurisdiction of the ordinary criminal courts.

Article 212-B vested the Federal Government with the power to constitute by law 31 as many Special Court(s), consisting of a judge of the High Court or a person qualified to be a judge of the High Court, and as many Supreme Appellate Court(s), consisting of two judges of the High Court and a judge of the Supreme Court, as it may deem necessary. The Article provides that cases of persons accused of heinous offences as provided by the law 32 may be referred to the special court by the Federal Government or an authority or person authorized by it, if in its view it is "gruesome, brutal and sensational in character or shocking to public morality." 33

The standard provided for guiding the Federal Government in exercising its discretion is far too vague and general to be of any use as a standard for such discriminatory classification. Further there is no provision specifying whether the discretion to be exercised by the "Federal Government or authority or person authorized by it" will be judicially exercised or not. In each subsequent Ordinance promulgated for its operation, only the term 'Federal Government' is used, making reference to the Special Court the sole discretion of the Federal Government. The exercise of such discretion is also not amenable to judicial review as jurisdiction of all courts is expressly barred once a case is referred to a Special Court. Also, as the Special Courts depend for jurisdiction on the discretion of the executive, therefore, by inference, ordinary criminal courts lose jurisdiction at the instance of the executive. Placing such unguided and unchallengeable discretion in the executive, besides violating Article 25, is as unjust as selective prosecution itself. Further, the vesting of such discretion in the
Government gives those with influence the ability to manipulate the exercise of such discretion - which will mostly be used against those sections of society with least power, including minorities and women - and to use it as an instrument of political intimidation.

Article 25 guarantees equality before the law and equal protection of laws. This should ordinarily mean that all persons in like circumstances should be treated in the same manner. By creating special courts this guarantee is automatically withdrawn. Two persons charged with the same offence can be tried by different forums under vastly different procedures. Even if such procedures were to ensure a fair trial, as our Constitution does not contain a ‘due process’ clause that provides for uniform procedural safeguards, trial by different forums for the same offence would violate Article 25.

The main purpose for establishing of the Special Courts being to ensure a speedier trial, the procedure devised is such that it handicaps the accused in his defence. For example, the power of courts to grant adjournments has been considerably curtailed. Persons tried by Special Courts are also at a manifest disadvantage in terms of the number of appellate forums they can move. A person tried by a Special Court may appeal only to the Supreme Appellate Court while those tried by ordinary courts can appeal first to the High Court and then the Supreme Court.

Geographically Specific Parallel Judicial Systems

On independence, Pakistan inherited alongside ‘settled’ areas and princely states, some tribal or frontier districts outside the mainstream of the British Empire. As stated earlier, these areas were considered to be a threat to the colonial power. Therefore special laws were enacted for ‘the suppression of crime’, called the Frontier Crimes Regulation (F.C.R.). Due to its extremely harsh, inhuman and discriminatory provisions the F.C.R. came to be known as the ‘black law’. This legal system was designed by the British to rule through a class of local notables who not only enjoyed social influence and status within society but were also loyal to the British. The object was to depict a policy of non-interference in their centuries old system of riwaj (custom); the real purpose was to keep them away from a universally
recognised judicial system thereby denying them the basic human rights of equality before law and equal protection of laws.\textsuperscript{37} Unfortunately, the F.C.R. was retained and applied to the tribal areas even after independence and was the first parallel judicial system in Pakistan.

The administration of justice is neither the aim nor purpose of the F.C.R. which is based on the premise of suppressing crime by inflicting the severest possible punishment. Both the substantive and procedural provisions of the F.C.R. are violative of the basic fundamental principles of the administration of justice. On the procedural side, the F.C.R. denies the accused due process of law. The entire procedure is based on a system of inquiry rather than presenting of evidence, examination and cross-examination of witnesses etc. Engaging of counsel too is not permitted. Appeals to the superior judiciary, i.e. the Supreme Court and High Court, which are the constitutionally guaranteed rights of every citizen of Pakistan, are denied to persons subject to the F.C.R.

The substantive provisions of the F.C.R. are no less discriminatory and repressive. The penalties formulated under these laws include: "blockade of hostile or unfriendly tribe,"\textsuperscript{38} confiscation of the property of all or any of the members of such tribe,\textsuperscript{39} prohibition to erect new villages or towers on the frontier,\textsuperscript{40} removal of entire villages,\textsuperscript{41} demolition of buildings used by robbers and collective responsibility of the entire tribe for the act of an individual tribesman.\textsuperscript{42} Section 30 of the F.C.R is especially unjust to women as adultery is defined as an offence committed only by the woman to the exclusion of her male partner.

The provisions of the F.C.R. have been challenged at different times in the superior courts of the country. In the case of Toti Khan vs. District Magistrate Sibi and Ziarat,\textsuperscript{43} provisions enabling executive authorities to refer any criminal case to a jirga were challenged as repugnant to Article 5 and void under article 4 of the 1956 Constitution (then in force). Chief Justice West Pakistan, S. A. Rehman, accepting the contention, was of the opinion that the provisions are ex-facie discriminatory. Similarly in Khan Abdul Akbar Khan vs. Deputy Commissioner Peshawar,\textsuperscript{44} certain provisions applicable to Pathans and
Balochis only were challenged as violative of Article 5 of the 1956 Constitution (then in force) in so far as they did not provide equal protection of law to these communities. Justice Kayani ruled that this amounted "to racial discrimination and is open to criticism as discrimination between a negro and a white man".

Unfortunately, soon after these judgments, martial law was imposed in the country (1958), and the 1956 Constitution of Pakistan abrogated, fundamental rights suspended and once again the F.C.R. reigned supreme. In 1979, it was again challenged before the Shariat Bench of the Baluchistan High Court and found repugnant to Islam. The situation as it stands today is that the F.C.R. still holds sway over the Federally Administered Tribal Areas (FATA) of the country and the citizens of the area labour under all the disabilities resulting from such retrogressive and repressive laws.

The West Pakistan Ordinance I and II of 1968

Historically the area that today comprises the province of Baluchistan had a number of laws applicable simultaneously to its different regions such as Baluchistan Agency Laws, Forest Laws, Civil and Criminal Justice Laws and the F.C.R. Special laws promulgated alongside the ordinary courts include the Civil Procedure (Special Provisions) Ordinance I of 1968 and Criminal Law (Special Provisions) Ordinance II of 1968. These Ordinances were initially not made applicable to the Provincially Administered Tribal Areas (PATA) where the F.C.R. was in force. However, in 1979 the F.C.R. was challenged before the Shariat Bench of the Baluchistan High Court in Maulvi Mohammad Ishaque Khosti vs. Govt. of Baluchistan on the grounds that it was violative of Islamic Injunctions as enunciated in the Holy Qur’an and Sunnah. The Shariat Bench upheld this claim. Soon after the pronouncement of this judgment, Ordinance 11 of 1968 was made applicable to PATA of Baluchistan through Criminal Law (Special Provisions) Regulation 1979.

The salient features of Ordinance II of 1968 like its counterpart Regulation in the NWFP (discussed below) is that it provides a special procedure for trial of scheduled offences laid down in Section 2(c) of the Ordinance. The most important aspect of this Ordinance is that it
excludes the provisions of the Criminal Procedure Code (V of 1898). Even the Evidence Act 1872 was originally not applicable. But after the promulgation of the Qanun-e-Shahadat Order 1984, the High Court of Baluchistan held that this law shall apply to proceedings under the Ordinance.

The Deputy Commissioner (D.C.), an executive officer, has exclusive jurisdiction to take cognizance of a scheduled offence committed within the district. He then refers the case to a tribunal constituted by him consisting of a president (who is to be an officer not below the rank of Naib Tehsildar) and four other persons. This tribunal sits as a judicial forum headed by a member of the executive. The tribunal submits its findings in the form of a report to the D.C. who has the authority to acquit or convict an accused person or to remand the case to a second tribunal. He may award the accused any sentence or fine, no matter what the punishment provided for the offence under the Pakistan Penal Code (P.P.C.) i.e., the ordinary criminal law of the country. The arbitrary powers of the D.C. are practically unlimited; even if an accused is found guilty of murder the D.C. may acquit him or simply impose a fine. Such arbitrary powers are not subject to judicial review by any ordinary court either in appeal or revision. Furthermore, the D.C. is conferred with powers whereby he may order the whole or any part of the fine recovered to be paid as compensation for any loss or injury. No civil court is competent to take cognizance against a claim to compensation based on such claim or injury. Section 14 of the Ordinance (like Section 30 of the F.C.R.) provides punishment for a woman who knowingly commits adultery, but no such punishment is provided for the man who is an equal partner in the act. Ordinance 11 of 1968 therefore not only discriminates against the people of Baluchistan generally by depriving them of equality before law and equal protection of laws, but is manifestly adverse to women. What is worse is that this Ordinance has not been made by the people of Baluchistan themselves, but by members of a presumably enlightened elite sitting in the country’s capital and professing to bring progress and prosperity to the less fortunate inhabitants of Pakistan.

The preventive provisions of the Ordinance under discussion also reflect the ‘ruler and the ruled’ dichotomy reminiscent of our colonial past. The D.C., no doubt motivated by exigencies of ‘law and order,’ is
empowered to impose a fine or demand security from any adult member of a family having a blood feud with another family.\textsuperscript{56} This, irrespective of whether such an adult is directly involved in the vendetta or not!

Therefore not only are citizens denied due process of law and justice, there is not even a pretence at doing justice as there is no separation of executive and judicial functions.

The PATA Regulations

Another highly confusing parallel judicial system that emerged over the years operated in what were termed the Provincially Administered Tribal Areas (PATA). Though several provisions recently ceased to operate (see update note), they make an interesting study in parallel systems. FATA comprises Malakand, Dir, Swat, Chitral and Kohistan located in the North West Frontier Province (NWFP) of Pakistan. Former states of British India governed by their own rulers. Swat, Dir and Chitral acceded to Pakistan and were later merged with first the province of West Pakistan, and on dissolution of the One Unit System, with the NWFP. Administrative units were created, civil administration and police force established and they were brought at par with the other districts and divisions in the province.

In the initial years after the merger, the judicial powers of the former rulers were exercised by the administration. The substantive and procedural laws were based on \textit{riwaj} (custom) of the areas, but a different hierarchy of judicial forums possessing different powers was created. Regulation I of 1970, made the Criminal Procedure Code (Cr.P.C.), the Evidence Act and the Police Act applicable to these areas. From then onwards nearly all the procedural and substantive laws that were enforced elsewhere in the NWFP were made available to the inhabitants of these areas. The ordinary courts, both civil and criminal, functioned for nearly four years.

In 1975 Dir, Swat and Chitral districts were included in the definition of PATA under Article 246-B of the Constitution thus according tribal status to areas where none existed prior to independence.\textsuperscript{57} As a consequence, these areas were brought within the purview of Article
247(3)&(4) of the Constitution, withdrawing law making power for these areas from Parliament and vesting this right in a nominee of the federal government, the governor of the NWFP. Thus while the inhabitants of PATA along with the ‘settled’ districts of the province had the right of adult franchise to elect members to the Provincial and National Assemblies who can make laws for the province/country, their elected representatives could not make laws for their own constituencies!

After the enforcement of Regulation I and Regulation II, a dual system of judicial forums emerged, operating simultaneously with the ordinary civil and criminal courts. The procedure is similar to that described for Baluchistan (above) except the term ‘tribunal’ is replaced with the word jirga. The jirga can pass any sentence prescribed for an offence under the Pakistan Penal Code (P.P.C.) except the death sentence. Appeal lies to the Commissioner of the division and revisional powers lie with the Government of the NWFP. Provisions of Regulation II are similar except in that they apply to disputes of a civil nature.

Regulation I and II are clearly in gross violation of fundamental human rights. They validate a parallel hierarchy of judicial forums based on unrepresentative legislation alongside ordinary courts and then arbitrarily include or exclude certain matters from their purview. For example, disputes involving a minor, insane persons and the government have been given the protection of the ordinary laws of the land while the rest of the citizens must seek redress through the executive authorities from a jirga comprising of a government official and laity. The overwhelming majority of inhabitants of PATA have thus been reduced to the status of second class citizens in their own country. They are neither equal before the law nor are they entitled to equal protection of laws in accordance with Article 25 of the Constitution.

Preambles to both Regulations are silent as to their objectives except that the provisions are to “meet the special requirements of these areas,” which apparently means no more than perpetuating the colonial psyche of maintaining an iron grip on the more ‘troublesome natives’. The rationale behind one parallel judicial system operating throughout PATA is incomprehensible on historical counts too, as prior to merger
of the former states of Dir, Swat, and Chitral with the province of West Pakistan, their judicial systems were different from each other. After merger in 1969 the ordinary law and courts were extended to these areas for years. What 'special requirements' suddenly surfaced after all these years is something of a mystery.

Protagonists of the jirga system have tried to compare it with trial by jury (as practiced in the USA for instance) but the systems differ on some fundamental points. The presiding officer in a jirga is a government officer and member of the executive branch of the government exercising judicial powers. In trial by jury, a judge presides. Members of both the jirga and jury are local persons with the marked difference that the jury is drawn from all sections of the population whereas a jirga comprises of the elite of the area. Furthermore, in trial by jury due process of law is given to both parties, whereas in a jirga an accused does not even have the right to be heard. 59

The implications and consequences of this dual judicial system are more detrimental for women. 60 To begin with, the operation of the Muslim Family Laws Ordinance 1961 (MFLO) and the Family Courts Ordinance has not been extended to PATA. Therefore women from these areas, already labouring under repressive customary practices are denied that very negligible relief available under the MFLO in the form of restraint on polygamy, recovery of dower etc. Moreover, even in areas where women's rights have been established by the law of the land (for example inheritance, child custody, exercising the option of puberty in marriage), women are unlikely to get relief from a jirga that represents the interests of the male elite of the area.

Implications and Consequences for Human Rights

There are many controversial issues arising from the discussion on parallel judicial systems in Pakistan. First and foremost is the question of whether these systems fulfill the basic requisites of equality before law and equal protection of laws. If they at all they do so, then on what grounds can we justify this difference of treatment meted out to supposedly equal citizens of one country?
In *Inamur-Rehman vs. Federation of Pakistan*, arguments were forwarded to explain specific circumstances under which different laws and/or forums could be made applicable to equal citizens of a country.\(^{62}\)

In other words, when may a classification, grouping or categorisation be legitimate and even essential for the protection of certain persons or classes of persons? For instance, certain disadvantaged sections in society, it is argued, need special laws to bring them at par with the rest of the country. But even such protective laws need to be monitored closely since it has been experienced that after an initial advantage, these laws actually prevent people from becoming 'equal'.

Taking into consideration the various parallel judicial systems operating in Pakistan, it is proposed to analyse the classifications and justifications on which they are based, and argue that they are neither reasonable nor based on any lawful object despite the fact that all these forums at least appear to possess the required constitutional cover.

The numerous ad-hoc constitutional amendments made mostly during General Zia's regime has converted this document into a self contradictory instrument. For example, equality before law and equal protection of laws are fundamental rights enshrined in the Constitution. Yet these very rights are trampled upon by other provisions of the Constitution. For example, the people of FATA are subject to the F.C.R. which denies due process of law. An administrator is the law maker, implementer, prosecutor, judge and counsel all rolled into one. No right of appeal is allowed to any judicial forum in the country neither can decisions be called to question at any level of government. The right of franchise too, has been denied to the 'tribals'. The members returned to Parliament from these areas in addition to being unrepresentative have no say in legislation affecting their constituencies, since the Constitution itself concedes law-making powers of these areas to the President.\(^{63}\)

As far as PATA Regulations 1 and 11 and West Pakistan Criminal Law (Special Provisions) Ordinance 11 of 1968 are concerned, they are both discriminatory and violative of basic human rights of the inhabitants of these areas as they too deny access to the ordinary legal forums of the country. Article 246 of the Constitution creates PATA and empowers
the governors of the NWFP and Baluchistan to legislate for these territories and gives legal cover to parallel judicial forums.

Applicable only to certain areas of the NWFP, PATA Regulations I and II created a categorisation of persons without serving a valid legal object. This is because the territories included in PATA are otherwise on an equal footing with the rest of the province both administratively and politically. After merger with the rest of the country they were subject to the ordinary law and judicial forums of the country before the creation of their status as PATA. The only manifest basis for singling out these areas for application of the said Regulations is cited in the preambles as "the special requirement of these areas". No further elucidation of 'special requirements' is offered lending credence to the argument that there is no rational plausible explanation for imposition of these discriminatory forums on the people of PATA. In a landmark judgment Mohammad Irshad vs. A.C. Swat, Justice Qazi Mohammad Jamil, declared both Regulations violative of Article 25 of the Constitution. The government has appealed to the Supreme Court and the judgment of the High Court stands suspended. One cannot, at this stage either gauge or predict the outcome of the case, but it would be worthwhile to recall the report of Justice Allah Bakhsh Khan who in 1981 was commissioned to ascertain public opinion and to find out the feasibility of the enforcement of normal laws in PATA. He recommended the repeal of Regulation I and II stating thus:

It would therefore, be in the interest of national integrity that uniform civil and criminal laws are enforced in the district of Dir, Swat and Chitral as well as the Malakand protected area and the entire division brought at par with other parts of the country in the field of administration of justice. The riwaj has outlived its utility and people of this division deserve to get rid of the evils of riwaj which were perpetrated during the tyrannical rule of the despotic nawab...

In Baluchistan too, the Criminal Law (Special Provisions) Ordinance 11 of 1968 came under heavy criticism, became the subject of constitutional litigation and was struck down as violative of articles 25, 2-A and 175(3) of the Constitution of Pakistan. In Baluchistan Bar
Association vs. Government of Baluchistan, Justice Amir-ul-Mulk Mengal, referring to Article 8 of the Constitution, was of the opinion that "the legislature shall not make law which takes away or abridges a fundamental right or any law which is in contravention of the Constitution. Such law thus would be void to the extent of such contravention." Following the line of argument taken up in Irshad vs. A.C. Swat, the court tried to determine whether the laws under discussion were "based on rational and reasonable basis, having an object to be achieved through such legislation or not." The court found that legislative power in this context:

[w]as exercised in a most whimsical and subjective manner... [w]e find sufficient force in the contentions raised by the counsel for the petitioners that the application of the Ordinance in the areas where people live in like circumstances is neither universal nor uniform and it has been left entirely to the whims and caprice of the government to decide without any rational basis to withdraw the Ordinance or re-apply the same in any area in a most subjective manner and there being no criterion in taking such a decision. Hence the classification is neither intelligible nor reasonable nor is it discernible.67

The fate of the parallel judicial systems in PATA and Baluchistan therefore hangs in the balance as judgments are still awaited. No matter what the outcome, it is heartening to see that these forums are being challenged in the highest judicial forums of the country. The classification on which these discriminatory laws and forums were justified are being rejected and its rationale questioned.

On the face of it, the purpose of classification of areas of the NWFP and Baluchistan as PATA was to treat these areas as special due to their backwardness. The idea was, presumably to use these special laws and forums as instruments of reform to bring these backward areas into the mainstream of national life. In reality, however, these special laws and parallel judicial systems have emerged as instruments of oppression since the discretion to use these fora vests with the executive sitting simultaneously as a court of law. It is an established fact that the primary responsibility of the executive authority, especially the kind
wielded in Pakistan, tilts away from the interests of minorities and other disadvantaged sections of society, especially women. The members of a jirga, which is an all-male forum, will be guided more frequently by their prejudices than by established legal norms. Furthermore, as the local elite they feel responsible for maintaining the local status quo and do not support women’s rights vis a vis the existing customary practices no matter how repressive the latter are.

The parallel judicial forums applicable throughout the country are the result of indiscriminate amendments to the Constitution. Jurisprudentially speaking too, concepts having a completely different normative base have been made to co-exist and complement each other. The resultant judicial system is thus a patchwork of secular and Islamic provisions that do not co-relate. The overriding concern behind these amendments was to gain legitimacy (no matter how transient) at the cost of a homogenous judicial system guaranteeing human rights. One therefore arrives at the uncomfortable conclusion that the parallel judicial forums within the Constitution were motivated neither by justifiable classification nor any lawful object. The sole purpose appearing to be a Machiavellian desire to rule and control the populace by all possible means.

Then there is the confusion created by the insertion of Article 2-A to the Constitution making the Objectives Resolution a substantive part of the Constitution. From the massive bulk of litigation piling up since its ‘elevation,’ it is evident that Article 2-A has opened a Pandora’s box of varying interpretations as to the extent and scope of its standing vis a vis other provisions of the Constitution. The immediate result is the creation of yet another parallel jurisdiction, as the High Courts and Supreme Court try their hands at deciding whether laws are in consonance with Islamic injunctions or not - previously solely the concern of the F.S.C.

Who or what factor is to determine, should such an occasion arise, which forum has the final authority in this respect? Is the F.S.C, a body formed in clear violation of the Objectives Resolution (i.e. independence of the judiciary), authorised to pass judgment on matters of such importance? On the other hand, are the High Courts and Supreme Court competent to take cognizance of matters clearly within
the purview of the F.S.C. by invoking the provisions of the Objectives Resolution now called Article 2-A? These and numerous other crucial questions arise out of the medley of rules, laws, judicial rulings, constitutional amendments, Ordinances etc. that comprise the legal system of Pakistan today. The spectre of state power, willing to go to any lengths to maintain and consolidate the status quo, looms large as the only coherent image in this vast sea of incoherence.

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SG Update

Since 1992, when this paper was written, new developments have replaced a number of parallel judicial systems mentioned here.

The Supreme Court upheld the decision of the Peshawar High Court in Muhammad Irshad’s case and the decision of the Baluchistan High Court in Baluchistan High Court Bar Association’s Case. As a result, PATA Regulations (Regulations I and II of 1975) applicable to the provincially administered tribal areas of the NWFP, and Regulation I and II applicable in the tribal areas of Baluchistan have ceased to take effect. Thus, the forums established under these Regulations stopped functioning and all pending cases were transferred to regular courts of law. The Frontier Crimes Regulation in the Federally Administered Tribal Areas (FATA), however, remains unaffected.

Similarly, Article 212-B of the Constitution providing for the Special Courts for Speedy Trials and their appellate courts known as the Supreme Appellate Court has since lapsed. The Constitution (Twelfth Amendment) Act 1991, provided for these forums for three years only. In 1994, on completion of the three-year period these special forums were abolished and all cases pending before them were transferred to the ordinary courts of law.

In August 1997 the Nawaz Sharif government passed the Anti - Terrorist Act (Act XXVII of 1997) in order to “provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences”. The Act provided for the establishment of Special Courts by the Federal and Provincial Governments and ‘scheduled’ offences specified in the Act fell under the purview of these Special Courts. These offences included use of bombs, dynamites, lethal
weapons to "strike terror in the people, or any section of the people, or to adversely affect harmony among different sections of the people". 

Appeals against decisions of the Special Courts were to be heard by an Appellate Tribunal consisting of two High Court judges and no appeal laid against its decision. Another controversial issue in this Act was the admissibility of a confession before a police official. For ordinary trials, Section 162 of the Criminal Procedure Code (Cr.P.C.) specifies that any statement or confession before a police officer is neither to be signed by the person making it nor has it any value in the court. Police (under Section 163 of the Cr.P.C.) are prohibited to offer or make any inducement, promise or threat in order to extract a statement. However, the Anti Terrorist Act made confession before police valid if it were made before an officer of the rank of Deputy Superintendent of the Police.

This Act was challenged in the High Court and then the Supreme Court. The Supreme Court in its decision, Mehram Ali vs. The State, struck down many provisions of this Act. It ruled that the tenure of judges of such courts be amended to bring it into conformity with the concept of the independence of the judiciary. Appeals against decisions of the Anti-Terrorist Courts would be to the respective High Court and then to the Supreme Court. The provisions of the Act providing police officers authority to shoot was also ordered to be amended. Trial in absentia on account of misbehaving in court was struck down, while the provision for confession before a Police DSP was to be amended and replaced with confession before a Judicial Magistrate. Moreover, the authority to frame rules under the Act was to lie with the High Courts instead of the government, as originally provided in the Act. The Supreme Court ordered that previous convictions were not to be affected by this decision, but that on-going trials would have to be in line with the amendments. Subsequent to this SC judgment, the government has made these amendments to the Act. Also, now crimes of gang-rape, child molestation or robbery coupled with rape have been included within the ambit of the Anti-Terrorist Act Courts.

Parallel courts and legal systems thus continue to be used by sitting governments ostensibly to exercise control over terrorism but also to keep opponents at bay. This was demonstrated as recently as November 1998 when, after the imposition of Governor's rule in Sindh, military
courts were set up in Karachi to try terrorists. The intention of the
government to cleanse violence-ridden Karachi of strife may be
commendable but relying on parallel and military courts has never
resolved these problems in the past.

Endnotes

1 One of the features of Dicey's exposition of law. Also appears in the Irish
Constitution.
2 Last clause, 14th Amendment to the American Constitution.
5 Preamble, Frontier Crimes Regulations (Regulation III of 1901).
6 Constituted under Article 303 C of the Constitution of Pakistan.
7 Constituted under Article 203 F of the Constitution of Pakistan.
8 Inserted in the Constitution under P.O. No. 14 of 1985, Article 2.
9 The Constitution of Pakistan (1956) was abrogated by General Ayub Khan when he
declared Martial law in the country in 1958, and General Yayha Khan did the same
with the 1962 Constitution.
10 *Nusrat Bhutto vs. Chief of the Army Staff* PLD 1977 SC 657.
11 Ibid.
12 For instance, *Sattar Gul vs. Martial Law Administrator Zone B, NWFP* PLD 79
Pesh. 119 wherein the Peshawar High Court observed "...if courts have not failed
the country in discharging their duties, it is not understandable how the trial of a
few cases by Military Courts is going to promote the welfare of the people". Also
see *Aizaz Nazir vs. Chairman Summary Military Courts* PLD 80 Kar. 444.
13 PLD 80 Kar. 444.
14 *Sulaiman & Others vs. President Special Military Court* NLR 1980 Civil Quetta
873.
15 See Articles 229-230 of the Constitution of Pakistan.
16 Under Presidential Order No. 5 of 1982.
17 P.O. No. XIV of 1985.
18 *Asma Jalani vs. Govt. of Punjab* PLD 1972 SC 139.
19 *Zia-ur-Rehman vs. The State* PLD 1986 Lah 428; *Messrs Bank of Oman vs. Messrs
20 *Habib Bank Ltd vs. Messrs Textile Mills Ltd.* PLD 1989 Kar 371 and *Sharif Faridi
vs. Federation of Pakistan* PLD 1989 Kar 404.
21 *Hakim Khan and others vs. Govt. of Pakistan* PLD 1992 SC 595.
22 Ibid at 616-617.
23 Ibid at 630.
24 Article 14 of the Indian Constitution corresponds to Article 25 of the Constitution
of Pakistan.
25 *Anwar Ali Sarkar vs. The State of West Bengal* AIR 52 Cal 150.
26 *The State of West Bengal vs. Anwar Ali Sarkar* AIR 52 SC 75.
27 Subsequently all similar laws providing for such special courts were declared
unconstitutional by courts in different cases (eg The Saurashtra State Public Safety
Measures Ordinance 1949 was struck down by the Supreme Court in *Kathi Raming
Rawat vs. State Of Saurashtra* AIR 52 SC 1952).
31 The Special Court(s) and the Supreme Appellate Courts are to be established by Act of Parliament.
32 An Act of Parliament has to specify offences under which cases can be referred to Special Courts.
33 Article 212-B (1) of the Constitution.
34 Due process implies in accordance with certain procedural safeguards. These appear in the fifth and fourteenth amendments to the U.S. Constitution.
35 Preamble, Frontier Crimes Regulations (Regulation III of 1901).
36 Pir Amir-ul-Mulk Mengal J., speaking for the court in *Baluchistan Bar Association vs. Govt. of Baluchistan* PLD 1991 Quetta 7.
37 ibid.
38 Section 21, F.C.R.
39 ibid.
40 ibid section 31.
41 ibid section 32.
42 ibid section 34.
43 PLD 1957 (W.P.) Quetta 1.
44 PLD 1957 (W.P.) Pesh 100.
45 Maulvi Mohammad Ishaque Khosti vs. Govt. of Baluchistan PLD 1979 Quetta 217.
46 ibid.
47 Now read as Qanun-e-Shahadat, 1984.
48 PLD 1987 Quetta 141.
49 Section 4 Ordinance II of 1968.
50 ibid sec. 6.
51 ibid sec. 11.
52 ibid sec. 12.
53 ibid Sec. 29.
54 ibid Sec. 13.
55 ibid.
56 ibid Sec. 40.
57 The Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation I of 1975 and the Provincially Administered Tribal Areas Criminal Procedure (Special Provisions) Regulation II of 1975 were made.
58 Section 3 of Regulation I and II of 1975.
59 The opportunity of hearing is provided by the *jirga* to the parties and it may record evidence as well but may also refuse to do so at its own discretion.
60 Section 14 of Regulation 1 of 1975 contains exactly the same punishment for adultery by a married woman as Section 14 of W.P.Ordinance II of 1968 and turns a blind eye to the man who is an equal participant in the offence.
61 The MFLO is the only piece of progressive legislation in the area of family law in Pakistan promulgated during the rule of Ayub Khan.
63 (ed. note) FATA was granted universal franchise in 1997.
64 PLD 1990 Pesh. 51.
65 Report of Justice Allal Bakhsh Khan dated 15.11.82.
This article of the Constitution of Pakistan deals with separation of the judiciary from the executive.

PLD 1991 Quetta 7.

For example, in Federation of Pakistan vs. Malik Ghulam Mustafa Khar PLD 1989 SC 26, the court held that it was not open to it to hold any of the provisions of the Constitution as violative of the Objectives Resolution (Article 2-A). On the other hand, in Tyeb vs. Messrs Alpha Insurance Co. 1990 CLC 428, it was held that Article 2-A was on a higher footing than other provisions of the Constitution.

Section 6 of the Anti Terrorism Act, 1997.

PLJ 1998 SC 1415.

References


Engagements of Culture, Customs and Law: Women’s Lives and Activism

Farida Shaheed

Abstract: This paper argues that both customs and law are intricately linked to culture and flow from existing structures of power. Though distinguishable one from the other, culture, customs and law operate in a linked fashion and together define the space and rights available to women. Drawing on the experience of Shirkat Gah Women’s Resource Centre, it looks at the implications for activism.

Introduction

As a window modulating perception and a casting mould for behaviour, culture is perceived to be ‘naturally’ connected to customs i.e. habitual patterns of behaviour. Perceptions of the law, on the other hand, have somehow become de-linked from culture, encouraging a tendency to see the law abstracted from people’s everyday lives. In reality the law is as closely linked to a society’s culture as are its customs; nor are laws and customs water-tight, mutually exclusive categories. For women, the dynamics determining how culture intersects with customs, law and politics has direct implications. Together, culture, customs and law outline the space available for a woman’s definition of self, the cross-cutting factors she must daily negotiate in her actions, and the boundaries against which she needs to push for self-affirmation and change. In fact, in many ways, the very concept of ‘womanhood’ is located in the interface of these factors. The same can be said to apply to the concept of ‘manhood’, but the implications are not alike.

Women rarely have the privilege of defining the contours of culture, customs or law whereas the men of the ruling elite exercise this privilege.

as a right, and all men enjoy in some measure the advantages that flow from this one-sidedness. Women share with others outside the magic circle of political power and decision-making the negative imposition of culture and customs defined by others. Women are particularly affected, however, because so many of the internalized rules of a society operate in the realm of the private and therefore in areas of immediate concern to gender relations and definitions of womanhood that in all patriarchal societies affect women more adversely than men. This is especially true when women are additionally burdened by being obliged to function as the repositories of culture.¹ For individual women, the control exercised by cultural norms, customary practices and legal provisions and their application will vary depending on particular circumstances and personal orientation. The aspects covered as well as the degree of elasticity, and the level and strength of each may also be different. Nevertheless, every woman and class of women has to negotiate the influence of each, often simultaneously since these influences operate in an inter-connected fashion. A clinical separation of these influences may be analytically helpful, therefore, but attempting to formulate strategies for change without exploring the nature and implications of the inter-connections is definitely problematic and can easily lead to an unhelpful dead end.

Culture and Law

Despite considerable and occasionally startling divergence, all societies organize their physical means of survival (production and reproduction), and each evolves a worldview that explains this organisation. Between the physical organisation required for survival and the intangible but potent worldview, are located the rules elaborated by a community to govern interaction between individuals, sets of individuals, and between human beings and their natural environment. When formalised, these rules are elevated to the status of law. A community’s legal system being the principal framework for enforcing the rules, resolving disputes and accessing justice as defined in that context. Further, by prescribing and prohibiting behaviours, norms and inter-relationships, the law projects an ideal for society and, in projecting an ideal, the law necessarily has cultural underpinnings.
A major pitfall of viewing the law abstracted from its cultural rooting is that it encourages a tendency - both in popular perception and in the discourse of human rights activism - to consider the law abstracted from people’s everyday lives. The popular perception is perhaps more understandable since legislation does in fact take place at varying distances from everyday life. In societies with strong democratic traditions concerned citizens can count on having access to the discussions surrounding legislation and to some channels for participation. Nevertheless, even then, legislation is a task delegated to others with whom we, the average citizen, have precious little direct interaction. In more authoritarian set-ups that have dispensed with such niceties, laws are literally made behind well guarded doors and imposed without eliciting the opinions and with little apparent concern or a casual disregard for those affected. Irrespective of the democratic credentials of a society there is a distancing of law from the everyday that, in my opinion, is far from coincidental. In a context where legal positivism is overwhelming, demystifying the law entails challenging the label of ‘scientific objectivity’ attached to law and its institutions. The institutions erected to implement and enforce the law are surrounded by an aura deliberately created to instill awe and/or fear. The ritual of the courts, the imposing buildings, the - until fairly recently - anachronistic use of white wigs, the continued use of a visible marker of identification in the prescribed robes or dress code (black robes and gowns in Pakistan) are intended to evoke a sense of the unusual and break with the everyday that is the starting point of our work and, from the perspective of the everyday and social organisation, laws are merely the rules people devise for the smooth running of their society.

In the context of human rights discourses and activism, the dissociation of the law from culture fosters an illusion of the law being an independent entity, almost self-gerant, that can be seen and therefore addressed divorced from its surrounding; a tendency that may be encouraged by the current emphasis on the universality of rights. I have no quarrel with the need to strive for the universality of rights, indeed I fully endorse the efforts in this direction. My concern is that the divorcing of any societal effort/enterprise from its social moorings appears at best naive and futile, at worst contrived and counter-
productive. My own inclination is to look at the law (as most things) from the perspective of people’s everyday lives and from this vantage point to see the significance of law in people’s lived realities: what it means to people, how they interact with it, and how the law impacts on their lives or - as the case may be - doesn’t. This inclination can certainly be attributed to my training as a sociologist, but it has been reinforced by my work at Shirkat Gah (a women’s resource centre) and the international network of information solidarity and support: Women Living Under Muslim Laws. An important thrust of both institutions is to demystify the law and its sources for the common woman and man so that these become in the first instance accessible, and in the second challengable.

Seeing the law as neutral successfully hides from view the basic premise that “legal rules and principles are justified by resort to sources that are accepted because of their reputed age and authenticity and to principles of social theory that are believed to be self-evidently valid but that in fact express the aspirations of the group which has for the moment achieved dominance” (Tigar and Levy 77:283). For these sources of validation to have meaning for people to the point of being ‘self-evident’ (i.e. unquestioned) demands that they be integrally rooted in a people’s world-view and therefore culture. Following from this, the framework used for both elaborating and justifying laws is bound to vary from one cultural, socio-economic context to another. In the struggle to promote the universal and indivisible nature of human rights, this essentially cultural equation is often forgotten. The relationship between power and law underlined by Tigar and Levy is equally important. Where strong feudal structures are firmly entrenched and society is dominated by large landlords, it is futile to expect that the operative rules and laws will support the interests of the landless peasants. Likewise, in this patriarchal global village of ours, women’s lack of economic and political power translates into the absence of their experiences in the text and institutions of the law the world over. Instead, “[i]t is generally men’s experiences, opinions and interests that throughout time have been etched into law” (Dahl 86:362).

Culture continues to interface with law beyond its formation. Since the interpretation of law cannot be detached from the specific cultural
context in which it is located, norms and accepted practices profoundly affect the application and interpretation of law. Given that the law is implemented by persons and not by automatons this is a truism, but one that, unfortunately, is too easily overlooked. One of the most obvious examples of the role of culture in determining the implementation of legal provisions is provided by cases involving concepts of and attitudes towards violence. In societies in which the concept of honour killings is socially validated, the formal legal system will reflect this validation - in spite of the textual provisions of the law - by reducing culpability in murder cases that are perceived to be related to honour. In Pakistan this is visible in at least two ways.

First, the provision of 'grave and sudden provocation' has been consistently interpreted by courts to virtually condone instances where men have murdered their female relatives (usually wives, but also sisters, mothers, and others) on suspicion of extra-marital sexual relationships (Hassan 95). The reasoning is exemplified in a judgment of the Supreme Court that, in granting exemption under grave and sudden provocation, held:

*Under village conditions and even in many other parts of society in this country, the right of the male member of the family to control the actions of their women folk, particularly in the field of sexual relations, is fully recognized and forcefully maintained. The idea that a young unmarried girl in a village family is entitled to leave her bed during the night and go where she pleases...simply cannot be entertained* [author’s emphasis].

I have added the emphasis to indicate how cultural norms (rather than the law and its requirements) have been taken as the standard against which the act was judged. Only subsequently was the law applied through the window of cultural perceptions and beliefs. While this is an old judgement, the trend has continued and cultural reasoning has been applied even when the evidence at hand has refuted the plea taken by the defence. *In Muhammad Younis vs. The State*, a man’s claim to have killed his wife on catching her committing adultery was belied by both medical evidence and the fact of her being fully clothed at the time of
death. Despite this he was granted the exemption of grave and sudden provocation since the court held:

_The appellant had two children from his deceased wife and when he took the extreme step of taking her life by giving her repeated knife blows on different parts of her body, she must have done something unusual to enrage him to such an extent_[^4] [author’s emphasis].

Legally irrelevant, the fact of the wife having borne him two children has no significance except by reference to a cultural belief of a society in which a man would (or should) be incapable of killing the mother of his children unless she did “something unusual to enrage him”. That social scientists would be hard put to produce evidence of the existence of such a society and further, that - in this particular case - there was no proof of the supposed projected behaviour, on her part seems to have had no effect on the judgement.

Second, in areas where the relatives of persons suspected of extra-marital sex find themselves ‘honour-bound’ by traditional cultural imperatives to kill both the offenders (karo kari - a practice found in parts of Sindh and Baluchistan), the legal provisions of the state have failed to dislodge these cultural dictates. In many instances, the police will not register a case of murder even when the culprit gives himself up to them immediately after the deed, regardless of the provisions of law. Consequently, the police - theoretically intended to uphold and implement the formal state law - actually colludes with non-legal cultural forces to disregard (and/or distort) the original intentions of the law. At present, where pre-existing cultural imperatives and the provisions of the law have clashed on matters pertaining to grave and sudden provocation and karo kari, more often than not, it is the former that have prevailed.

Customary Laws

No society ever reduces all of its rules into formal state law and customs are a powerful means of exercising control and providing guidelines for interaction amongst members of a society. In every community, starting
from childhood people learn and internalize a fairly complicated set of rules of acceptable and unacceptable behaviour through a culturally specific process of socialization. These internalized rules - in sociological terms ‘codes of behaviour’ - are a crucial part of an individual’s framework for self and interaction with others. To a large extent these internalized rules or codes of behaviour pre-determine what, for each individual, is proper and improper, permissible and forbidden, laudable and vile, appropriate and inappropriate. We act upon these internalized ‘laws’ instinctively and are not given to thinking of them as culturally significant. Yet without these internal rules to guide us, we would not know the appropriate body language, tone and words, dress code etc. to use in a particular situation. Such things only strike us when we are transposed into a culturally unfamiliar context and, bereft of the familiar signposts and signals we take for granted, find ourselves hesitating, groping for the appropriate response and articulation, trying to second guess the suitable, or when more dramatically, we experience ‘culture shock’.

Different cultural reference points multiply the potential of misunderstandings and miscommunication. Anyone meeting persons from distinct cultures will recall the inevitable issue that confronts us of gauging the physical interaction that is culturally proper/acceptable between individuals of specific sexes, ages and familiarity. Does one shake hands or merely smile, does one bow by inclining one’s head or one’s torso? Does one embrace or peck the cheek and if so, is the requisite number once, twice or thrice? At best an inappropriate response is merely gauche or embarrassing, but under some circumstances an inappropriate response could result in someone getting killed.

Much like law, ‘ignorance is not an excuse’ and the cultural dictates of ‘customs’ are as binding and the penalties for transgression often more immediate, than the legal system and its institutions. Not requiring external enforcement, customary practices often pose greater obstacles to women’s autonomy than formal legislation. When people contravene norms or break taboos within their own society - be they adolescents rebelling against parental authority or women (and men) rejecting patriarchal norms - they are conscious that they are not doing the ‘done
thing'. Transgressions always entail some degree of risk since each society or community has prescribed sanctions for those contravening its customs that range from verbal reprimands, to economic sanctions, social ostracization and physical violence - or its threat. Before pushing against the accepted limits of behaviour, women (as anyone else) calculate the likely risk, and take the risk either when they confident in their ability to cope with the projected consequences or when they are desperate or committed enough. Customary practices are also no more neutral than the formal laws, for both presuppose a potential ability to enforce compliance or take punitive action in cases of transgression. They therefore reflect the ideology and world view of those with the power to enforce.

Nor are these customary laws (customary practices or informal law) peculiar to societies of the South or to the ex-colonial states of the Third World (nor even that strange term 'societies in transition' which surely should mean that the rest are stagnating but is used instead as a euphemism for their rapid development!). Few countries have laws to prevent women entering specific occupations (although not long ago this was the case for medicine and law in Europe and the USA), to limit their physical mobility, to restrict their political participation, or to prescribe a particular dress code, yet in all these aspects women’s lives are circumscribed by internalized social codes in both the Muslim and the non-Muslim world, in societies of the South as well as those of the North. Certainly, we would all agree that it is customs or social conventions flowing from patriarchal structures - rather than laws - that have prevented men from being house-husbands the world over. In sum, a socially sanctioned behaviour code is internalized through the socialization process, finds reflection in societal attitudes and practices, and ends up being obeyed either automatically through self-censorship or out of fear of physical or other forms of reprimand.

Since its inception in 1984, the WLUMIL network has highlighted the importance of the cross-cutting influences of culture, customs and law in the context of the Muslim world. Others have carried out similar work in other contexts and, thanks to fairly recent feminist scholarship, the importance of cultural practices in defining the lives of all women is gaining recognition outside the context of ‘developing countries in
transition'. Indeed, my recent discovery of the analysis and insights in the writings of those at the Institute of Women’s Law in Oslo provoked an instance cord of empathy and recognition, not dissimilar to that of unexpectedly stumbling across a long lost friend. For instance, Tove Bolstad uses the term informal law for what I refer to as customary practices and defines this as "rules which are adhered to because they are perceived as a moral duty and because they may be sanctioned by, for instance, some people becoming angry if such duties are not performed. Such informal regulations arise steadily in semi-autonomous spheres. Family life and in particular farm life is precisely such an area".

She poignantly points out that:

[all cultures contain spheres in which is it impossible for the members ‘to think that they are thinking wrongly’ - things are obvious, self-evident and natural. These are implicitly areas of silence, of inarticulation, arenas into which language does not intrude or in which it is forbidden to speak. (Bolstad 95:26-27)]

I should hasten to add that Bolstad is referring to Norwegian society which, arguably, enjoys some of the most gender-neutral formal law in the world. Approached from a South perspective, the interface of culture customs and law presents other complicating factors.

Parallel Systems

Catapulted overnight into independence in the era of the nation-state, most newly independent states were obliged to evolve (hastily) uniform state laws and a sense of nationhood. State laws were normally devised by a small minority elite that assumed political power (often characterized by a specific ethnic and religious identity) and imposed from above. Without the benefit of the historical development of nations in western Europe in the 17th - 19th centuries, these new states were not nations in the classic sense of the word. In the absence of ‘the imagined community’ of nationhood (to use Benedict Anderson’s popular terminology), the contours of a state were superimposed on distinct sub-
state entities each with its own structure of authority, legal system and cultural framework. Indeed, sometimes the only common denominator amongst these different entities was the colonizer (Ahmed 96; Rashid and Shaheed 93; Shaheed 86). It could never be hoped that merely achieving the status of an independent state would automatically grant the state legitimacy and displace previously existing systems of authority. Nor was it particularly helpful that, hoping to emulate the growth patterns of industrialized countries, many states concentrated their state-building efforts on economic growth and formalizing state institutions and neglected the more fundamental task of integrating their citizens into a cohesive cultural and social entity. Where the state has failed to successfully address issues of national integration, the net result has been the absence of coincidence in the world-view of the state and its citizens with direct implications for the interface of culture, law and customs.

This lack of coincidence encourages and sustains parallel legal systems. In countries such as Pakistan, formal state law and its machinery has either not penetrated into different parts of society or has not found legitimacy because of its content, or has been found wanting as a system of justice because of its faulty implementation. The example cited earlier of honour killings under karo kari is a case in point, indicating a clear dissonance between the provisions of the state’s law and the practices and beliefs of its citizens. Examples abound, some of them discussed in other chapters of this book. Sub-state entities have continued to govern the affairs of their community through traditional fora of adjudication (e.g. in Pakistan the jirgas, panchayats, biraderis) (see Shah; Naheed and Iqbal, this volume). Indeed, the less integrated a state is, the greater the likelihood is of there being sub-state cultural entities with attendant parallel systems of adjudication. A disturbing side product of the existence of a dual system of justice occurs when communities may have access to both. If the formal law system has not been able to dismantle and replace traditional fora, it has nevertheless succeeded in displacing the sole of authority of the traditional system. Where this occurs, it undermines the authority of both formal and informal/traditional systems since those who are dissatisfied with the ruling of one, can then challenge this by approaching the other forum.
It is essential to understand, however, that women whose lives are governed by the informal law (both as codes of behaviour and as formalized systems of adjudication that operate parallel to state law) are usually unaware of the existence of parallel legal systems. In societies like that of Pakistan, where women’s mobility is severely restricted and heavily controlled, female illiteracy rampant, and the official language of the state differs from that of sub-state groups, women end up like the frogs in a well of local proverb (kuwain ke meindak): at the bottom of a dark well in a narrow world demarcated and cut off from its surroundings by high walls of isolation. With little access to information about either state laws or other cultural practices within the country, the operative practices of their community become an absolute standard for the majority of women in Pakistan. Women fashion their strategies for survival or change within a confined context, and conduct their struggles closed off from potential sources of support. Their isolation and lack of information makes women more vulnerable to control mechanisms and/or reprisals within their community and simultaneously limits the available avenues for change.

Combined with ignorance, the primary hold of custom over the realm of gender relations in Pakistan negates access to any potential benefits provided by law. For example, a critical determinant of a woman’s adult life is the choice made in marriage. If the law theoretically requires a woman’s consent and seeks to de-legitimize the practice of child marriages through the provisions of the Muslim Family Laws Ordinance (1965) and The Child Marriage Restraint Act (1929), the reality remains largely untouched by these provisions. Young women are rarely consulted about the marriages arranged for them by their families. A recent national survey (of 1609 women respondents) showed that 75 percent had either not been consulted or their opinion given no weightage at all. Child marriages continue (though the prevalence is unknown) and the Option of Puberty that allows minors to rescind unconsummated child marriages before reaching 18 years of age has never been heard of by an overwhelming number of those it is intended to provide relief to. If the MFLO provides for the registration of marriages, the vast majority of marriages continue to go unrecorded with numerous ramifications, the most common being that a woman who then desires to divorce her
husband believes this to be impossible without proof of marriage. When, in addition, the social norms of her community (caste, class, ethnic) are shaped and held in place by a culture that believes women should leave their parental home in a bridal palanquin and that of their husband’s only in a coffin, (aurat ma baap ke ghar ko chorthi hei doli mey aur shohar ke ghar ko cuffman mey) the theoretical option of leaving an abusive marriage loses all significance except, perhaps, as a hoped-for dream that dissolves at the slightest contact with the implacable harshness of reality. Running parallel to state law, informal law and culture oblige women to submit to an endless cycle of oppression that assumes the shape of their preordained gismat (fate).

In the area of divorce, ignorance and customs functioning in tandem can lead to a disastrous outcome for women since the Enforcement of Zina (Hudood) Ordinance was promulgated in 1979 (see Ahmad; Warraich and Balchin, this volume). Even though personal status law requires divorces to be registered, in a country where unregistered marriages are the norm, divorce through an oral repudiation by the husband (pronouncing ‘I divorce you’ thrice) may not be recognized in law but is socially valid. Women divorced in this manner often re-marry and, until 1979 faced few problems. Since then, serious problems have been caused by the infamous Hudood Ordinances that provide severe punishments for extra-marital intercourse, today a cognizable crime that can be registered by any person. Other than its misuse for other motives, the Zina Ordinance has been maliciously used by men as a means of punishing ex-wives they have orally divorced unilaterally when the ex-wives later remarry. Without official divorce papers, such women who are remarrying in good faith (in that their oral divorce is socially valid) find themselves (along with their new husbands) charged with a criminal offence that under certain circumstances - the testimony of four male Muslim adults of good repute to the act or a freely given confession in a competent court - carries a punishment of stoning to death for married individuals. Though the level of proof required normally precludes such a sentence being passed, lesser punishments of lashes, imprisonment and fine can and have been given.

Most people - certainly most women - wrongly believe that the only form of divorce that exists is a talaq, a man’s prerogative, and that
women cannot take any initiative in this matter. In fact several other options exist including divorce initiated by the woman and divorce by mutual consent (see Warraich and Balchin, this volume). The catch is that other than talaq, the forms of dissolving a marriage require access to the courts which in themselves are so far removed from people’s realm of knowledge and experience as to be non-existent.

Customary practices and the law are also at odds when it comes to the remarriage of a previously divorced couple. The popular belief, stemming from Muslim jurisprudence, is that a woman must first marry and divorce another man before she can remarry her ex-husband (hilala). According to the formal law, however, this provision only applies if a couple marry and divorce each other three consecutive times without an intervening marriage.

There are endless examples illustrating how women’s rights are undermined by the contradictory influences of social norms and legal provisions. Most of the cases given above show the predominance of custom and its negation of legal provisions, but this is not always the case. The use of the Hudood Ordinances by ex-husbands to punish women who remarry is one example of the negative use of formal law to refute socially accepted practice. In some aspects, the formal law may be more important, in others the uncodified ‘laws’ internalized by women and maintained through social pressure may have a greater impact. Nevertheless, in a patriarchal society an over-riding principle appears to be that wherever several parallel options exist on the same issue, the one least favourable to women is most likely to be implemented (Shaheed 94).

The widespread ignorance of people regarding the provisions cannot be dismissed as simply the machinations of patriarchal constraints, though these, too, come into play. One is obliged to question the state’s commitment to the rights granted women by laws when these remain confined to paper, and the court system is unknown to women, foreclosing issues of accessibility.
Implications for Activism

The existence of these parallel systems and the confluence of culture custom and law have direct implications for women's everyday reality and for activism that seeks to expand women's autonomous space.

The links of both formal state laws and customary practices to structures of power means that groups excluded from the centres (or corridors) of power can never presume that their rights will be safeguarded, much less promoted. This can only happen by changing the relations of power either by overturning those in power and seizing control or, and more commonly, through the process of gradual change and reform. In the second option, to achieve their rights, women (and other disadvantaged groups in a society) have to first convince society (and within this, policy-makers) that their demands are justifiable. For their demands to find sufficient resonance amongst either society at large or policy-makers to institute change, the justification for these demands must be articulated from within the broadest parameters of the existing cultural norms. When the demands for rights are made outside the existing framework of a people's belief system, this greatly multiplies the likelihood of their being rejected or falling on deaf ears. The alternative is to replace the existing framework within which rights are pursued. Requiring a paradigm shift, this is a far greater challenge. Those engaged in such a task, such as human rights activists, have to be able to catalyze a groundswell opinion in support of the alternative framework and reference points, something that can only be accomplished by mobilising substantial social and political support.

Political and social movements are, of course, critical to the entire process of achieving rights and ensuring justice for all. Such movements are themselves essential determinants of the over-riding culture, its acceptance or rejection by society. Periods of intense political activity often provide women substantial opportunities for changing their lives, and social reform movements create an enabling environment for articulating and pursuing a rights agenda. In contrast, periods of conservatism and retrogressive measures – exemplified in Pakistan by General Zia-ul-Haq's regime (1977-88) - pose serious obstacles for attaining rights by curtailing the space for discourse and restricting the
activities of institutions of civil society. During such periods women, as always, fare poorly since their rights and liberties are inevitably amongst the first to be targeted.

As it is, the parallel existence of formal state laws and customary practices creates a fairly complex environment for activism. Especially in ex-colonial states, the cultural reference points of the ruling elite and society at large may not coincide. Where such disjunctions exist, activists can find themselves facing the unhappy dilemma of having to locate their argumentation for rights in one of (at least) two possible cultural matrices neither of which is sufficient to guarantee the enjoyment of the right in question. Rights justified in a framework that is meaningful for policy makers alone may produce results on paper but, failing to find resonance in society, risk being ignored or rejected by people in general. In Pakistan, the disparity between policy-makers and society often surfaces around issues pertaining to women's rights where the provisions of the law on even such basics matters as marriage and divorce, are disregarded with impunity. There is an obvious need, therefore, to work at several levels simultaneously.

At the level of the everyday it is clear, for instance, that before women can break out of the constrictions imposed through the triangulation of culture, custom and law, they must first be aware that options - other than the one applied in their specific community context - do exist. Making known the provisions of the law is important, but women can also learn from the variations in customs that prevail in other communities, particularly those acknowledged as belonging to the broader culture in which women (and their kinfolk) locate themselves. These can range from the smaller groupings of neighbouring communities, to sub-categories of the nation (urban centres, specific strata) to the national identity and spread outwards to religious or regional identity. If nothing else, knowing that women's lives are governed differently in other places puts into question the inevitability of the paremeters of one's own life.

By itself, of course, knowledge is not enough. To successfully act upon a choice in defiance of cultural imperatives and their supporting structures of power, women must be able to plug into and draw strength
from support systems irrespective of the nature of the choice made. Even when the choice is to avail of a legal option, women still have to confront the forces of culture and custom. In Pakistan this can be seen from the number of women who, upon initiating a legal case relating to family matters, are compelled to seek shelter to pursue their decision. The fact that they are pursuing a choice formally granted them under the state’s law is not enough to overcome societal resistance to women’s independent decisions. Such women may be denied support in both their natal and marital homes, families can also be the main source of threats and possible danger to a woman who embarks on a decision not of their making, not to their liking. When a woman’s decision cuts her off from expectations of assistance from within the family is when she most desperately needs assistance from institutions outside the family’s control. In principle, this assistance ought to be provided by the state as a logical outcome of the formal rights granted women, but this is rarely the case in Pakistan. Instead independent initiatives have had to step into the vacuum to provide both sanctuary and a means of expanding women’s options.

In supporting women to act upon their choices, a lesson learnt time and again in Shirkat Gah is that the blurred edges separating law and customs require a constant shifting back and forth from the legal arena to the realm of customary practices. For example, approaching the state’s legal system may be opposed by the local power elite who views this as a challenge to its power base. Under such circumstances, it is essential to adopt a strategy that responds to the developments and repercussions of the informal system while approaching the formal legal system. In any event, when women choose to exercise an option that involves (or culminates in) litigation or legal redress, the actual technical legal assistance required is seldom - if indeed ever - enough to ensure that a woman can sustain this choice. The court room and consulting room is only a small part of the dynamics of her decision. She will need assistance in coping with and addressing the social ramifications of her actions. She will probably need to be sustained through the periods of doubt and despair, of indecision on whether to continue this line of action or capitulate, of feeling abandoned and lonely. There may be monetary needs, or issues relating to any children or other relatives that
may equally be affected by the outcome. Clearly, the supportive measures required over and above technical legal aid that most women need to make autonomous choices are numerous, complicated, diverse and point to a need to reassess the effectiveness of legal aid services detached from social support mechanisms beyond the law. In terms of legal activism, the need of the hour as expressed by Tove Stang Dahl, is to:

apply a perspective of law grounded from below. Having collected data about women’s reality and manifest needs, we examine to what extent the law meets such needs. On the other hand one has to mould these findings into a general structure of norms, a structure anchoring the various claims and options to certain long-range principles of a fundamental character (Dahl 86:364).

From the social perspective of the everyday, interventions aiming to change women’s lives and empower them to determine the nature of the choices available must first consciously work to free women from preconceptions emanating from either custom or law and certainly from the culture that permeates both. Programmes of social activism must therefore provide women with the tools to unpack the concepts, identify the sources and understand the institutions in the areas of law and custom that serve to maintain control over women through definitions of womanhood.

This analysis underlies Shirkat Gah’s legal consciousness initiative described in the last chapter of this volume. The programme seeks to promote an understanding of the forces that come into play in determining the parameters of women’s (and other people’s) lives in both the social and legal context. Further, by making visible the linkages of the political process (including women’s activism) to the legislative process, it focuses attention on the crucial role that people have in maintaining or rejecting existing laws and customs both. For it believes that women must be enabled to think the unthinkable, question the self-evident and natural, and break the silence to be able to assert their own choices and redefine their lives.
Ultimately, however, converting women's struggles for survival into workable strategies for transforming a severely patriarchal society into a more gender-equitable one requires more than small initiatives. Effective lobbying and advocacy strategies must be devised and initiatives pursued on a much larger scale in order to address the political framework within which the process takes place. Networks can accelerate this process by sharing successful strategies for change, by the mutual support women and human rights and women's groups can derive from each other, and by an increased awareness of both common and diverse situations confronting women. Less obviously, but equally vital, networks provide an alternative reference point for women and legitimacy for change. Over and above intangible moral support and mere information, networks can and do mobilize very concrete means and effective channels in support of women's efforts for autonomy, from the local to the international level. But for the change to be meaningful, the result of networking must be equal to more than the sum of its parts. Local situations must be transcended to address the political process and issues relating to the state and its structures to change the parameters of power relations. Only by doing so can women redesign the interface of culture, custom and law in which the concept of womanhood is located to become a space that has a shape and texture of our own choosing.

Endnotes

1 This is not to deny that men also suffer the impositions of patriarchal constraints and are obliged to carry out various gender-appropriate roles defined for them. However the spaces available for negotiating modifications of their lives are far greater for men than for women.

2 In fact, following amendments made through the Qisas and Diyat Ordinance 1990, the term "grave and sudden provocation" has been dropped from the text of the law. In case law, however, the concept continues to be used regularly.

3 Mohammed Saleh vs The State, PLD 1965 SC 446.

4 Muhammad Younis vs. The State, 1989 PCr.LJ 1747.

5 Mid-Term Report, Pakistan Country Project: Women & Governance: Democratic Processes: Reimagining the State. A five country South Asian study under the aegis of the International Centre for Ethnic Studies, Colombo.

6 The Hudood Ordinances 1979, cover: extramarital intercourse, zina (fornication and adultery), rape, theft, drunkenness and giving false evidence.
References


The Evolution of Muslim Personal Law in Pakistan

Kamran Arif

Abstract: This paper traces the evolution and development of Muslim family law in colonial India with particular reference to the attempted codification of customary laws. It also details the administration of justice during the Mughal era, and traces the gradual development of the colonial system of administration of justice from the early efforts of the British to introduce their own laws, including efforts to apply ‘indigenous legal norms’ to the local population, to the eventual fallback on custom as a source of law.

Introduction

Before its colonization by the British, the Indian subcontinent had seen centuries of Muslim rule. Islamic law was introduced in the Indian subcontinent by Muhammad bin Qasim soon after he conquered Sindh in 712 AD, but it was firmly established in India only towards the end of the 12th century, when the administration of justice through qazis or judges (with the help of muftis) as practiced in other Muslim countries, was introduced.

The Mughal Emperors who ruled over the subcontinent from 1426-1858 took the administration of justice very seriously. The Emperors, regarded as the ‘caliph of the time’ and the highest judge, made it a point to hear selected cases themselves. It was during this period that institutions were developed for deciding cases according to Sharia. (The single exception was Emperor Akbar who fancied himself a divine head and King and created a new religion, the Din-i-Illahi).\(^1\)

The influence of Mughal institutions, however, remained limited to provincial towns or qasbas. Imperial interests also demanded that the Mughal rulers tolerate non-Muslim communities, who were allowed to retain local institutions and practices that were not in conformance with Sharia (Anderson 90; Ewing 88).
During the Mughal period a number of courts functioned simultaneously and over the centuries numerous courts were in turn created and abolished, particularly at the lower tier of the judicial administration. Three main courts functioned during the latter part of the Mughal period.

1. The Royal Court, which was presided over by the Emperor himself, served as the highest appellate court in the country. The court also served as a forum of complaints against administrators, both judicial and executive, Provincial Governors and qazis.

2. The Qazi Courts, which administered Islamic law, heard both civil and criminal cases. The Chief Qazi (Qazi-ul-Quzat) held court in the imperial capital while qazis and their deputies (naib-qazis) sat in the provincial capitals with each tehsil (subdivision of a district) having a pargana qazi and each district a sarkar qazi.

3. The Chancellor, (Diwan), presided over the court of Diwan-i-Ala, the highest civil and revenue court in India. The court of Mir-i-Adil was the highest civil court in the provinces and the court of the Adil was further down the hierarchy.

In addition to these, executive officials also held court at every level: the shiqdar at the tehsil, the fazudar at the district, the subedar at the provincial level, and in the capital, the Emperor himself.

Despite these divisions, the courts were not well organised in that their jurisdiction and powers were not clearly demarcated and the hierarchy not definite. (Jois 84:19). In fact, jurisdiction overlapped a great deal as all courts heard both civil and criminal cases and there were no clear territorial limits to their jurisdiction.

Judges did not decide cases only on record or evidence produced before them but also made inquiries and investigations of their own to arrive at the truth. They did not, therefore, rely merely on principles of law.

The courts also had concurrent original jurisdiction. A litigant could initiate his case at any court in the hierarchy. On appeal, the case was not decided on the basis of the record of the lower court but was treated as a fresh case (Mannan 73:14).
The procedure followed by the courts was as follows: after the filing of a complaint the defendant was summoned to court and issues were framed in the presence of both parties with the onus of proof shared between the parties. Witnesses from both sides were examined, and after each side had closed its case, the judge would make his own investigation into the matter before giving judgment (Mannan 73:15).

Being an imperial power and interested only in maintaining the status quo, the Mughal rulers did not attempt to enforce purely Islamic concepts of law and justice. In fact, they were quite tolerant of customary practices in the agrarian communities as long as these did not disturb the balance of power.

Colonial India

Most rulers of India espoused religious freedom. The British rulers who first entered India through the agency of the East India Company also followed this policy of non-interference in the religious susceptibilities of their subjects (Fyze 64:53-54). The British had two broad goals: to extract economic surplus in the form of revenue from the agrarian economy; and to maintain effective political control with minimal military involvement (Washbrook 81).

During the earlier years, the Company was authorised by Charters (of 1600, 1622, 1726, 1773 and 1833 ) from the Crown. The first of such Charters issued in 1600, authorised the Governor and the Company to make laws and orders as were necessary for good government of the Company as long as such laws and orders were reasonable and not repugnant to the laws of England. Though the Charter conferred limited legislative power on the Company, it was the starting point of what became a new legal system in India. The Charter of 1622 authorised the Company to chastise and correct all English persons residing in East India and committing any misdemeanor either, with martial law or otherwise. In 1661, the Governor of the Council of the Company was empowered to try all persons (including non-Europeans) living within the Company's control in civil as well as criminal cases.

After establishing its trading centres at Bombay, Madras and Calcutta the Company gradually transformed itself into local government,
establishing courts at each city. The Charter of 1668 introduced English law in Bombay while that of 1726 went further in introducing English law, both statute and common law, in all these three British settlements which came to be known as Presidency Towns. Under this Charter, the Mayor’s Courts were set up in these settlements with express jurisdiction to administer justice according to the Laws of England deriving, for the first time, their authority and jurisdiction from the Crown. Hindus and Muslims, however, continued to be governed by their own personal laws.

After 1694 the Company, on authority from the Mughal Ruler, started holding Zamindar’s Courts largely for the collection of rent but also having and criminal jurisdiction. The Zamindar’s courts applied indigenous law and procedure and the language of the court was Persian.

The Charter of 1753, which superseded the Charter of 1726, expressly stated that for Hindu and Muslim residents of the Presidency Towns in matters related to family law, inheritance, and so on the Mayors Court would not try the case if both parties assented. The Charter of 1753 is said to be the first reservation of the laws and customs of the natives (Akolde 84:447).

In the 18th century the Company had begun to combine mercantile pursuits with military and political activities. After the battle of Plassey and the grant of Dewani (Chancellorship) to Lord Clive by the Mughal Emperor Shah Alam in 1765, the Company emerged as the supreme political power in Bengal. The Diwan authorised the collection of provincial revenue and the administration of civil justice, but not criminal justice (Jung 89). Local officials performed these functions under the supervision of an English Resident. In 1772 the Company decided to ‘stand forthwith as the Diwan’ and assume these responsibilities themselves.

The Warren Hastings Judicial Plan of 1772 established a judicial system for areas outside the Presidency Towns. It provided a complete hierarchy of civil and criminal courts. Although the courts followed British procedure, Article 23 provided that in suits regarding inheritance, marriage, caste, and other religious usages and institutions
‘indigenous legal norms’ i.e., ‘Laws of Shastras’ for the Hindus and ‘Laws of the Koran’ for the Mohammadans should be applied.

Hastings was of the opinion that the personal laws of the Hindus and Muslims should be applied and enforced and that they should not be subjected to English Law which had evolved under entirely different circumstances (Jois 84:34).

As Muslim Personal law was written mostly in Arabic and Hindu Law in Sanskrit, pandits and qazis (persons reputed to have some knowledge of Hinduism and Islam respectively) assisted English judges. The judges, nonetheless, had problems applying these laws which were neither clear nor easily accessible. The pandits and qazis were themselves not well versed in their respective personal laws and courts would often arrive at different conclusions on similar questions of law. This led to conflicting decisions creating uncertainty in law (Jois 84:46-47).

To overcome these difficulties, Hastings initiated a compilation of Hindu and Muslim laws. Amongst other monumental works, Halhed's Code of Gentoo Law and Hamilton's Hedaya are products of this period.3

The Regulation II of 1772 extended the applicability of the 'indigenous legal norms' to certain matters only. Thus another Regulation was made which provided that in all cases not covered by Regulation II of 1772, the court would decide the case according to the principals of 'justice, equity and good conscience'. Courts were thus given a wide discretion to decide cases not covered by the provisions of Hindu or Muslim personal laws. This again led to great uncertainty and to some extent to the inclusion of principles of English law into the Indian legal system (Jois 84:41-44). The influence of English law therefore increased not only in the Presidency Towns but also in other areas.

The Hastings system did not prove very successful as it depended mostly on accurate translations of religious texts and on the advisors to the court. The British then began to focus on customs as a source of law which led to a compilation (or codification) of the local customs of various regions (Anderson 90:207 & 215).
Following the unsuccessful war of independence of 1857, the Directors of the Company transferred their possession in India to the Crown and it wasn’t until the 19th century, after having achieved a degree of stability in India, that the British made some efforts to provide ‘common law applicable to all classes of the inhabitants of India with due regard to the feelings and usages prevalent among them’. The Charter of 1833 provided for the appointment of a commission for this purpose, which became the first of the three such law commissions. After debating various suggestions, the report of the Indian Law Commission (Lex Loci Report) declared that neither the Muslim nor the Hindu law could be the Lex Loci of India as both were “the consequence of the indissoluble union of law with religion”. It recommended that a declaratory Act be passed making the law of England as the law of India, subject to some safeguards. These recommendations, however, were never carried out.

Codification of the Customary Laws: Customary Laws under Executive Directions

The shift towards customary laws became evident when Punjab became a province in 1849. Lord Dalhousie’s despatch to constituting the Board of Administration in Punjab said:

The Governor General would wish to uphold Native institutions and practices as far as they are consistent with the distribution of justice to all classes; but he is persuaded that, except in some of the wild trans-Indus or Alpine country of the Sind- Sagur Doab, there is no portion of the country which will not be benefited by the gradual introduction of the British system at the earliest possible period.

These directions formed the basis of the observance of customary law from 1849 to 1872.

For a long time conquered territories, like Punjab, were administered by the Governor General in Council on the theory that the Government of India possessed the right to legislate as agents of the Queen of England (Tupper 1881:4). But this view soon changed and it became
doubtful whether the Government could make laws for non-regulation provinces by a mere executive order.

As the ‘native institutions’ were at best informal, their ‘practices’ not even written let alone codified, and differing from region to region, the task of upholding them was not easy. In less than five years after Lord Dalhousie's Despatch, Sir Richard Temple, then a Settlement Officer had, under the instructions of Sir John Lawrence and Sir Robert Montgomery, drawn up the Punjab Civil Code. Sections of the Code containing rules of substantive civil law, with comments there on, were circulated for the information and guidance of judicial officers in May 1854. The Punjab Civil Code was a manual and not an attempt to codify the civil law of the Punjab. It comprised of rules drawn form various sources: from regulations, Hindu and Muhammadan laws, English law, and provincial usages. It was by no means a compilation of local customs or usage but it did give great importance to custom, which it referred to as the ultimate authoritative guide (Tupper 1881:5). Though circulated only as a manual, the Punjab Civil Code was acted upon as substantive law.

In the early settlements, customs relating to succession, transfer of property, and some other matters were usually recorded in the village administration paper - a document which was partly a declaration of fact and partly a written agreement.

In the settlements conducted by Settlement Commissioner, E. Prinsep, the practice of collectively interviewing villagers of the same tribe, or part of the district, and recording their joint answers on material points was initiated. In his report of 1865, Prinsep opined that if the government should at any time desire codification there would be enough material for the purpose in the districts where such records were prepared. The Government of India approved the idea but directed that the material should be carefully limited to the actually recognised and established customs (Tupper 1881:8-9). Various measures were taken to improve tribal records and records prepared after the government’s decision possess a greater degree of value than those of previous settlements.
Legislative Sanction for Customary Laws

During the 19th century several laws were enacted that gave preference to customary law over personal laws. Important among these (i.e. applicable to areas now part of Pakistan) were:

(i) Bombay Regulation IV of 1827  
(ii) Punjab Laws Act IV of 1872  
(iii) Bengal Agra and Assam Civil Courts Act VIII of 1887  
(iv) NWFP Laws and Justice Regulation IV of 1901

Section 5 of the Punjab Laws Act 1872, which was akin to Section 27 of the NWFP Laws and Justice Regulation 1901 and Section 26 of the Bombay Regulation (IV of 1827) reads as follows:

(5) In questions regarding succession, special property of females, betrothal and marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of the decision shall be

(a) any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;

(b) The Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.

The emphasis on custom was included due to an amendment made by Sir George Campbell, then Lieutenant Governor, Bengal, but who had been employed in the Punjab for many years. The law prevailing in Punjab was fairly simple, and he wanted to prevent the introduction of the complicated Hindu and Muhammadan laws into the province and keep out the voluminous case-law that had developed from courts all over India (Tupper 1881:7-8). Thus, custom was made the first rule of
decision in all the matters mentioned including marriage, dower, divorce, succession, special property of females, wills, etc. Personal law was to be applied only if customary law had no rule on a particular point. Thus customary law would outweigh the written text of the law. (Collector of Madura vs. Moottoo Ramalinga 1868).  

The term 'customary law' is usually taken to mean old conventions and usages adhered to and followed by the people through generations. Enforcing customary laws had its problems since customs differed from tribe to tribe and place to place and although often unwritten were treated as a question of fact. There being no presumption in favour of a custom it had to be found on evidence provided by the person alleging it. For a custom to be valid i.e. legally enforceable, it had to be immemorial, reasonable and continuous; not contrary to the principles of 'justice, equity and good conscience'; and not declared void by any competent authority. To establish whether a particular custom was applicable or not was a lengthy, complicated and time consuming process.

Moreover, customs were hardly ever fixed and were liable to frequent changes. They lacked certainty, a crucial characteristic of all laws.

The assault on customary laws came more as a political move than as a result of a desire on the part of the Muslims of the subcontinent to be governed by their personal law.

At the turn of the century, with the formation of the All India Muslim League, Indian politics started mobilising around a Muslim identity. The Muslims of India needed something to prove that they were one nation governed by the same set of laws rather than many different communities or nations following different local usages and customs and only professing the one religion. Thus began the assault on the customary laws which came in the form of various ‘Shariat Acts’ (see Arif and Ali, this volume). In 1914 the Anjuman-e-Khawateen-e-Islam or the All India Muslim Ladies Conference was formed. Although of little importance then, it did play a significant role in the enactment of the Shariat Applications Acts later.
Conclusion

With the development of the judiciary on the lines of the English legal system, many changes came about in the local administration of justice. Islamic law relating to crime, punishments, revenues, land tenancy, proceedings, evidence and, partly, transfer of property was gradually replaced by enactments of the legislature. Thus, as the state apparatus of the colonisers became stronger, large portions of Islamic law were replaced by laws of British origin. One of the earliest Anglicising trends was the application of the doctrine that in cases where indigenous laws seem to provide no rule, the English concept of 'justice, equity, and good conscience' should apply (Anderson 90).

Despite these changes, certain areas of the law, such as marriage, dower, divorce, maintenance and guardianship, gifts, wills and waqfs (endowments), were still governed by Islamic law with minor modifications. This was because family law was viewed as a politically sensitive issue, interference in which might have sparked off resistance thus weakening the colonial power. Hence, no matter how much these rules may have rankled their sensibilities of the colonial rulers, personal status laws were left pretty much untouched. Today, when the West bemoans the degraded status of women in our society, it would be pertinent to point out their own negative role in the fossilization of Islamic family laws. By indulging in the selective 'emancipation' of the 'natives' and conveniently overlooking areas affecting women, the British colonisers dealt a heavy blow to women's rights in the Indian subcontinent. For instance, customary law was allowed to govern areas particularly detrimental to women. One such area is inheritance and succession. Although Islamic law gives women a share in inheritance, yet custom which denies it to them was made the overriding rule until the fourth decade of the 20th century.

Endnotes

1 For details on the administration of justice in India during the early Muslim and Mughal period, see Jung, Ibn S. The Administration Of Justice In Islam, Lahore: Law Publishing Co: pp. 57-88.
2 By George I's Charter of 1726 which authorized the Governors and Council of the three Presidencies "to make, constitute and ordain bye laws, rules, and Ordinances for the good government and regulation of the several corporations hereby created
and of the several towns, places and factories aforesaid respectively, and to impose reasonable pain and penalties upon all persons offending against the same or any of them".

3 During this period translations of renowned works of Islamic Law was undertaken. These included: Hamilton's *Hedaya* (1791); translations of *Al-Sirajjah* and its commentary called the *Sharf-yah%; Baillie's Digest of Muhammadan Law*; translation of *Fatawa Alamgiri*; *Tagore Law Lectures* (1891-92); the translation of *Mishkat-ul-Masabih*, (extracts from *fatwahs* by Kazee Khan). Also worthy of note are *Muhammadan Jurisprudence* by Abdur Rahim (1911) and *Principles and Precedents of Muhammadan Law* by Macnaghten.

4 *Collector of Madura V. Moottoo Ramalinga*, (1868) 12 MIA 397.

5 *Air 1944 Lah. 442, AIR 1937 Lah. 742.*

6 *AIR 1945 Lah. 17 (F.B.)*.

7 *PLD 1949 P.C. 18.*

8 Restrictions laid down by the Punjab Laws Act 1872 and other similar laws.

9 *Gazette of India, Part V: 137.*

10 Systemetized transformation of the educational set-up resulted in lawyers trained to appear in 'anglicised' courts and familiar with the English legal system.

References


The Origins of the MFLO: Reflections for Activism

Asma Jahangir

Abstract: This paper briefly traces the history of the Muslim Family Laws Ordinance 1961 and notes the failure of women's rights activists to respond to the challenges it poses. At the end of the paper, a few suggestions are outlined for women’s rights advocacy groups.

Background to Family Laws for Muslims in Pakistan

The process of Islamisation of laws is often connected to the period of General Zia-ul-Haq’s martial law (1977-88). To a large extent this perception is correct, except in the case of family laws. It is often overlooked that family laws in Pakistan are essentially based on religious beliefs.

At independence in 1947 Muslim family laws were not codified. They were based upon religious practices and traditions, and were commonly known as personal laws. A decade earlier in 1937, the British Government had enacted the Muslim Personal Law (Shariat) Application Act to do away with customary laws which regulated the ‘private’ lives of Muslims. Both Muslim men and women demanded this change as they believed that most customary laws conflicted with Islamic law. The Act’s statement of objects and reasons said:

For several years past it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law.¹

The Shariat was applied to marriage, dissolution, divorce, maintenance, dower, guardianship, gifts, trusts and trust property etc., but inheritance to agricultural property was specifically excluded. This exclusion either went unnoticed by the women who demanded religious rights, or perhaps they accepted it, under pressure from the ruling landed classes of India. In any event, it is obvious that the law sought to deprive women of their
right to inherit agricultural land. According to customary practices, women did not inherit agricultural property although Islamic law specifically gives women the right to inherit, even if their share of the inheritance is not on an equal footing with men.

This embargo on inheritance in agricultural property was removed in Sindh and Punjab in 1950 and 1951 respectively and in the Frontier Province and areas comprising the present Baluchistan Province in 1962.

The stated objectives of the 1937 Act emphasized that should Islamic law be applied, ambiguity would be removed. However this assertion was short lived. In 1939, the British had to pass a law called the Dissolution of Muslim Marriages Act, 1939, in order to codify grounds for the dissolution of Muslim marriage and to curb the practice of Muslim women converting to another faith so as to be able to seek dissolution. The stated objectives of the law said:

There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provisions of the ‘Malaki, Shafi or Hanbali law’. Acting on this principle the ulama have issued fatwas to the effect that in cases (where certain grounds are found) a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called Heelat-un Nazeza published by Maulana Ashraf Ali Sahib, who has made an exhaustive study of the provisions of Maliki Law which under the circumstances prevailing in India may be applied to such
cases. This has been approved by a large number of ulema who have put their seal of approval on the book.

As the courts are sure to hesitate to apply Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principe is called for in order to relieve the sufferings of countless Muslim women.

The statement then goes on to point out that:

The courts in British India have held in a number of cases that the apostasy of married Muslim women ipso facto dissolves her marriage. This view has been repeatedly challenged at the bar, but the courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim Law. The ulemas have issued fatwas supporting non-dissolution of marriage by reason of wife’s apostasy. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the Courts. Any number of articles have been appearing in the press demanding legislation to rectify the mistake committed by the courts; hence the law is changed, (whereas conversion would not form a ground for dissolution).

Although it became apparent in 1939 that Islamic laws required condification and were not as definite as Muslims wished to believe, yet neither the Muslim community nor the law making authorities ever wished to deal with this reality. For Muslims this reality is a harsh one to face even today. For others, even the British Government, it was a delicate issue to confront.

It is apparent that the Dissolution of Muslim Marriages Act was passed thanks to the ulema’s protest regarding the conversion of Muslim women wanting to dissolve their marriages and the courts’ activist role in this regard. Realizing that Muslim women could not find any other honourable way for ending an unwanted marriage, the courts were forced to find a judicial solution. This led to resentment amongst sections of the Muslim community. The legislature could not, however, simply address the Muslim point of view by prohibiting divorce through
conversion, as this would be further injustice to Muslim women. Thus the law had to include some minimum acceptable grounds which allowed Muslim women to dissolve their marriage. It may be concluded that this particular law i.e. The Dissolution of Muslim Marriages Act 1939, was not enacted for the benefit or advantage of women, nor was it initiated out of concern for women. In fact the law was made to dissipate the political tensions created by the decisions of the superior courts which had agitated Muslim extremists.

During British rule, it was generally considered fair that a religious minority would jealously guard against any interference in its religious practices as it would naturally want to assert its particular identity. This point of view is, not however, supported by subsequent events since, for example, in 1929 as the colonial rulers introduced the Child Marriages Restraint Act and following pressure from the Muslim community they introduced the Dissolution of Muslim Marriages Act in 1939.

In the independent state of Pakistan, where Muslims are the overwhelming majority, it is even more staunchly believed that Islamic law requires no codification being both definite and ‘all-encompassing’. The more liberal Muslims could not expose this blind belief, as religious issues continued to be a delicate and sensitive point, particularly where the rights of women were concerned. Religious sensitivity has not been affected by the numbers of Muslims in the society: whether they are in a minority or rule as the majority, religious sentiments have remained the same.

The 1955 Rashid Commission

After Independence, personal laws regarding guardianship, marriage, divorce, inheritance, maintenance and other marital rights were based on religious traditions. Polygny was legal and could be freely practiced. Taking advantage of this Prime Minister Mohammad Ali Bogra, took a second wife. His first wife was a member of All Pakistan Women’s Association (APWA), and her friends, as a favour to her, held a protest against the Prime Minister. Public opinion was aroused and eye-brows raised at the Prime Minister. Soon after, the Prime Minister commissioned a report requiring some form of documentation
concerning family matters and women. The purpose of the Commission on Marriage and Family Laws which presented its report in 1955, was not really effected to benefit and advance women’s rights. Rather it was, in essence, a means of responding to the situation and an attempt to save the Prime Minister from public embarrassment.

The Commission consisted of seven people - three women and four men. The report itself was finally written by Mr. Justice Abdul Rashid (the President), with very little participation from the women members of the Commission. Their terms of reference were as follows:

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

The Commission was asked to report on the proper registration of marriages, divorces, the right to divorce excersizable by either partner through a court or by other judicial means, maintenance and the establishment of Special Courts to deal expeditiously with cases affecting women’s rights. Theoretically, the Commission, was set up to codify family laws as stated above. However it had to present a justification for this and as such it carried a certain kind of baggage:

It is an indisputable article of the Muslim creed that so far as the basic principles and fundamental attitudes are concerned Islam’s teaching is comprehensive and all embracing, and Islamic law either actually derives its principles and sanctions from Divine Authority as revealed in the Holy Qur’an or clear injunctions based on the Sunnah (The Report 56:1198).³

With a background such as this, the objection that arises is that if a well-defined code concerning marriage and family laws already existed, where was the necessity of appointing a Commission for the purposes of any revision or modification? The Commission justified its existence through the following reasoning:
So far as the Holy Book is concerned the laws and injunctions promulgated therein deal mostly with basic principles and vital problems and consist of answers to the questions that arose while the Book was being revealed. The entire set of injunctions in the Holy Qur'an covers only a few pages. It was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life time. His precepts, his examples and his interpretation or amplification constitute what is called Sunnah. As nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the Holy Qur'an and the Sunnah before their eyes (The Report 56:1199).  

It is this large area left free for interpretation in the judicial field outside the Sunnah and Holy Qur'an that gives Islamic law a very grey and uncertain bearing. Therefore, though on the surface one may hold that Islam is definitive on matters pertaining to law is 'certain', this grey area and the problems that arise from it prove otherwise.

At the time the Report was commissioned the prevailing law was inherited from the British. Like the Romans, the British adopted the policy of non-interference in the personal laws of the various religious communities and thus Muslims were ruled by what was called Anglo-Muhammadan Law. According to the Report:

Muslim law, thus introduced, ceased to be a growing organism responsive to progressive forces and changing needs. What was accepted as the personal law of the Muslims was conservative, rigid and in many respects undefined, but owing to political subjection any liberalisation or reconstruction was well-nigh impossible (p.1203).

This view is controversial, as political subjection does not close the doors to *ijtehad*. Even after Independence, the liberalisation of Islam
received little official support. Interpretations which were dubbed liberal but were actually quite conservative - like the ones put forward by the Commission - were also resisted by many Muslim Pakistanis. The influence of the Commission’s Report is an example.

As already pointed out, the Report by no means addressed women’s rights on the basis of equality, but remained very much within the parameters of interpreting Muslim law. The Commission’s members understandably interpreted the rights of women within Islam cautiously. None of the basic controversies were settled. For example, the question of a total ban on polygyny was avoided and instead restrictions were discussed; the accepted principle of recognising the father alone as the natural guardian of his children was not disapproved of.

Given the lukewarm reforms the Commission suggested, it should have gained acceptability. Members of the Commission were not all agreed on many issues - even the requirement of registering marriages and divorces found no consensus. While all other members of the Commission agreed to the recommendations, the alim member (religious scholar) passionately disagreed with the entire Report. He wrote a dissenting note attacking the Report and the Commission members, for their un-Islamic views and ideas.

This dissenting note could have been ignored as the insignificant view of a single member, except that once the Report was published in 1956, it was heavily criticised by many orthodox Muslims - men and women. This feeble attempt at liberal interpretation of Islam did not find popular support.

The Report was not implemented until 1961. It appears that the then civilian governments of that time could not give any legal shape to the Report for fear of the controversy such action might raise. Thus it was only in 1961 that the military government of Field Marshal Ayub Khan promulgated an Ordinance which included some of the Commission’s recommendations – the Muslim Family Laws Ordinance (MFLO). Subsequently a resolution was brought before the National Assembly disapproving of the Ordinance (see also Mumtaz, this volume). Although, the resolution was not carried, the Ordinance continues to be
dubbed not purely 'Islamic'. In fact, several clauses have currently been challenged in the Federal Shariat Court.

This begs the question of whether any liberal interpretation of Islam would be acceptable as a basis for reforms in family law. Despite the Report's conservative approach, it was still not fully accepted and only a few of its recommendations were found reflected in the Ordinance. Thus the Ordinance was a watered down version of a cautious report. Despite this, to date the Ordinance has not been accepted as Islamic. Further it does not guarantee women adequate protection in family laws nor does it extend women any additional rights.

The objective of tracing the history of family laws is to determine whether reforms should be introduced with caution and gradually within the parameters of Islam, or whether reforms should be liberal yet based on a farsighted liberal Islamic interpretation, or whether reforms should be simply demanded on the principles of equality and the demand of justice for women. It is apparent that conservative and cautious reforms will remain controversial and yet still not fulfill women's needs. As reforms cannot be introduced rapidly, half-hearted measures are likely to jeopardize the chances of a liberal change in the future.

To make this argument more forceful, the Muslim Family Laws Ordinance must be studied to see what it actually grants women.  

The provisions of the Ordinance can be summarised as follows: it overrides other laws, custom or usages; requires the registration of all Muslim marriages and divorces; provides for children of predeceased parents to inherit from their grandparents (although a wife does not receive the share of inheritance, owed to her from her husband's share); provides procedures for the exercise of the delegated right of divorce and court dissolution of marriage; allows women to approach the Union Council if they are not maintained adequately; allows for polygyny only with the prior permission of the Arbitration Council; the traditional concept of *hilala* is overruled and is declared necessary only if a third consecutive divorce of the same people becomes effective.

The Ordinance made amendments to the Child Marriages Restraint Act, 1929 and the Dissolution of the Muslim Marriages Act 1939. The
minimum age of marriage was raised to 16 for girls and 18 for boys. However, a child marriage once performed is considered valid, unless it is not consummated. In that event the female can get the marriage annulled as soon as she reaches majority. An additional ground for dissolution of marriage was added: any ground recognised as valid under Muslim law (see Warraich and Balchin, this volume).

The Ordinance was enforced on the 15th July 1961. It extends to the whole of Pakistan including the Tribal Areas. In reality the Ordinance is not enforced in the Tribal Areas, a matter which has so far not been challenged in the courts. All Pakistani Muslim subjects, 'wherever they may be', are subject to the Ordinance which thus has extraterritorial jurisdiction.

Under restrictions placed in the 1962 Constitution and subsequently in the 1973 Constitution, the Ordinance could not be challenged as being inconsistent with Fundamental Rights. However, this restriction was intended to be for a limited period. It was presumed that the Ordinance would be challenged on the basis of violating religious freedom, thus ostensibly the Ordinance was protected for the benefit of women. Yet this measure also took away the opportunity of challenging the Ordinance on the basis of 'equality before law' and non-discrimination on the basis of sex. While the Ordinance has been challenged several times - without ultimate success - as contrary to Islam, it has so far not been tested on the principles of Fundamental Rights.

The Muslim Family Laws 1961 were happily accepted by women's groups in Pakistan. There was no movement to reform the law and to bring it in accordance with the concepts of equality, justice and fairness. To the contrary, the Ordinance was jealously guarded as a milestone for women's rights in Pakistan.

It was not until some years later in 1980, that women began to question the discrimination of religious laws and practices. This new-found realisation was prompted by General Zia-ul-Haq's 'Islamization' process.

One of the first pieces of Zia's Islamic legislation were the Hudood Ordinances (1979). They replaced some of the penal laws and criminal
procedures in Pakistan. All along, women in Pakistan had believed they had ample political rights. Disparities in rights granted under family laws were taken as a consequence of the natural differences between the sexes. Zia’s obvious and declared gender bias shook women. The 1979 Hudood Ordinances added insult to injury.

Following the introduction of the Zina (Enforcement of Hudood) Ordinance in 1979, the situation has become extremely complicated placing the courts in an awkward position. If the courts follow the MFLO strictly and narrowly, a large number of ignorant and illiterate people would face the possibility of being sentenced under the Zina Ordinance on account of their failure to follow MFLO procedure. On the other hand, if unregistered marriages and divorces are accepted by the courts liberally, rapists and abductors will invariably take the defence of being validly married to their victims. The High Courts have taken conflicting stances regarding the issue of unregistered marriages and divorces, and specifically whether these simply attract the penalties envisaged in the MFLO or whether the relevant marriage or divorce is invalid.

There has been a long-running controversy regarding the Islamic character of the MFLO. In 1988, the Sindh High Court declared it repugnant to Islam and held that the High Court had jurisdiction to strike it down. When the judgment of the SHC was challenged, the Supreme Court overturned the ruling and declared that Section 7 of the MFLO was not repugnant to Islam, but it did not pass judgment on the scope of the High Court’s jurisdiction.

In a number of cases, shortcomings in the legal procedure and the accused’s lack of awareness has resulted in his/her conviction. Thus the courts in criminal appeals have taken advantage of precedents where the MFLO had been dispensed with in order to give the accused the benefit of the doubt and overturn their conviction. The courts in Pakistan have so far avoided resolving the inconsistencies between the civil and criminal liabilities entailed in non-registration of divorces. It is clear that no firm guidelines can be drawn up which could apply consistently to both civil and criminal disputes. To change the family laws to suit the
offence of *zina* would be disastrous. There would be unending disputes regarding people’s marital status.

Women’s groups should not accept laws based on religion - whether they be family laws or Islamic criminal laws. It is now a forgone conclusion that a true liberal interpretation of Islam will never be widely accepted. On the other hand, the half hearted liberalisation of Islam will be more detrimental for women. Laws which violate the rights of women must be repealed. Those which give women no rights must be reformed.

Endnotes

1 Statement of objectives and reasons, Gazette of India 1935 Part V p. 136.
2 Statement of objectives and reasons, Gazette of India 1936 p. 154.
5 National Assembly Debates 20 March 1964.
6 For further details regarding the implementation of the Muslim Family Laws Ordinance, as well as its interaction with the Hudood Ordinances, see Warraich and Balchin; *Ahmed; Ali*, this volume.
8 *Mohammad Azam vs. Muhammad Iqbal* PLD 1984 SC 95 at p. 127.
10 *Federation of Pakistan vs. Tahira Begum* 1994 SCMR 1740.
Part II

Implementation of Law and Practices
Marriage, Dower, and Divorce:
Superior Courts and Case Law in Pakistan

Shaheen Sardar Ali and Rukhshanda Naz

Abstract: Reviewing some fifty years of case law relating to marriage, dower and divorce, this paper focuses on the extent to which women use the law to resolve their problems and with what degree of success. It also reviews the attitudes of the courts while deciding cases of women litigants. The issues highlighted in this paper are by no means exhaustive of the subject. We have confined ourselves to these primarily because the bulk of reported case law raises these issues, making them the most litigated problems in family law. We also highlight and analyse areas where reported case law is minimal. The concluding part of the paper brings together the overall impact of traditional Muslim jurisprudence, statutory law and other laws made in the process of ‘Islamisation’ on the status of women in Pakistan. Finally we assess the use of legislation as a tool of social engineering with particular reference to family law in Pakistan.

Introduction

When Pakistan was created in 1947, it inherited two main statutes that are relevant to our discussion of laws relating to marriage, dower and divorce.¹ These were the Child Marriage Restraint Act 1929 and the Dissolution of Muslim Marriages Act 1939. According to its preamble, the aim of the Child Marriages Restraint Act 1929 (Act XIX of 1929) is to restrain the solemnization of child marriages. It therefore falls under the category of laws setting legal norms rather than expecting immediate widespread application. It provides punishment for persons (parents or guardians) who contract their minor children in marriage and either of the spouses who may be adult (Sections 4,5,6,7). But keeping in view the prevalent social norms and in the interest of the minors themselves, marriages contracted in contravention of this Act were not made invalid.

* Case law from 1992-1997 has been updated by Nausheen Ahmad with the assistance of Natasha Faruque.
The Dissolution of Muslim Marriages Act, 1939 (DMMA, Act VIII of 1939) is one the most important pieces of legislation promulgated in the area of Muslim family law in the subcontinent. Before this Act, Muslim women had no legal right to divorce while customary practice denied them access to the doctrine of *khula* (discussed below). To avoid this situation, Muslim women in large numbers were converting to Christianity and thereby automatically dissolving their marriages on the basis of apostasy. Seeking to prevent this mass conversion, the *ulema* urged the passage of this Act. The preamble states that the purpose of the DMMA is 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 tie.

The Act codifies and, to that extent, regulates grounds on which a woman married under Muslim law may obtain a judicial decree of dissolution of marriage from the courts. An important provision of the DMMA is Section 5, which states that dissolution of the marriage contract under this Act will not affect the wife’s right to dower. Section 2(vii) of the DMMA also extends the option of puberty available to a Muslim girl to repudiate her marriage if contracted while she was a minor, to include a marriage contracted on her behalf by her father or grandfather.

After independence, the only serious effort at legislation in the area of family law was, ironically, an Ordinance passed by the military dictator Field Marshal Ayub Khan, the Muslim Family Laws Ordinance, 1961 (MFLO). Due to consistent pressure from women, a Commission on Marriage and Family Laws was set up in June 1955 with the brief to find ways of restricting polygamy and giving women more rights of divorce than granted to them under the DMMA (see Jahangir, this volume). The Commission presented its report in July 1958 but it was not until 1961 that some of its recommendations took the form of the Muslim Family Laws Ordinance, 1961 (VIII of 1961).

The MFLO contained some very important provisions that were advantageous to women. For the first time an effort made to regulate
and formalise the process of divorce (Section 7). Secondly, polygyny was restricted in that a husband desirous of a subsequent marriage had to submit an application to the Arbitration Council besides seeking the permission of the existing wife or wives (Section 6). In the event of the husband contracting such a marriage, Section 6 of the MFLO made him immediately liable to payment of the dower of the existing wife/wives. Under Section 4, the Ordinance also gave rights of inheritance to the children of the predeceased issue of a prepositus. In addition the MFLO amended the Child Marriage Restraint Act 1929 by raising the legal age of marriage for females from 14 to 16 years and from 16 to 18 for males.² The provisions of the MFLO, however, are applicable only to Muslim citizens of Pakistan as was discussed in a more recent case, *Mst. Amira Bokhari vs. Faqir Syed Jameel-ud-Din Bokhari,*³ where both parties were Muslim citizens of USA. Although the marriage had been solemnized in Pakistan under the MFLO, the couple had since then migrated to the United States and were also citizens of that country. The court ruled that the provisions for sending notice to the Chairman and the constitution of an Arbitration Council were not effective and the proceedings before the Chairman Arbitration Council were thus futile and null in the eyes of the law.

Marriage: Translating General Principles into Law

According to Hamilton, "*Nikkah* or marriage implies a particular contract used for the purpose of legalizing generation." (Hamilton 57:8). However, on authority from *Kifayah,* (Vol iii:577), Baillie states that marriage is also instituted for the "solace of life" and is one of the "prime or original necessities of man." Therefore, marriage remains lawful even in extreme old age, after hope of offspring has ceased or during *marz-ul-maut* or terminal illness (Baillie 65:4).

All major writers on Muslim jurisprudence agree that marriage according to Islam is in the nature of a contract; hence all the requisites of a valid contract must be fulfilled. First of all, the parties to the marriage contract must have capacity (Mannan 91:363). Every adult Muslim of sound mind may enter into a valid contract of marriage.⁴ Marriage of a Muslim who is of sound mind and who has attained puberty⁵ is void if it is brought about without his/her consent. Even if a guardian has contracted a minor or a person of unsound mind into a
valid contract of marriage, ratification of the contract is essential when
the minor attains puberty and when the person of unsound mind regains
sanity respectively. *Eejab o kabool* i.e., declaration and acceptance at
one meeting in the presence and hearing of two adult and sane
witnesses legally confirms the contract of marriage (Mannan 91:39-
40).^6

Dower is another essential element of the marriage contract, although
its exact implications and legal effects remain controversial. Baillie
(65) defines it as "the property which it is incumbent on a husband,
either by reason of it being named in the contract of marriage, or by
virtue of the contract itself, as opposed to the usufruct of the wife's
person." It is argued, however, that dower is not the exchange or
consideration given by the man to the woman for entering into the
contract, "but an effect of the contract imposed on the husband as a
token of respect for the woman" (Hamilton 57: vol. ii 58). *Nikah* in its
primitive sense, means carnal conjunction, and requires only the union
of the parties. Hence the marriage contract is valid even though no
dower were mentioned, and even though it were expressly stipulated
that there should be no dower (Hamilton 57: vol ii 41,44).

In contrast to the above, it is argued that *mahar* or dower 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 which case *mahar mithl* (proper dower) becomes due
(Hamilton 57: vol ii 379). Dower therefore is a right which comes into
existence with the marriage contract itself and is its integral component.
Dower is of two kinds; specified i.e. one which is expressly mentioned
in the marriage contract, and proper and therefore that which is due by
the contract itself. Proper dower or *mahar mithl* means literally, dower
of the like or the woman's equal. It is determined by the court in cases
where dower has not been specified in the marriage contract after
taking into account the dower of other women belonging to the wife's
family. Specified dower is classified as either prompt or deferred.
Prompt dower is payable on demand, and deferred on dissolution of
marriage by death or divorce. Prompt dower may also be demanded
before consummation of the marriage. Even after consummation has
taken place, the wife may refuse to live with the husband unless he
pays her the prompt dower, and this non-payment would be a complete
defence to a suit for restitution for conjugal rights.

The wife may remit the dower or any part thereof in favour of the
husband or his heirs. But this remission must be made with free consent
(Baillie 65:553; Mulla 91:402). It has been held that where a woman
remits her dower either under mental stress in the period following her
husband’s death,7 or during his lifetime to gain/retain his favour, she is
not acting as a free agent. Such a decision is not one made with free
consent and therefore not binding on her.8

Dower is a debt which must be paid to the wife by the husband.9 After
his death, the wife is entitled to recover it from his estate and if she is
legally in possession of his estate, she may retain it until her debt is
paid off (Mulla 91:405-417).

The Hanafi School of law classifies marriages as valid (sahih), irregular
(fasid), or void (batil).10 A valid marriage is one where all the
requisites have been fulfilled. Baillie describes a number of legal
effects of such a contract. For example, it legalizes the mutual
enjoyment of the parties in a manner permitted by law or according to
nature. It imposes on the husband the obligation of mahr or dower and
of maintenance of his wife. It establishes on both sides the rights of
inheritance and the prohibited degrees of relationship (Baillie 65:13).
The Shias, however, do not recognise the concept of irregular marriage
at all.11

A void marriage is no marriage in the eyes of the law. It does not create
any civil rights or obligations between the parties and the offspring of
such a marriage are illegitimate (Mulla 91:375). The obstacle in void
marriages is permanent and perpetual and cannot be remedied.
Marriages prohibited on the ground of consanguinity, affinity, and
fosterage are void.12 Marriage with a woman whose husband is alive
and whose marriage with him subsists, is also void. Likewise, marriage
of an adult and sane person brought about without his/her consent is
void (Mulla 91:367,363).

An irregular (fasid) marriage is one that suffers from a temporary bar.
Instances of irregular marriages are a marriage contracted without
witnesses, a fifth marriage by a man already having four wives (Baillie
and a marriage with a woman during her *iddat*. The termination of the marriage is only complete after *iddat* has been completed,\textsuperscript{13} *iddat* being the period following the dissolution of marriage for any reason during which it is incumbent upon a woman not to contract another marriage. In addition to this, a marriage of unlawful conjunction is also irregular\textsuperscript{14} as is remarriage with a thrice repudiated wife without an intervening marriage (*hilala*) (Baillie 65:151). However, the procedure remarriage of a divorced couple, is now governed by the Muslim Family Laws Ordinance.

In some cases a marriage due to difference of religion is irregular. It is lawful for a Muslim male to marry not only a Muslim female but also a *kitabia* (female follower of a revealed religion, e.g., a Christian or a Jew). But if he marries an idolatress or a person outside the category of a revealed religion, the marriage would be irregular. A Muslim woman, on the other hand, may only contract a valid marriage with a Muslim male. If she marries a non-Muslim male even if he is a *kitabi*, the marriage is irregular. This point however, is controversial.\textsuperscript{15}

Since declaring the Qadianis as non-Muslims in 1974, serious doubt has been placed on the status of the marriages of those Muslim males who are married to Qadiani women as well as those Muslim women who are wedded to Qadiani men. In a 1978 case,\textsuperscript{16} the question was raised as to whether Islamic law could be applicable to Qadianis. It was held that although as a general rule this was not so, since the Qadiani section of non-Muslims claim to be bound by the law of Qur’an and Sunnah, therefore they may be governed by Muslim law on principles of justice, equity and good conscience. Three cases involving Ahmedis/Qadianis are reported in 1986. The first was a maintenance suit where the husband, as a defence to the wife’s demand for maintenance, took the plea that he is an Ahmedi and therefore under the Constitution (2nd Amendment ) Act no. XLIX of 1974, a non-Muslim. This makes his marriage with a Muslim woman (his wife) void.\textsuperscript{17} The court did not take up the issue of validity or otherwise of this inter-faith marriage. Instead, it ruled that the husband’s plea came at a very late stage and this defence could not be upheld. The learned judge was of the opinion that since the couple were married in 1958 according to Muslim Sunni Hanafi law, therefore the same law will apply. The second case involving Qadianis was where the validity of a *talaq*
pronounced by the husband under the MFLO was at issue.\(^{18}\) The *talaq* was held effective after the expiration of the period of 3 months, once again without going into the details of why a law supposedly applicable only to Muslims should form the basis of a decision between non-Muslims.

In the third case too,\(^{19}\) the court simply declared that the MFLO 1961, was not applicable to the parties as they were Qadianis without going into the issue of what law would be applicable to these marriages. The above cited decisions are some of the rare case-law reported on the issue and we have not come across one that deals directly with the validity or otherwise of a Qadiani-Muslim marriage. In fact, it seems as if the courts do not want to address the problem at all.

An irregular marriage has no legal effect before consummation and can be terminated by either party either before or after consummation. The woman may, in addition to the right of suing in court, avoid an irregular marriage by relinquishment.\(^ {20}\) Once the marriage has been consummated, the wife becomes entitled to dower, she is bound to observe the *iddat*, and the issue of the marriage is legitimate. An irregular marriage however, does not create mutual rights of inheritance between husband and wife (Baillie 65:375, 694-701).

Traditional Islamic law concedes to every adult Muslim whether male or female, the right to contract a marriage. It also recognises the right of a guardian to contract a minor in marriage (*jabar*) but, upon attaining puberty, the minor is required to ratify or reject the marriage. This right belongs successively to the father, paternal grandfather how highsoever, and brother and other male relations in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

Most writers on Muslim jurisprudence are of the view that if a father or grandfather contracts a minor in marriage, the marriage is valid and binding and cannot be repudiated by the minor on attaining puberty (Baillie 65:382, 50; Hamilton 57:37). However, if the marriage has been contracted on behalf of the minor by a guardian other than the father or grandfather, the minor has the right to exercise what is
technically called *khyar-ul-bulugh* (option of puberty). This option is lost if, after attaining puberty and of being informed of the marriage and her right to repudiate it, a female acts after unreasonable delay. In case of a male, the right to exercise the option of puberty continues until he has ratified the marriage either expressly or in an implied manner e.g. by payment of dower or cohabitation. Consummation of the marriage with the consent of the female also extinguishes this right.

By virtue of DMMA: Section 2(vii), statute law has modified the traditional Islamic law regarding option of puberty and the position today is that if a minor female has been given in marriage even by her father or grandfather, she can still exercise her right of repudiation, extending the option of puberty to a marriage contracted by the father or grandfather. But in *Mst. Daulan vs. Dosa* it was observed that:

> the option of puberty of Muhammadan Law is only a right given to a minor party to a contract to avoid the contract entered into by her guardian on becoming *sui juris*. As the preamble shows, the Dissolution of Muslim Marriages Act, 1939, does not purport to effect any change in Muhammadan Law but to clarify and consolidate it.

The DMMA also sought to regulate this option by requiring the minor girl to exercise it between the age of 15 years and 18 years. But that is not to say that a girl who has attained puberty earlier than 15 years cannot exercise the option.

Case law in this area is fairly stable and where it is proved to the satisfaction of the court that all ingredients of exercising option of puberty are present, it has found for the woman. For example in the case of *Muhammad Aslam vs. Mst. Razia Suliana* the judge expressed surprise that the respondent did not use her right to repudiate *nikah* when she attained majority under the MFLO rather than apply for *khula*.

What exactly is the scope of this right? Courts have declared that when a girl is pubert, she may exercise the option of puberty not only with regard to dissolution of marriage but also when she wishes to contract a marriage (whether with or without her parents'/guardian's consent).
Reported case law has mostly had to deal with cases where the girl wanted to get out of an undesirable union. Courts have used the 'Islamic' age of majority which is on the onset of menstruation and invariably lower than the age of majority by the law of the land (eighteen). But in an unusual decision in *Sajjad Hussain vs. Superintendent Darul Aman Multan*26 a distinction was drawn between the age of puberty (which may be 15 years or less) and age of discretion (which the court held to be 18 years). In the instant case, the girl was pubert according to Islamic Law, *sui juris*, and thus capable of making her own decision regarding who she wanted to marry. But the court awarded custody to her parents saying that until she reached the age of discretion, her parents would hold custody.

One may argue in favour of more clarity in establishing the scope and extent of the right of option of puberty under the DMMA. Is this right restricted to opting out of a marriage or does it also include contracting a marriage of one’s own choice? This question, in fact, was considered by the courts at length during 1996-1997 in the much publicized case of *Hafiz Abdul Waheed vs. Asma Jahangir*27 also widely known as the Saima Waheed case. Saima Waheed, a 21 year old student, married her brother’s tutor secretly in February 1996. When her father, the petitioner, found out about the marriage, he refused to accept its validity. The case revolved around three main questions:

1. Do the parents have a right to be obeyed and whether this right can be enforced judicially?

2. Is marriage in Islam a civil contract?

3. Is the wali’s (guardian’s) permission one of the main conditions of a valid *nikah*?

The majority of the case law cited as precedence allowed the adult girl to choose her partner in marriage. In an earlier 1996 case (not referred to as precedence in this case) the judge specifically stated that according to Muslim jurisprudence a "*sui juris* girl may contract valid marriage of her own accord but she should possess sufficient maturity and her decision of marriage should be in consonance with the accepted norms of society."28
Cases which took a different view did so because the girl was a minor or there was no nikahnama. In the Saima Waheed case, the petitioner relied heavily on Islamic doctrine and argued that there was a difference between the English usage of the word ‘marriage’ and the meaning of the word ‘nikah’ which means to unite or bind. He therefore argued that a nikah involved the binding of two families rather than merely two individuals and the permission of the wali was therefore indispensable. The Lahore High Court decided that a marriage contracted by a female without the wali’s consent was not invalid. The court also reiterated that a marriage forced upon a woman without her consent is not valid and that the consent of the man and the woman who are getting married is an indispensable condition for the validity of a marriage - the wali has no right to give such a consent on behalf of the woman without her approval.

Under traditional Muslim law, a Muslim male may lawfully marry up to four wives at the same time (Baillie 65:30, 154; Mannan 91:367). This right of the husband has been restrained by the MFLO (Section 6) and now a certain procedure has to be followed by the husband and permission of the Arbitration Council sought before he can contract a subsequent marriage. But polygyny has not been banned and is permissible under certain conditions. A subsequent marriage by the husband in contravention of the MFLO, however, is still valid, hence it fails to act as an effective deterrent. Failure to follow the MFLO provisions, for instance, makes the husband liable to pay the entire amount of the dower to his existing wife/wives. If the amount is not so paid, it shall be recoverable as arrears of land revenue. The husband may also be punishable with simple imprisonment which may extend to one year, or with fine which may extend to Rs.5000, or with both.

A consequence of the above mentioned provisions of the MFLO was that they gave the wife a further ground for judicial divorce under section 2(ii-a) of the DMMA. Though this provision was repealed in 1981 and therefore no longer applies, relevant case-law is discussed below.
Dissolving a Marriage

The contract of marriage under Islamic law may be dissolved by death of one of the parties or by divorce. Divorce takes several forms and is described accordingly. The prerogative of the Muslim male to unilaterally terminate the marriage contract irrevocably without assigning any cause is known as *talaq*. *Talaq* under traditional Islamic law may be given either orally or in writing. Although no particular form is prescribed, three modes of pronouncing *talaq* are generally recognised. *Talaq-ahsan*: a single pronouncement of divorce made during a ‘*tuhr*’ or period between menstruations, followed by abstinence from sexual intercourse for the period of *iddat*. *Talaq-hasan*: three pronouncements of divorce during three successive *tuhrs*, no intercourse taking place during any of the *tuhrs*. *Talaq-i-bidat*: three pronouncements of divorce either in one sentence or three separate sentences. The intention to pronounce an irrevocable divorce must be present. But since marriage is in the nature of a civil contract, a restraining stipulation to the effect that this right of the husband may be delegated to the wife, may be inserted as *talaq-i-tafweez*, as discussed below (Mulla 91:428-430; Baillie 65:242-254). According to Mulla and Baillie, this delegated right of divorce may also be given to a third person either conditionally or absolutely and either permanently or for a temporary period.

This principle of traditional Muslim jurisprudence has been recognized and incorporated in Section 8\(^{31}\) of the MFLO and a clause (number 18) of Form II of the Rules under the Muslim Family Laws Ordinance, 1961, is specifically designed to ascertain “whether the husband has delegated the power of divorce to the wife, and if so, under what conditions”.

A perusal of case law reveals that from 1947 to date not more than a dozen cases have been reported where the wife has obtained a dissolution of her marriage on the basis of *talaq* by *tafweez*. The second fact that came to light was that more cases of *talaq* by *tafweez* were reported in the pre-1947 period and the early post-independence years despite the absence of legislation regulating this practice than in the years following the promulgation of the MFLO.\(^{32}\) Lack of reported case law may not necessarily imply lack of the use of *talaq* by *tafweez* and
in order to establish whether that was the case we decided to look into Nikah Registers of three of the most populous areas of Peshawar, the provincial capital of NWFP. Most residents of these areas are literate and exposed to urban life and its amenities including the mass media. Therefore, one would presume them to have some degree of awareness of the law and their rights. As far as the socio-economic status of these wards is concerned, the Spin Jummat or University Town is an upper class residential area. The Sunehri Masjid (Saddar) locality is mostly middle class whereas Nauthia is lower middle class with a few professional and middle class households. Though the results can not be generalised, the mini-survey revealed some interesting facts.

The Nikah Registrars of these wards, all three of whom had been performing this duty for more than 20 years, stated that as a matter of practice Clause 18 of the Nikah Form is either left blank or crossed out. When asked who actually did this, the Registrars said that surprisingly enough it was the members of the bride’s family and not the relatives of the bridegroom. In the Spin Jummat (University Town area), not a single nikahnama contained a delegation of the right of divorce. Likewise the Sunehri Masjid Nikah Registrar said that his register also did not have any case with a talaq by tafweez stipulation. It was only in the Nauthia area that the Nikah Registrar reported two marriage contracts which contained a stipulation restraining the husband from pronouncing talaq as well as delegation of the right of divorce to the wife.33

This mini-survey raises a number of issues, the most important one being that of the use of legislation as a tool for bringing about social change. As stated above, traditional Muslim jurisprudence recognizes the doctrine of delegation of the right of divorce. Statutory law (the MFLO) codifies and regulates this right for the benefit of women. Why then is it not being used? Despite the fact that it is an Islamic principle, people shun it and do not want to even discuss its utility.

On the other hand, Section 4 of the MFLO giving inheritance rights to the children of pre-deceased sons and/or daughters34 is frequently invoked. This is despite the fact that Section 4 of the MFLO has always been controversial and is not in keeping with traditional Muslim jurisprudence. One is bound to infer that social trends are not uniform
in assimilating and accepting legislation as an effective vehicle of change. Our research shows that society has, at least in the area of family law, made only very selective use of any attempt at legal reform through legislation.

The third kind of dissolution of marriage is on the basis of mutual aversion between the husband and wife termed *mubarat*. If the aversion is on the side of the wife and she takes the initiative in the dissolution of the marriage (by agreeing to forego her dower and/or other material benefits given by the husband), then it is called *khula*. The main difference between *khula* and *mubarat* is that in *khula* the wife is bound to give consideration to the husband for a release from the marital tie whereas in *mubarat* the spouses mutually agree to terminate the marriage contract. In this case the wife may or may not give anything to the husband in exchange for divorce.

There is no uniform view regarding the exact legal position of *khula*. Writers on Muslim jurisprudence define *khula* as meaning “to put off, as a man is said to *khula* his garment when he puts it off.... In law it is laying down by a husband of his right and authority over his wife for an exchange” (Baillie 65:305).\(^{35}\) The inference is that although *khula* is the right of the wife it is one that she may not exercise unilaterally in the manner in which the husband would pronounce *talaq*.\(^{36}\) Hence the need for the *qazi* or judge to pronounce dissolution of the marriage. If, however, *khula* is concluded with the consent of the husband then it may be effected without the interference of the court. This view thus places the right of *khula* on a weaker footing than *talaq* by the husband since the one (*talaq*) may operate independently of the consent of the wife while in the other (*khula*) the consent of the husband must be taken. If the husband does not consent, then it is the judge who, if he is convinced of the wife’s case, orders the termination of the marriage. However, since the landmark case of *Khurshid Bibi vs. Muhammad Amin*, the consent of the husband is no longer held as a condition precedent to the operation of *khula* in Pakistan (discussed below).\(^{37}\)

An interesting point of comparison between *talaq* and *khula* has come up in case law further illustrates their different categorization. It is generally stated that once finalised and pronounced, *khula* operates as irrevocable divorce even to the extent that leave to appeal an order for
it is not allowed (discussed below). But in a landmark judgment while distinguishing between the two concepts, it was held that they are so essentially different that if a marriage stands dissolved by khula and the parties wish to remarry, they may do so without an intervening marriage (hilala). On the other hand if an irrevocable talaq has been pronounced then a remarriage would not be valid without an intervening marriage.\textsuperscript{38} The argument seems to be based more on the technicality of whether the husband himself utters the words or writes them down in a talaq while in a khula the judge is authorised to pronounce the termination of the marriage contract. We would, however, beg to differ from this analysis of khula advanced by the court as being too literal (for a detailed discussion see Warraich and Balchin, this volume).

Whereas for a talaq the husband is not bound to assign any cause for terminating the marriage contract, a woman is required to provide justification for seeking khula from her husband. Another important characteristic of khula is the fact that the wife has to 'buy' her freedom from her husband. This is effected by returning to the husband material benefits received from him. (It ordinarily consists of dower though an agreement to pay something else is also valid).\textsuperscript{39}

The fourth kind of dissolution of marriage is by judicial decree of the court under the DMMA, which is discussed below.

Other forms of divorce recognised under Islamic law but rarely used are: ila, zihar, and li'an.\textsuperscript{40} In all the three modes the wife is entitled to move the court for a dissolution of the marriage. Literally meaning mutual cursing, as a term of jurisprudence, li'an signifies testimonies confirmed by oath, on the part of a husband and wife where the husband accuses the wife of adultery and there is no evidence other than the husband's accusation. In Pakistan, Section 14 of the Offence of Qazf Ordinance, 1979 applies to such cases. Li'an procedure is as follows: a husband accuses his sane and adult Muslim wife of the offence of adultery before a court of law. The wife does not accept the accusation to be true. If both spouses reiterate their respective position on oath, then the court in such a case will dissolve the marriage, and the order would be non-appealable. If however the allegation is accepted, she remains liable to be punished under offence of zina.\textsuperscript{41}
Some Issues in Case Law

Reported case law in the area of family law is extremely varied and diverse, and during the course of our research it became evident that it was not possible to analyse each and every issue that came up before the courts for adjudication. Therefore, in this section we have decided to confine ourselves to two kinds of issues. Firstly, we will discuss those issues that have been raised in the bulk of reported case law, for instance cases of dissolution of marriage by invoking the doctrine of khula, or cases where notice of talaq has not been given to the Chairman, Union Council and the existence (or otherwise) of the marriage is contended. Other provisions of law that have been invoked by women (though less frequently) are: cruelty, failure to maintain on the part of the husband and the option of puberty.

The second category of case-law consist of those areas where reported case-law is minimal. These include cases in which talaq-i-tafweez is exercised by the wife (discussed above) and dissolution sought under the DMMA or the MFLO on the grounds that the husband had taken another wife. Finally, we discuss cases where husbands have invoked provisions of the Dowry and Bridal Gifts Restriction Act 1976 to deprive former wives of their dowry and bridal gifts. Since dower is an issue that runs alongside all the above strands, it will be discussed in their context and not under a separate heading.

As defined above, khula is a mode of dissolution of marriage which the wife may exercise by giving back her dower and/or other benefits received from her husband. Additionally, she has to prove a fixed aversion for her husband and convince the court that she is incapable of living with him ‘within the limits prescribed by Allah’. In other words, that an irretrievable breakdown of marriage has taken place, at least insofar as the wife is concerned. A study of reported Pakistani case-law suggests that superior courts have upheld the traditional interpretation of the doctrine of khula, namely that it is not an absolute right of the wife but a controlled one. The landmark decision of the Supreme court in Khurshid Bibi vs. Mohammad Amin established the doctrine of khula in the following words:

The Holy Qur’an declares in Verse 2:228 that women have rights against men similar to those that men have against
them. It conferred the right of *khula* on women as against the right of *talaq* in men. On the one hand, it put fetters on the unbridled exercise of power of divorce by the husband by providing for appointment of arbiters in Verse 35, Section 6, Chapter IV, in case of breach between the spouses., and on the other, conferred a right on women to seek dissolution of their marriage before the *Qazi*, the success of the right depending upon his order. The trend of Qur'anic legislation is clearly in favour of freeing of the wife, where the marriage tie cannot serve the objects of marriage, namely, *sukun, moaddat* and *rehmat* (peace of mind, love, kindness, sympathy and compassion) specified in verse 21, Chapter XXX, part 21 of the Holy Qur'an. If its objects cannot be served by a marriage, should it continue, though it be purposeless and even harmful, or is it not better that it be dissolved, so that the evil consequence of an impossible relationship are avoided?44

Although *Khurshid Bibi vs. Mohammad Amin* clearly established the principle that intense hatred, dislike and aversion on the part of the wife against the husband were valid grounds for terminating the marriage contract,45 in later cases the effect of this landmark judgement was watered down by judges exercising their own discretion as to what constituted extreme hatred, dislike etc.46 In a 1986 case, for example, it was held that *khula* was not to be allowed on the mere asking of the wife. Existence of irremediable breach between parties making it impossible for her to perform her part of the contract within the limits prescribed by God is to be proved by wife to the satisfaction of the judicial conscience of the court. Similarly, in another case it was held that "Islamic principles of law enjoined upon the court the solemn duty to reasonably scrutinize plausibility ... any loose consideration or blanket authority allowed to wife would lead to frustrate the very purpose and object of regulating rights through courts of law."447 In recent years, however, the courts seem to yet again adhere to the *Khurshid Bibi vs. Mohammad Amin* ruling in granting *khula* on the basis of extreme revulsion on the part of the wife. In a 1993 case, for example, the court noted that
a woman is not chattel and there is no method by which she could be forced to live with her husband if she herself had acquired a hatred of him. The judgement has to be that of the wife herself and if she feels that there is no possibility of her living with her husband and if the marriage was not dissolved she would not be in a position to observe the limits ordained by God and the qazi, on the basis of the circumstances is subjectively satisfied that the parties cannot live together, it would be a fit case for the grant of dissolution of marriage on the principle of *khula*.

In *Shah Begum vs. District Judge*, for example, the court observed that "as soon as a woman demands her right of dissolution of marriage on the basis of *khula*, the courts have not to see whether the otherwise relevant factors which are the basis of dissolution of marriage stand proved or not."

A further principle that emerged from the decision in Khurshid Bibi's case was the fact that the consent of the husband was not a condition precedent to the termination of the marriage contract (Ali 85:57). Fortunately, this principle has been upheld and the trend is fairly stable.

Discussion in reported case law on *khula* has also attempted to draw a parallel between *talaq* and *khula*. In the Khurshid Bibi case, Justice S.A.Mahmood stated that *khula* is so characteristically different from *talaq* that the two cannot be equated. *Talaq* is to be unilaterally pronounced by the husband without being required to assign any cause. *Khula* is given at the instance of the wife only when the spouses cannot live harmoniously. But in *Safia Begum vs. Khadim Hussain* it was held that a woman can claim *khula* as of right, the only limitation being where it was sought for immoral purposes. Similarly, in *Syed Muhammad Rizwan vs. Mst. Samina Khatoon*, it was stated that the right of a woman to obtain *khula* on her offer to return all the benefits received by her from her husband is almost akin to the right of a man to pronounce *talaq* on his wife without assigning any cause. The case of *Ahmed Nadeem vs. Assia Bibi* (discussed above ) further reinforces this view where the court held that the right to claim divorce by the wife on the principal of *khula* is equal to the right of pronouncement of *talaq* by
the husband except with one difference that the husband can pronounce *talaq* himself but the wife has to file a suit seeking dissolution of marriage on the principle of *khula* in the court of the *qazi* (family court).

One could at this point argue that there may be some weight in the above argument. The reason being that the right of the husband to pronounce *talaq* is not always as unfettered as it is made out to be. He may have delegated it to the wife or to a third person, either permanently or temporarily, conditionally or absolutely. Moreover, since the promulgation of the MFLO, under Section 7, a man cannot simply pronounce *talaq* on the wife and is required to follow a certain procedure. Although at the end of the day, the husband may still terminate the marriage contract, yet some minor obstacles do appear in the way of this unfettered right of unilateral dissolution.\(^55\) It may be argued that the provisions of the MFLO cited above can hardly be described as obstacles since at the most they can delay a subsequent marriage by the husband. No matter how insignificant the obstacles, however, the MFLO has succeeded in making a ‘dent’ in the popularly held view among Pakistani Muslims that *talaq* is the unfettered unilateral right of the husband.

Similarly, the wife’s right to *khula* is controlled by the condition that she has to convince the court of the fact that under no circumstances can she live with her husband as his wife. But there the comparison ends, because if the court does not find in her favour, she is then incapable of dissolving the marriage.\(^56\) In the *Subhan Khatoon vs. Nazar Muhammad* case, for example, it was held that the object of levelling allegations against the husband was to get a divorce from him and since the same were not proved, the courts below rightly refused the wife *khula*.

The second category of cases which we took up for analysis was those concerning the affect of Section 7, MFLO, on dissolution of marriage. Section 7(3) tries to prevent hasty dissolution of marriage by *talaq* pronounced by the husband unilaterally, without an attempt having been made at reconciliation.\(^57\) Secondly, under Section 7(6) it attempts to minimise the practice of intervening marriage by the woman (*hilala*), if the former spouses wish to remarry.\(^58\) The MFLO, therefore,
envisages a certain procedure to be followed for pronouncing *talaq* as well as for other modes of dissolution of marriage. The most important step required of the husband is that as soon as he pronounces *talaq* he is required to give notice thereof to the Chairman Union Council who then initiates the reconciliation process (Sections 7(1) and 7(4)).

Before long, loop-holes resulting from faulty drafting became evident as the provisions of the MFLO in general and those of Section 7 in particular lent themselves to varying interpretations. Moreover, with the passage of the Hudood Ordinances in 1979 and, later on, other so-called Islamisation measures in legislation, the effects of these latter laws on the MFLO began to unfold. Firstly, traditional Islamic law does not require a man to give any kind of written notice to his wife if he wants to divorce her. In fact, under Shia law it is incumbent on the husband to pronounce the divorce orally in the presence and hearing of two competent witnesses. A written divorce is ineffective and not recognised unless the husband is physically incapable of an oral pronouncement. The MFLO, on the other hand, required written notice of divorce to the Chairman, Union Council. So the first issue the courts had to resolve was the effect of absence of notice required under section 7(1) of the MFLO. Did it make an otherwise irrevocable divorce ineffective and consequently a subsequent marriage by a former wife, invalid? The second crucial question was whether absence of notice by a husband alleged to have pronounced *talaq* could be construed as revocation of *talaq*. A heavy bulk of case law focusing on these issues has built up over the years. The courts followed a rather chequered course, the balance at times tilting towards traditional Islamic law and at others upholding with rigour provisions of the MFLO (for details on conflicting judgments see Warraich and Balchin, this volume).

As regards the first issue, it has been held that non-supply of copy of *talaq* notice is not material to when *talaq* becomes effective. The *talaq* will be operative 90 days after it is pronounced and the Chairman, Union Council has no power to annul a divorce on alleged non-supply of copy to wife. In another case of similar nature, it was held that *talaq* would be effective although absence of notice to Chairman constituted a violation of Section 7 of the MFLO and was punishable. On the other hand, courts have also at times given a strict construction
to Section 7 MFLO and held that where no notice of *talaq* was served upon the Chairman, *talaq* does not become effective unless and until 90 days expire after service of notice to Chairman. But the established view of the courts is that failure to give notice to the Chairman and not submitting to arbitration is a procedural fault and does not affect the substantive issue, namely, the fact of dissolution of marriage.

The second question arising out of interpretation of Section 7 is whether a husband pronouncing *talaq* without informing the Chairman and subsequently either resuming marital relations with his wife or claiming it, may be presumed to have revoked his earlier pronouncement of dissolution of marriage. Furthermore, if a husband does send notice of *talaq* but then continues living with his wife, is he presumed to have taken back his earlier *talaq*? In a case of this nature, despite the husband’s notice of *talaq*, husband and wife continued to live together, and a son was born. Meanwhile, the Chairman issued a certificate of *talaq*. The court held that the fact that the parties resumed cohabitation and did not appear at the conciliation proceedings was to be taken as revocation of *talaq*. In another case, however, where the husband stated that he had revoked his divorce through the Union Council was not granted relief as the Federal Shariat Court ruled that he could not revoke the divorce given by him according to Sharia.

With the enforcement of the Zina (Enforcement of Hudood) Ordinance 1979, this provision of the law began to be used against women. Its effects became clear as vindictive former husbands who had not sent notice of *talaq* to the Union Council, claimed that their former wives, who had subsequently remarried, were guilty of adultery under Hudood.

After many legal battles, the courts finally declared that failure to notify did not invalidate the *talaq* itself. In a landmark judgment, Justice Naseem Hassan Shah (as he was then), held that:

> where a wife bona fide believing that her previous marriage with her former husband stands dissolved on the basis of a *talaq nama* although the husband has not got it registered with the Union Council enters into a second marriage, neither this second marriage nor the fact of her living with
the second husband will amount to *zina* because of her bona
defe belief that her first marriage stood dissolved.\(^69\)

In more recent cases courts have treated this issue with greater caution
than previously. In *Muhammad Yar vs. Sardar Khan*\(^70\) the court stated
that it was a settled law of Muslim jurisprudence that where direct
proof of a marriage between the parties is not possible (i.e. if there is no
documentary or oral proof), then Muslim law presumes legal marriage
and legitimacy of any children involved, from continued cohabitation
or an acknowledgment made by the husband and wife of their marital
status. Another interesting case is that of *Mst Rani vs. the State* where
the court ruled that the fact that an accused single woman was pregnant
did not automatically mean that *zina* had been committed by her - even
if her claim of being raped was implausible due to the acquittal of those
she accused. \(^71\) The prosecution had to prove that she had committed
*zina* with her own free will before she could be convicted. Another
important ruling was that the petitioners had to name both parties
involved in the offence of *zina* - prosecuting one party was not allowed.
Equally interesting is the fact that there is at least one case in which a
wife has used this Ordinance to try to prosecute her husband who had
contracted into a second marriage. \(^72\)

The contract of marriage places upon the husband the duty to maintain
his wife and live in a congenial atmosphere. She is entitled to a judicial
divorce if the husband fails to maintain her\(^73\) or treats her with cruelty.\(^74\)
The DMMA defines cruelty as not being restricted to physical ill-
treatment only and covers many aspects of ill-treatment amounting to
cruelty. The bulk of reported case law relating to the DMMA deals with
cases where the wife demands termination of the marriage on grounds
of cruelty and/or non-maintenance by the husband. Earlier in this paper,
it was stated that in the majority of these cases the women end up
getting out of the marriage only by obtaining *khula* and foregoing their
dower. We found very few cases that used section 2(ii) or section
2(viii) of the DMMA, a successful claim of which would entitle the
wife not only to a divorce but also to her dower and maintenance
during the period of *iddat*.

Until 1981, another ground for divorce under the DMMA was: "(ii-a)
That the husband has taken any additional wife in contravention of the
provisions of the Muslim Family Laws Ordinance, 1961;..." In 1981, under the Federal Laws (Revision and Declaration) Ordinance (XXVII of 1981) item 18, amendment 2(ii-a) of the DMMA was omitted thus taking back this ground for divorce from women. Our study of case law in the superior judiciary shows, however, that even while it subsisted, this clause was only invoked in five or six cases and that too in conjunction with Section 2 (viii)(f) of the DMMA which states that if a man has more than one wife/wives and fails to treat her/them in accordance with the injunctions of the Qur'an, then the wife/wives have a ground for dissolution of marriage.\(^7\) Except for one case, (discussed below) Section 2(ii-a) of the DMMA was not specifically mentioned. Moreover, in a couple of cases, the wife had complained that the husband had entered into a subsequent marriage without seeking prior permission from her and hence the subsequent marriage should be declared void and illegal.\(^6\) In one 1981 case (Mst. Ghulam Fatima vs. Mst. Anwar), the plea of the appellant was that since her husband's second marriage had neither been registered under the MFLO nor had she granted him the required permission, therefore the subsequent marriage was not valid. The court, however held that contravention of the said provisions of law can be visited with punishments provided therein but it has not been laid down anywhere in the said ordinance that a marriage which is not registered under Section 5 of the Ordinance or contracted in contravention of its Section 6 thereof would be invalid.\(^7\) Marriages held in contravention of the provisions of the MFLO are not invalid; the husband is merely liable to be punished as stated before. Interestingly, we did find one reported case even after this provision had been repealed where the court had granted dissolution of marriage on the ground that the husband had contracted a second marriage without the consent of the wife.\(^8\)

A survey of reported case law where the remarriage of the husband has been directly invoked in obtaining dissolution of marriage shows the paucity of litigation in this area. Furthermore, as stated above, there are very few reported cases where a complaint has been made against the husband for contracting a subsequent marriage in contravention of the MFLO. A number of reasons may be advanced for this state of affairs. First and foremost of course is the religious argument. Right from its inception, the MFLO faced stiff opposition both inside and outside the legislature. It was contended vociferously that since Islam permitted up
to four wives simultaneously, no earthly power could revoke this privilege (see Mumtaz, this volume).

The only verse in the Qur’an that deals with polygamy states:

And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two, three and four, but if you fear that you may not do justice to them, then marry only one or a captive that your right hand possesses. That will be more suitable to prevent you from doing injustice.

Many commentators have opined that this passage of the Qur’an only permits polygyny under certain circumstances: it neither enjoins it nor even permits it unconditionally. It has also been the view that since the permission for polygamy arose out of peculiar circumstances and since these may recur now and then, it is not right to prohibit polygyny by legislation. But that since the Qur’an has made it conditional on a just and equitable treatment of wives, it is open to the State to prescribe conditions under which polygyny will be permissible (Siddiqi 92:117).

The MFLO has simply tried to restrain polygamy by prescribing certain procedures to be followed for contracting polygynous marriages. Therefore the so-called Islamic argument does not hold. Secondly, the state leaves the complaint against an errant husband to the aggrieved party/parties i.e., the wife or wives as the case may be, therefore if she chooses to ignore his breaking the law, the matter will not go much further. Looking at this provision of law in our socio-cultural context, it is understandable why we have minimal case law in this area. Who would countenance a wife going to court against her own husband, particularly one who also is the mother of his children? More importantly, what will she achieve after this litigation? In a number of cases women have been made to reconsider their decisions by the husband threatening a divorce and the wife’s family withdrawing their support. What is a woman to do in such circumstances, especially if she neither wants a divorce nor her husband marrying again and at the same time has no independent means to support herself? Finally, even a cursory glance at our society suggests that polygamy is the exception rather than the rule and this too, may account for the lack of reported case law.
Our analysis of case law on the dissolution of marriage revealed a very interesting pattern: of the bulk of case law, an overwhelming majority consisted of cases where women had prayed for a judicial divorce on grounds contained in the DMMA or the MFLO, but had in the alternative asked for a dissolution on the basis of *khula*. In fact, more than 80% of the reported case law on dissolution of marriage reviewed here, revealed this pattern. Judgments invariably granted *khula* even though well established grounds such as cruelty, failure to maintain etc. were invoked and proved as material elements in the award of *khula*. This leads us to conclude that the trend of the courts in divorce cases is to use the least controversial option, that is to ask the woman to forego her dower (to please her husband) and give the woman her freedom. This trend is also an indicator of the unbearable delay in litigation in our courts. As a result, women in particular are advised to agree to a *khula* to save themselves from the agony of the inordinate delay that is a hallmark of our judicial system.

Last, but not least, it is important to mention that by and large marriages are dissolved by using the *khula* mode, for which a wife must make ‘payment’ to her husband usually in the form of foregoing her dower or other material benefits received from her husband. Though it must be noted here that non-payment of stipulated consideration of *khula* would not invalidate the dissolution of marriage; it would only create a civil liability with regard to the benefits. The husband may institute a separate suit for recovery of *zar-i-khula* or it may be ordered in the same suit if directed by the court. Yet in many orders granting *khula*, where it was felt that the husband was at fault, either a minimal sum was allowed as the price of the wife’s freedom, or if the husband had expressly failed to mention the *zar-i-khula*, then no such order was passed. For instance, in *Shagufta Jabeen vs. Javed Iqbal*, it was held that the court in its discretion can either order complete or partial restoration of benefits or not at all depending upon the circumstances of each case. Court will also consider as to which of the spouses was at fault which led to the dissolution of marriage. But it is submitted that this view deviates from the very concept of *khula* which simply consists of a wife buying her freedom from her husband on the plea that she cannot longer live in matrimonial harmony with him. In *Zahida Bi vs. Muhammad Maqsood*, it was held that since the husband had turned out the first wife from his house, had remarried and that the first wife
was being maintained by her parents, therefore Rs.4000 was enough to buy her freedom.  

This attitude of the court is harmful for women for a number of reasons. Firstly, a distinction between a judicial divorce where the wife does not forego her dower and also succeeds in terminating the marriage contract, and an order granting *khula* where the wife foregoes her dower must be clearly drawn. By granting an order for *khula* when grounds such as cruelty and failure to maintain by the husband have been proved amounts to a complete misunderstanding of the concept of *khula*. It is also tantamount to encouraging a casual and callous attitude in men as regards their duties to their spouses. The courts appear to be encouraging the trend whereby a woman will forego her dower rather then indulge in prolonged litigation.

With respect to maintenance, the established law is that the wife is entitled to it not only during the subsistence of the marriage but also on its termination during the period of *iddat*. Earlier, Section 488 of the Criminal Procedure Code could also be invoked in a claim for maintenance, but since the repeal of that section,  maintenance suits are filed under Section 9 of the MFLO. The courts have also allowed maintenance during the period of the marriage’s subsistence even though the suit of maintenance was made after the divorce. In two cases in 1994, the court held that the limitation provided under Article 181 (Limitation Act 1908), has no relevance to application for grant of maintenance under section 9 MFLO 1961 and the wife is entitled to claim past maintenance for a period of 6 years.

A question that comes to mind and on which Pakistani courts as well as law makers are silent, is that of post-divorce maintenance for the wife. All schools of Muslim jurisprudence agree that the wife is not entitled to post-divorce maintenance and this is also the conclusion on the basis of case law in the subcontinent. But exceptions exist where a stipulation in the marriage contract for lifelong maintenance for the wife has been incorporated. In *Muhammad Muinuddin vs. Jamal Fatima* it was held that:

the marital rights ended with the divorce but the contract subsists till the plaintiff dies or breaks it, and so long as the
right to maintenance lasts, it cannot be treated as devoid of consideration or opposed to public policy. 91

With respect to dowry and bridal gifts, a strange situation prevails. *Jehez* (dowry or trousseau) generally includes money, property, clothes, jewelry and household effects given to the girl at the time of marriage by her parents. Insofar as its origin and source of validity is concerned, dowry is mostly cultural having few antecedents in religion. Most traditions (*ahadith*) and narratives on the life of the Prophet describe how he gave only a few household goods to his daughter Fatima on her marriage to Ali. The Prophet’s son-in-law had to sell off his armour and horse to set up house. These examples set by the Prophet of Islam are completely disregarded by his followers in the subcontinent, not only today but for centuries.

The single most important reason is that dowry is an integral component of our cultural environment. It is valued very highly and cannot be disregarded, illustrating how un-Islamic practices are blatantly countenanced and espoused when they appear favourable to the elite of society. Other reasons may be advanced for the practice of giving dowry to the girl on the occasion of marriage. First, women are rarely given their share of inheritance and dowry may be seen as some measure of compensation. This is particularly true of landed families who are loathe to part with the land which serves as their power base. Second, dowry is invariably in a much larger quantity than the economic standing of the girl’s family. This is done for the aggrandisement of the girl and her family. It not only supposedly fetches a better match in marriage, but is meant to place her on a stronger footing vis-a-vis her in-laws. The practice has now acquired abnormal proportions further reducing the woman to a marketable commodity. Cultural variations affect the extent and manner of giving dowry. The practice is very widely prevalent in the Punjab; to a lesser extent in the NWFP and Baluchistan for two reasons. First, giving away one’s wealth for no good reason is considered as a gesture of appeasement in Pukhtun culture. Consenting to give away a woman from one’s family is bad enough without having to part with one’s wealth as well. (That the dowry will benefit his own daughter or sister is not a good enough reason for the Pukhtun male!) Second, if a man wants to acquire a wife, he must be capable of paying for her. This
view is now changing due to interaction with other parts of the country and urban centres within the province itself.

Over the years, a number of statutes have been passed by the legislature to regulate, restrict and then perhaps eliminate the custom of dowry. These are:


The above being repealed with the enactment of The Dowry and Bridal Gifts (Restriction) Act, 1976 (Act XLIII of 1976).

The Dowry and Bridal Gifts (Restriction) Rules, 1976.

That this legislation has had absolutely no impact on social norms and practices is beyond doubt. Apart from social indicators, negligible case law in this field also bears out the lack of importance that this law has for the people of the country. We did not come across any cases where provisions of the above cited laws have been invoked complaining either of excess dowry or its display. What was felt, however, was that when the Act of 1976 was passed, people were wary and made an effort not to display the dowry for fear of being reported. The fear was not that a genuine complaint may be made, but that these laws may be used by rivals/enemies. After some time this very token caution too was thrown to the winds and to this day it has been business as usual!

In our study of reported case law we came across a highly ingenious use of these laws. To begin with, there were few cases invoking these statutes. But all suits were instituted consequent to dissolution of marriage wherein claims had been made by women for the recovery of their movable property comprising of dowry effects. It was argued on behalf of the husbands that since the Act prohibited dowry in excess of Rs.5,000, hence returning goods exceeding this value would be a violation of the law. It is heartening to note however, that all reported case law on the subject upheld the wife’s appeal to return her dowry and bridal gifts.

The court while discussing the purpose of the Dowry and Bridal Gifts (Restriction) Act, 1976, stated that:
...it was meant to benefit women to be married and their parents so that women may not remain unmarried for lack of heavy dowry. It was not enacted to deprive wives of their dowry and bari (gifts given to the bride from the husband’s side) in excess of the restricted amount of Rs. 5000......instead of being beneficial to women and wives, the Act has proved to be detrimental to their rights and interests.\textsuperscript{94}

The Act has also been termed un-Islamic and violative of the Islamic Law of inheritance and counter to Qur’anic injunctions.\textsuperscript{95}

The predominance of social norms demonstrate the limits of law in standard setting and social reform. Furthermore, it also depicts the selective use of religion; although Islam strictly prohibits lavish expenditure and the institution of dowry is almost non-existent, yet the custom is practiced in every household in the country, irrespective of social class.

Conclusion

Analysis of reported Pakistani case law in matters relating to marriage, dower, divorce, maintenance etc. reveals interesting patterns. Courts seem to reflect public opinion, societal trends, and attitudes towards the familial sphere of life, for instance, the view that whatever transpires between a husband and wife belongs solely to the private sphere and as far as possible should be resolved within that sphere. A culture that is skeptical of the efficacy of any formal dispute resolution system, aggravates this situation. There is also the problem of a heterogeneous legal system with laws having completely different and divergent normative bases. For instance, certain aspects of family laws have their base in religion, and are neither open to discussion nor lend themselves to any modification. Beside these religion-based laws are the so called secular provisions of the general law of the land, many of them made by the colonisers.\textsuperscript{96} More often than not, legislation in this area has been piecemeal and has tried to compromise political expediency with the dictates of justice and the needs of the time.\textsuperscript{97} The result has been a strange mixture of customary practices, Islamic law and statute law held together in legislative enactments. But these laws have only been
accepted and used selectively as borne out by our analysis, and one comes across judgments where the Islamic nature or otherwise of a certain statute is discussed at considerable length. It is pertinent to note here that time and again courts have arrived at conclusions on the premise that a certain provision of the law is un-Islamic and hence may justifiably be disregarded. For instance, various sections of the MFLO as well as the DMMA have met with this fate. This goes to show that even judges at times do not consider statute law as the settled law of the land and believe that the subject is always open to debate.

One of the most disturbing facts that came to light during this research was that the bulk of reported case law concerned dissolution of marriage through khula. As discussed before all the safeguards and grounds which a woman can plead to obtain a judicial divorce become completely ineffective since the woman is forced to bargain away her dower as well as maintenance in order to buy her freedom.

Yet another issue is the confusion, whether inadvertent or deliberate, of the extent and operation of the doctrine of khula that is evident in case law regarding dissolution of marriage. If evidence is led by the wife and accepted by the court that the husband is at fault, then a clear case for a judicial decree for divorce is established under the DMMA and the husband is liable to pay dower and maintenance to the wife. How is dissolution of marriage by khula justified by the court in these circumstances? Furthermore, if it is a clear case of khula, then why is the zar-i-khula reduced in proportion to the fault of the husband?

The concept of talaq-i-tafweez has also developed into a controversial issue as, in the opinion of some feminists, tafweez or delegation of the power to divorce, by virtue of its very meaning, is yet another reiteration of male dominance within the institution of marriage. It is argued that tafweez implies that talaq is the sole prerogative of the husband and if he so desires, he may delegate it to the wife. Delegation, legally speaking, is not an ‘original’ and absolute concept and is subject to revocation by the party or source from which it emanates. Our study of case law on tafweez shows quite clearly that although based on one of the few non-controversial principles in Islamic family law, it is nevertheless the least used - another indicator of male dominance.
To conclude, one may argue that from a study of reported Pakistani case law, it is evident that all laws whether religious or secular have their limits as tools of social engineering and only those provisions/injunctions are applied that perpetuate the status quo. Ours is not the only country where family law debates are concentrated in the political arena and religious leaders and liberal politicians alike attempt to undermine progressive legislation in this field for political gains. The efforts at legal reform in the field of family law (e.g., DMMA and MFLO), are nonetheless useful fragments of 'hope' for women; the thrust must now be on saving these laws and on implementation of whatever little reprieve they offer.

Endnotes

1 For a detailed discussion of the situation before independence see Arif, this volume.
3 PLD 1994 Lahore 236.
4 But a minor may be validly contracted into marriage by his or her guardian. (Mannan 91:380-381).
5 Traditional Islamic Law (e.g. Hedaya) states that "the earliest period of puberty with respect to a boy is twelve years and with respect to a girl nine years." But puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.
6 The presence of two male or one male and two female witnesses is required. In Baillie, (65:Vol.i, pp.6-7)it has been argued that a female may act as witness to a marriage, but the presence of at least one male one is compulsory. According to this view therefore a marriage with only four female witnesses would not be valid. Shafei differed on this point deeming the testimony of females inadmissible except in cases relating to property.
9 The period of limitation for a suit to recover prompt dower is 3 years from the date of demand and refusal, or, where no demand has been made during the continuance of the marriage, on dissolution of the marriage by death or divorce. (Limitation Act, 1908, Sch. I, Art.103). The period of limitation for a suit to recover deferred dower is 3 years from the date when the marriage is dissolved by death or divorce. But see later discussion on MFLO for changes.
10 These categories appear in Mulla's Muhammadan Law. Baillie uses the term 'invalid' for irregular marriage.
11 They do however have an institution of 'temporary' (mut'a) marriage whereby a man and a woman may validly contract themselves into a union for a particular period of time. In a mut'a the period of cohabitation and dower is fixed and on the

12. Under Islamic Law, it is prohibited to enter into a valid contract of marriage with some relations. There are three classes that constitute these “prohibited degrees of relationship.” The first is prohibition on the ground of consanguinity i.e., blood relationship. Thus a man cannot lawfully marry his mother, grandmother how highsoever, his daughter, granddaughter how lowsoever, sister whether full, uterine or consanguine; niece or great-niece how lowsoever, and aunt or great-aunt how highsoever, whether paternal or maternal.

The second category of prohibited degree of relationship is on the ground of affinity. A man is prohibited from marrying his wife’s mother or grandmother how highsoever, wife’s daughter or granddaughter how lowsoever, the wife of his father or paternal grandfather how highsoever; and the wife of his son’s son or daughter’s son how lowsoever.

The third set of relatives with whom a man may not contract a valid marriage are those prohibited on the ground of fosterage.

13. The purpose of *iddat* is, primarily, to determine whether the woman is pregnant or not. The duration of *iddat* (following divorce) is three menstrual cycles; if she is not menstruating, then three lunar months. Should the woman be pregnant, *iddat* terminates upon delivery. Duration of *iddat* when marriage terminates on death, is 4 months and 10 days or delivery (if woman is pregnant) whichever is later.

14. Unlawful conjunction means where a man combines in marriage two women who are so related to each other by consanguinity, affinity or fosterage, that if either had been a male, they could not have lawfully intermarried. For instance, two sisters or an aunt and niece.

15. Bailie and *The Hedaya*, argue that since the bar is of a temporary nature therefore it is correct to classify such marriages as irregular. But Fyzee regards it as void.


18. LN 1986 Lah. 597.


20. This aspect of the law has been discussed in detail in *Muhammad Miskin vs. Nasim Akhtar* 1979 CLC 558.

21. “2(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated:”


23. See for instance, the discussion in *Muhammad Mumtaz vs. The Judge Family Court*, Shahpur Sadar, District Sargodha (1985 CLC 1808) where on interpreting sec.2(vii) of the DMMA regarding its scope, the Court favoured a wide meaning to it rather than construing it in the narrow sense.

24. Some of the leading cases where option of puberty has been invoked to obtain a release from the marriage tie are: *Mst. Ghulam Sakina, minor through Muhammad Hussain vs. Falak Sher* PLD 1949 Lah. 75; *Mst. Daulan vs. Dosa* PLD 1956 (W.P.) Lahore.712; *Mst. Sarwar Jan vs. Abdul Majid* PLD 1965 (W.P.) Pesh.5; *Zafar Khan vs. Muhammad Ashraf Bhatti* and PLD 1975 Lah.234; *Muhammad Bakhsh


26 NLR 1981 PCr.LJ 12.


28 PLD 1996 I.hr 462.

29 Section 6 of the MFLO states that permission of the Arbitration Council must be sought by the husband by giving reasons for his desire for a subsequent marriage. Examples of some 'acceptable' reasons are infertility of the wife, incapacity for performing marital obligations, lunacy etc...

30 MFLO Section 6(3) states that the husband may be granted permission by the Arbitration Council for a subsequent marriage.

31 "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."

32 The pre-independence cases relate to a period when this was not an aspect regulated by a law. In the post-MFLO era, litigation will only have taken place if this right is contested. It would therefore require a study of marriage and divorce records of the Union Councils to see to the extent to which this right is being used by women, beyond the scope of the present study.

33 The first nikah took place on the 20th November 1992 and the second on 25th December 1992. The Registrar, Mr. Muhammad Rauf considered this such an unusual incident that he knew the exact dates when these marriages had taken place as well as the names of the parties. Furthermore, he said that he had been acting as Nikah Registrar for at least 20 years and these were the only two incidents he had ever come across.

34 "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."

35 See also Kifaya vol. 2, 278; Hamilton 57:112-116.

36 This point is well established from existing case-law analysed below.

37 Khurshid Bibi vs. Muhammad Amin PLD 1967 SC 97.


39 But khula would be operative even if the wife had agreed but not actually paid back the husband the stipulated price of her freedom. The husband may then bring a suit to claim the amount.

40 Ila is effected when a husband abstains from sexual intercourse with his wife for a period of at least 4 months, pursuant to a vow. Zihar is a mode of dissolution of marriage in which the husband compares his wife to his mother or another female with whom he may not lawfully contract a marriage.

41 NLR 1984 SD 174; PLJ 1984 FSC 54.

42 Sura Al-Baqarah, Verse 229 of the Qur'an from which the concept, origin and legal basis of khula is derived.

43 Abdul Rahim vs. Shahida Khan PLD 1984 SC 329.

44 PLD 1967 SC 97; at pp.144-145.
45 It thus overruled decisions such as the one in *Mst. Sayeeda Khamum vs. Mohammad Sami* PLD 1952 Lah.113 where the court held that appeal for *khula* was to be dismissed because hatred on the part of the wife for the husband is not a valid ground for divorce under Muslim law unless the husband agrees to it.

46 *Aali vs. Additional District Judge-I*, Quetta 1986 CLC 27.

47 PLJ 1986 Quetta 159. See also *Raisa Begum vs. Muhammad Hussain* 1986 MLD 1418.


51 PLD 1967 SC 97 at pp 142-143. Also see *Nawab Bibi vs. Anwar Bibi* PLD 1970 Lah.1.


53 1985 CLC 1869.


55 For instance see Section 7(2) MFLO which prescribes a punishment of simple imprisonment up to a year or with fine which may extend to Rs.5000 or with both.


57 Section 7(3) of the MFLO provides: “Save as provided in sub-section (5), *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of 90 days from the day on which notice under sub-section (1) is delivered to the Chairman.”

58 Section 7(6) of the MFLO provides: “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 3rd time so effective.”

59 For instance, article 2-A of the Constitution of Pakistan inserted by Presidential Order No. 14 of 1985, read with Article 268 of the Constitution.

60 PLD 1963 SC 51; NLR 1988 SD 117.

61 PLD 1987 Kar. 670.

62 Section 7(1) of the MFLO.

63 NLR 1986 UC 25.

64 PLJ 1982 Lah. 493 and NLR 1982 Cr. Lah. 638.

65 For instance, in the famous case of *Syed Ali Nawaz Gardezi vs. Lt. Col. Muhammad Yusuf* PLD 1963 SC 51 it was held that a notice of talaq by the husband is mandatory without which a divorce is not valid. Also see *Abdul Mannan vs. Safurun Nessa* 1970 SCMR 845 and 1986 PSC (Pak.) 614.

66 1982 PCr LJ 625.

67 *Ghulam Muhammad vs. the State* PLD 1994 Supreme Court 236.

68 Some of the leading cases in this field that attracted a lot of public attention were: *Shera vs. The State* PLD 1982 FSC 229, *Muhammad Siddique vs. The State* PLD 1983 FSC 173, *Muhammad Sarwar and Mst. Shahida Perveen vs The State* PLD 1988 FSC 42.

69 *Bashiran vs. Mohammad Hussain* PLD 1988 SC 186. See also cases at end note above.

70 *Muhammad Yar vs. Sardar Khan* PLD 1993 Lahore 575.

71 *Mst. Rani vs. the State* PLD 1996 Karachi 316.

72 *Mst. Zahida Shaheen vs. The State* PLD 1994 SC 266.
73 Section 2(ii) of the DMMA “that the husband has neglected or has failed to provide for her maintenance for a period of two years.”

74 Section 2(viii) of the DMMA makes cruelty a ground for getting a judicial divorce: “(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 ill-treatment, 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
(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 Qur’an.”


78 Nadir Khan vs. Zeenat Bibi 1990 CLC 293.

79 This was the argument advanced by the clergy sitting in opposition whereas the government lobby responded by appealing to the spirit and letter of Islam and its progressive stand on women’s rights.

80 Qur’an, Surah Al-Nisa (iv) verse 3.

81 M. Muhammad Ali, Translation of the Holy Qur’an, explanatory note to Surah Al-Nisa (iv), verse 3. Also see A. Yusuf Ali, The Holy Qur’an, explanatory note 2988, at p.905 where he says, “the unrestricted number of wives of the times of ignorance was now strictly limited to a maximum of four provided you could treat them with perfect equality in material things as well as in affection and immaterial things. As this condition is most difficult to fulfil I understand the recommendation to be towards monogamy.”

82 But it has been argued that while ordering restitution of benefits received by wife, the courts must take into consideration the reciprocal benefits received by the husband. This view was held in M. Saqlain Zaheer vs. Zabun Nisa (1988 MLD 427), where continuous living together, bearing and rearing children, housekeeping etc. could also be taken as benefits received by the husband.


84 ‘Zar’ in the broad sense means wealth. In the present context, it implies the material benefits that a wife has to return to her husband in consideration of her release from the marital tie.

85 MLD 1988 1207.


87 Zahida Bi vs. Muhammad Magsood 1987 CLC 57.


89 ‘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, on payment of the prescribed fee; prefer an application for revision of the certificate, (to the Collector) concerned and his decision shall be final and shall not be called in question in any court."

90 Riffat Ibrar vs. Mrs Shehla Sabri PLD 1994 Lahore 148 and Syed Mudasser Altaf vs. the Deputy Commissioner/Collector Lahore PLD 1994 Lahore 810.

91 1921, 43 All. 650.


93 About a dozen such cases have been reported. For instance, 1986 CLC 2265; PLJ 1986 Lah.388; PLD 1986 Lah.52; NLR 1988 Civil Rawalpindi 682.

94 NLR 1988 Civil Rawalpindi 682.

95 ibid.

96 For example, the Pakistan Penal Code (PPC), The Code of Criminal Procedure (Cr.PC).


98 See for example, the court's ruling in Mirza Qamar Raza vs. Mrs. Tahira Begum PLD 1988 Kar. 169 declaring that ineffectiveness of talaq in the absence of a notice to the Union Council Chairman as envisaged in section 7, MFLO is against the injunctions of Islam. This view was subsequently affirmed by the Shariat Appellate Bench in Allahdad vs. Mukhtar 1992 SCMR 1273 which also stated that the period of iddat need not always extend to 90 days and could be much shorter. The court was of the opinion that the Qur'anic injunction in this regard (Surah Al-Baqara 2:228) says "And the divorced women shall wait for three periods of menstruations," and therefore iddat will have to be calculated on an individual basis. In the instant case the judges said it could be as short as 39 days.

Again, the clause of the option of puberty in the DMMA section 2(vii) came under discussion in Mahmood Butt vs. Mrs. Bibi Hanfa NLR 1987 Civil 18. This time it was the learned advocate for the Appellant who pleaded that the above mentioned section was contrary to the Hanafi doctrine of option of puberty and hence should be disregarded. The court however ruled for upholding and following the legislative enactment. Similarly, section 4 of the MFLO that allows children of predeceased children to inherit was termed as un-Islamic by courts (Federation of Pakistan vs. Mrs. Farishta 1981 PLD SC 120).

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Custody and Guardianship: 
Case Law 1947-97

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Abstract: This paper looks at the trends of the superior courts in Pakistan in cases of custody and guardianship. Based on reported case law spanning a period of 50 years (1947-97), the paper is confined to major substantive issues of the law arising in custody and guardianship disputes and the approach and consideration adopted by the judiciary in resolving such matters. In particular, the focus is on the courts’ attitude towards women who appear as litigants in custody and guardianship cases. The paper argues that statutory laws are not the only determinants in the final resolution of conflicts. The judiciary cannot be expected to operate in a vacuum neither can it steer clear of societal norms and political pressures. Cultural norms and religious rules are an equally - if not more - potent force. These influencing factors assume tremendous importance in awarding custody and guardianship of minors to women as they reflect the status of women both in the eyes of the law and society.

Introduction

In Pakistan the main law governing custody and guardianship of minors is the Guardians and Wards Act 1890 (Act VIII of 1890). This Act keeps in view the personal law applicable according to the individual’s religious conviction. Minors are subject to their father’s personal law. In guardianship and custody cases, certain constitutional provisions are invoked such as, for example, the writ jurisdiction of the High Courts under Article 199 of the Constitution of Pakistan. Section 491 of the Criminal Procedure Code (Cr.P.C.) is invoked in situations where the minor is held forcibly and proceedings under this section are supposed to restore immediate interim custody to the mother. In some cases, the West Pakistan Family Courts Act 1964 (Act XXXV of 1964) and the West Pakistan Family Court Rules 1964 have also been invoked.

Case law from 1992-97 has been updated by Nausheen Ahmad with the assistance of Natasha Faruque.
In adjudicating such cases, the courts apply both codified and uncodified Muslim personal law (with all its variations) as well as statutory law, the Guardians and Wards Act 1890 (Act VIII of 1890). Consequently, there is more room and discretion available to judges to put their own construction on the existing principles. During the course of this study it became clear that the superior courts in Pakistan have developed and even modified the traditional Islamic law of custody and guardianship according to the circumstances of a particular case. This 'liberty' has especially been taken in the absence of an express Qur'anic text on the subject or where the different schools of thought in Islamic jurisprudence take divergent views on an issue. The Sunni Hanafi school of thought, for instance, entitles the mother to the custody of her minor daughter until the girl attains puberty. But, under Shafei law, the interpretation has been that a mother is entitled to the custody of her daughter until the girl is married, therefore, even after the girl has attained puberty.

As we are concerned with cases where at least one party is Muslim it would be pertinent to state, briefly, the principles of Islamic law on custody and guardianship that are recognized and enforced by the courts in Pakistan. Islamic Sharia divides guardians into three classes of guardians for the management and preservation of a minor's property; guardians for hizanat or custody; guardians for marriage (Mokul 79: 17-37). With respect to the last category, Islamic law recognises the validity of a minor's marriage only if contracted by the guardian but, in Pakistan, statutory law allows the minor to repudiate this marriage on reaching adulthood if the marriage has not been consummated.

The Guardians and Wards Act 1890 regulates the grant of custody and appointment of guardians of minors keeping in view the personal law to which the minor is subject. Guardians under this law are classified in the following manner: natural guardians; testamentary guardians; guardians appointed under the Guardians and Wards Act 1890 by a district court; guardians appointed under the Guardians and Wards act 1890 by a High Court in exercise of its inherent jurisdiction.

Hizanat or custody is described in the Hedaya as the care of infant children (Hamilton 57: 138). The courts have further defined custody as actual or constructive possession for the purpose of protection.
Khan vs. Gul Ferosha 1972). Under the principles of Sunni Hanafi law, a mother is entitled to the custody of her male child until he attains the age of seven years and a female child until she attains puberty after which custody reverts to the father. Under Shia law, however, the mother is entitled to the custody of a male child until he attains the age of two years and of a female child until she attains seven years of age (Ladli vs. Muhammad 1887).

If, for the reasons discussed later, the mother is disqualified for custody then the following relations become entitled to the minor’s custody: mother’s mother, how high so ever; father’s mother, how high so ever; sister; uterine sister; consanguine sister; sister’s daughter; uterine sister’s daughter; consanguine sister’s daughter; maternal-aunt, in like order as sisters; and paternal-aunt, in like order as sisters (Mannan 91:48).

In default of the mother and other female relations, the custody of the minor belongs to certain male relations including the father, paternal grandfather, brother, cosanguine brother, brother’s son, father’s brother, son of father’s brother and son of father’s cosanguine brother. However a male relative is not awarded the custody of an unmarried girl whom he can lawfully marry (Hamilton 57:138-139; Baillie 65:437). If there are no female or male relations, the court appoints an appropriate person to take custody of the minor (Mannan 91:492).

There is consensus amongst Muslim jurists regarding the circumstances in which a mother or other female relative loses her right to custody of a minor (Mannan 91:489-490; Hamilton 57:138-139; Baillie 65: 435-436). The mother stands disqualified on her remarriage to a man not related to the child within the prohibited degree. This rule is more stringently enforced where the custody of a female is in question. The right to custody revives, however, on the dissolution of the subsequent marriage either by death or divorce. The mother also loses the right to the custody of her child/children if she resides at a distance from her husband’s place of residence, during the subsistence of her marriage (Mannan 91:489-491).

Two more factors are taken into account when disqualifying a mother’s right to custody: if she is believed by the court to be leading an ‘immoral’ life, as where she is a prostitute, and/or if she neglects to
take proper care of the child (Mannan 91). The 'proper care' of a child is a relative term and courts are doing away with stereotypical allegations and images attributed to women. In Shaireen Abdullah vs Mehmood Akhtar (1993), the court held that the right of custody of minors belongs to the mother and nothing can deprive her of this right except for her own behaviour. One does not find these rules for disqualification applicable to the father or other male relatives in any of the published works on Muslim jurisprudence. Yet our analysis of reported case law on the subject reveals that courts have taken factors such as remarriage of the father as a material point to merit serious consideration when awarding custody of minors.

Another important rule on which there is apparent consensus among major commentators of Muslim law is that, in drawing up a list of relatives to be awarded preferential right to the custody of a minor, the mother and other female relations gain precedence over the father and other male relations (Mannan 91:488).

A guardian has been defined as "any person who has de facto or de jure care of the person and/or property of a minor" in Section 4(2) of the Guardians and Wards Act 1890. Broadly speaking, the terms custody and guardianship seem to have similar connotations, but it is often argued that guardianship is the superior right and will always include custody or hizanat (Mannan 91:485-486). Guardianship denotes a legal relationship and custody is always subservient to it. Courts have also specified that the mother who has custody of a minor does not have the authority to dispose of the minor's property. In Mst. Abdara vs. Salim Khan (1992), the court held the sale of the minor's property by her mother as void since it observed that "according to Muhammadan law the mother of the minor is not a de jure but a de facto guardian and thus has no authority of full disposition of the minor's property". Muslim law categorically asserts that custody may belong to the mother at a particular point in time, yet only the father is a child's 'natural' guardian. Hence, a mother may have immediate custody of the minor but the child is considered to be in the constructive possession of the legal guardian, primarily the father. It follows therefore that custody of a minor is not a condition precedent to acquiring the status of a guardian. Nevertheless, under the Guardians and Wards Act, Section 4(2), the term 'guardian' has been given a broad definition and even a
mother who only has custody of her child is its guardian. This interpretation of the term guardian as including a person who has custody of the minor was upheld in *Naiz Bi vs Fazal Ellahi* (1953).

From the above discussion, it is evident that no single meaning has been placed on these two key words. Neither have any clearly defined parameters been drawn to determine the nature and extent of the privileges inherent in the persons awarded either custody or guardianship of a minor. Analysis of case law as well as commentaries on the Guardians and Wards Act 1890 fail to make the issue any clearer and the words 'guardian' and 'custody' have been used interchangeably. The only inference we have been able to draw is that the word guardian is mostly used when referring to the legal guardian while custody is taken to refer to the mother or any other female having physical possession of the minor.

The Guardians and Wards Act tries to codify the often divergent principles of different schools of Islamic thought or *fiqh*. The established view is that "where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act 1890, the latter will prevail over the former," (Mannan 91:484). The lack of clarity and uniformity in Muslim personal law itself has given the courts room to manoeuvre. In fact, working under the broad framework of the principle that "the welfare of the minor is always of paramount consideration," courts in Pakistan have succeeded in making inroads into traditional Islamic law. For instance in 1962, in *Munnawar Jan vs M. Afsar Khan*, it was held that although under Muslim law there is a presumption that the welfare of the minor lies in living with the party entitled to *hizanat*, this can be rebutted. Similarly, in *Zohra Begum vs Latif Ahmed Munnawer* (1965), the court stated:

... [I]t would be permissible for courts to differ from the rule of *hizanat* stated in the text books on Muslim law for there is no Qur'anic or traditional text on the point. Courts which have taken the place of *qazis* can, therefore, come to the conclusions by the process of *ijithad* [logical deduction on a legal or theological question] which, according to Imam-al-Shafei is included in the doctrine of *qiyas* [analogical reasoning with regard to the Qur'an, sayings of
the prophet and the unanimous consent of the learned). It has been mentioned earlier that the rule propounded in different text books on the subject of hizanat is not uniform. It would therefore be permissible to depart from the rule stated therein, if on the facts of a given case, its application is against the welfare of the minor. I am fortified in this view by the instance in which a qazi finding hardship in the application of a rule of law to which the parties belonged sent the case to the qazi of another school of law which took a liberal view of the matter.\textsuperscript{13}

Thus, although the father is considered the 'natural' and legal guardian of the child under traditional Islamic law, Pakistani courts prefer to decide each case on its merits making the welfare of the minor their prime consideration. Moreover, custody does not automatically shift to the father once the children reach an age where the mother is no longer entitled to their custody under the personal law applicable to her or the child. The father - or anyone else - wanting custody, would have to file a case in the Guardians Court.

Case Law

Having looked at reported case law of the superior courts in Pakistan, our analysis is therefore limited to those cases that have 'made' it to these forums. In reported case law, the bulk of custody and guardianship litigation falls under the following categories: cases in which custody has been granted to the mother; cases in which custody has been granted to the father; cases where the remarriage of one or the other or both the parents is considered by the court as the determining factor in awarding custody; cases in which one of the parents claiming custody has changed his/her religion from Islam to another faith; cases concerning the custody of a minor married female.

An analysis of case law shows that the courts often deviate from the principles of traditional Muslim jurisprudence. In the majority of cases custody is awarded to the mother of the minor. Pakistani courts prefer to award custody to mothers on the assumption that they are best suited to look after their children even after they have crossed the age at which traditional Islamic law holds that the custody of a minor reverts
to the father. On the other hand, in a number of cases, the father was awarded custody of his minor child/children even though they were still within the age group where the mother is entitled to their custody. Once again, the judges were motivated more by considerations of the welfare of the minor than by the strict rules of Islamic law.

The most radical departure from traditional Islamic law was found in cases where the father had remarried. The courts have taken the remarriage of the father in consideration in deciding custody cases even though this has never been a disqualification for male relations under Islamic law. Interestingly, case law relating to the custody of a minor married female presented a number of interesting issues. Of particular interest is the interaction of statute law, customary practices and religious law. The discrepancy in the age of majority under Islamic law and that under the Majority Act (IX of 1875) was highlighted in cases studied.

When custody is awarded to the mother or father

The law currently applied to custody and guardianship cases in Pakistan accepts the father as the natural guardian of minors even when they are in their mother’s custody (Ghulam Fatima vs. Chanoomal (1967)). But in Feroze Begum vs. Muhammad Hussain (1983) it has been held that a natural or certified guardian may prove himself to be an undesirable person, unfit to fulfill the responsibility of guardianship and/or custody. In such cases, the mother is given custody and/or guardianship of children even beyond the period stipulated by traditional Islamic law because in the absence of a universally accepted rule of decision, the courts decide on the grounds of justice, equity and good conscience.

A cardinal principle of the patriarchal family is that the father is the ‘provider’. Thus, during the time when the minor is in the custody of the mother, the father is bound to meet the expenses incurred by the mother in bringing up the child/children (Abdul Ghani vs. Kalsoom Begum and Tassadiq Hussain Shah vs. Surraya Begum 1980). Failure to provide maintenance is considered a sign of abandonment of the father’s right to custody and may weaken his claim. Conversely, there are many cases where the courts have held that the fact that the father
did not pay maintenance until he was compelled to do so by the court
does not deprive him of the custody of his children. Where the mother
is in a stronger financial position and able to provide better education
and other facilities in life to her children than the father, the court may
allow the child to remain in her custody. On the other hand, lack of
financial resources has been deemed irrelevant in determining
suitability or otherwise of a mother for the custody of her child.

According to Muslim jurisprudence, a mother has preferential right to
the custody of her male child until he is seven years old and of her
female child until she has attained puberty, to the exclusion of the
father or any other relative. This right is subject to a number of
provisos discussed earlier. But even when the child is in the mother’s
custody, the father remains his/her legal guardian and the child is
considered to be under his supervision. *Imambandi vs Mutsaddi* (1918)
is the leading case in the area of custody and guardianship and is still
relied upon by Pakistani courts. Technically, once a girl reaches
puberty and a boy is seven years old, both custody and guardianship
revert to the father.

Occasionally, fathers are given custody of their children at a time when
normally the mother would be so entitled. The main reasons cited for
such a premature transfer of custody rights to the father are: the
remarriage of mother to a stranger, and delay on the part of the
mother in claiming custody of her children. Although in *Mst. Sajidah
Parveen vs. Ubaidullah Khan* (1993), the court while awarding custody
to the mother noted that “no mother would voluntarily abandon her
child if she left her husband’s house... it, therefore, can be inferred that
she was being ill-treated,” improper care and/or negligence towards
the child’s welfare, and where it is proved that the mother is leading an
immoral life are two more factors that have been taken into account
when disqualifying a mother’s right to custody. All the above are
questions of fact that have to be substantiated by evidence and only on
conclusive proof do the courts agree to award custody of a minor of
tender years to a person other than its mother.
Implications of the remarriage of a parent

According to the principles of traditional Muslim jurisprudence, a female, including the mother, who is otherwise entitled to the custody of a child loses this right if she marries a person not related to the child within the prohibited degrees. But this right revives on dissolution of the marriage by death or divorce. The rationale behind this rule is that if a woman marries a man not related closely to the child, he/she may not be treated kindly by the stepfather. On the other hand it is presumed that if the mother marries the child’s paternal uncle, for instance, the child is likely to fare better. Some jurists argue that this rule must be strictly adhered to where the minor is a female (Hamilton 57:138). Courts in Pakistan have never rigidly followed this principle and opinion seems almost evenly divided as to whether a mother loses her preferential right to custody or hisanat on remarriage. One reason for this ambivalence may be the lack of unanimity on the subject among scholars of Muslim jurisprudence and the absence of a clear Qur’anic or traditional text on the issue (Hamilton 57:139).

Courts therefore take as their guiding principle ‘the welfare of the minor’. The opinion of the court in Salima Bibi vs. Muhammad Khan (1987) seems to sum up the dominant factor in deciding custody cases. The court held that “the paramount consideration in the matter of custody of minors is their welfare and not the rights of parents.”27 The courts have also held that a mother’s remarriage does not necessarily bar her from obtaining custody of her minor child, all the circumstances of the case must be considered.28 In Faiz Bakhsh vs. Sakina it was held:

[The] Court presumes that welfare of minor lies in custody with guardian recognized by personal law .... If guardian under personal law is not found to suffer from any serious disqualification, then the court should invariably give custody to him......rule that the mother loses right of hisanat on marrying a stranger is to be enforced with absolute jealousy when female child is approaching age of puberty......custody of female minor to be restored to father if he does not suffer serious disqualification.29
In *Faiz Elahi vs. District Judge* (1989), the court while upholding the
decision to grant custody to the father emphasised that the mother’s remarriage was not the deciding factor in their decision:

...Appellate Court below had devotedly considered question of welfare of minor and applied its conscious mind to relevant evidence and circumstances appearing in the case and had given more than one cogent reason in support of its conclusion that welfare of minor lay in his being with the father and that mother had not been deprived custody of minor on the sole ground that she had contracted a marriage with a stranger.\(^{30}\)

In another case, the court ruled that if other relations are not better qualified to look after the minor than the mother, she will not lose her right to custody on account of remarriage.\(^{31}\) However, some judges do take a stricter view, especially where the child is female. In *Ghulam Janat vs. Bahar Shah* (1952)\(^{32}\) the court stated that under Muslim law the mother is disqualified from guardianship of her minor daughter if she is married to a man not related to the minor within the prohibited degree. Another interesting development in the factors affecting custody and/or guardianship of minors is that the remarriage of the father has become an important determining element. In some cases, courts have refused to grant custody/guardianship where a father has contracted a subsequent marriage. Although in some cases the father is awarded custody despite his remarriage, the very fact that it is raised as a material factor capable of having a bearing on the outcome of the case is, in itself, a departure from traditional Muslim jurisprudence. In *Muhammad Zaman vs District Judge* (1983), for example, the mother of minor daughters was granted custody because she had chosen to remain single while their father had contracted another marriage. The father also had children from the subsequent union. The court held that a father or a stepmother could not substitute the maternal love and affection that a mother has for her child.\(^ {33}\) In a similar case, a father working in Saudi Arabia applied for custody of his minor children. He had remarried after divorcing the mother of his children. The court was of the opinion that if the minors were handed over to the father, he would himself not be available to look after them. They were likely to
live with their stepmother and would be “at her mercy”. Hence, in the interest of the minors, the mother was granted custody.\textsuperscript{34}

The period of time which lapses between the date on which the father becomes entitled to custody and the date when he actually files the claim is also an important factor in deciding custody cases, as Pakistani courts tend to rely on the English doctrine of unreasonable delay (\textit{laches}).\textsuperscript{35} Thus, where the father failed to claim custody within a reasonable time after the mother’s remarriage, he was presumed to have abandoned his right to custody of the infants.\textsuperscript{36} The court, however, held that as the mother stood disqualified due to her marriage to a stranger, custody of the female minors in this particular case was therefore awarded to the maternal grandmother.

It is clear from the above that in their decisions the courts are guided primarily by the welfare of the minor. In \textit{Mehmood Ayyaz vs. National District Judge, Chakwal} (1992), for instance, the judge overturned a decision that granted custody of a 15-year old daughter to the mother and the 11-year old son to the father and awarded custody of both to the father. The judge stated that the opinion of the children was not a deciding factor but was certainly taken into account: the daughter implored the court to let her stay with her father as she said her mother was hindering her education.\textsuperscript{37} This further shows that the courts take all circumstances into consideration and decisions are taken on the basis of individual cases. Also, by awarding custody of a female child approaching puberty to live in a house where the stepfather or husband of the female appointed as guardians is not a \textit{mehram} (i.e. someone from the opposite sex within the prohibited degrees of marriage), courts have certainly moved beyond the defined parameters of traditional Muslim jurisprudence.

The influence of the religion of the parents/relatives of the minor

According to Muslim jurisprudence as outlined in \textit{Fatawa-i-Alamgiri},\textsuperscript{38} apostasy by the mother is a ground for disqualifying her from \textit{hizanat} of her child/ren because a woman who relinquishes the Muslim faith has to be kept in prison till she returns to Islam and is therefore incapable of looking after the minor. This view does not enjoy universal acceptance by all schools of thought. The \textit{Hedaya} states that
it is permissible for a non-Muslim mother to be awarded custody at least for the initial years (Hamilton 57:139). Mullah’s *Mohamedan Law* too does not mention it as a ground for disqualification for the mother’s right to custody (Mannan 91:489). The concept underwent a change during British colonial rule in the subcontinent when many ‘natives’ were converting to Christianity or other religions from their former faiths. The Caste Disabilities Removal Act (XXI of 1850) and the Freedom of Religion Acts were introduced to overcome problems for new converts. These laws also came to the rescue of persons affected by their personal law declaring that the right of a guardian to give a minor in marriage is lost by his apostasy from Islam (Hamilton 57:392). Reported case law on the subject is not consistent, however, particularly in the pre-independence period. In the case of *Mihin Bibi* (1874), it was held that a Muslim who had converted to Judaism was disqualified to get his daughter married by reason of his apostasy, but in *Gul Mohammad vs Mst. Wazir* (1901), the Chief Court of the Punjab held that a Muslim father did not lose this right by virtue of his conversion to Christianity and such cases were decided mainly on the grounds of the welfare of the minor.

These variations notwithstanding, a difference in religion between the minor and the proposed guardian is given prime importance by the courts in Pakistan. A number of rules are kept in mind. First, that the minor is subject to the same personal law as his/her father and follows the same religion. Therefore, a child born a Muslim remains a Muslim unless he/she renounces the Muslim faith (on attaining puberty); this fact being irrespective of the religion of the mother. Second, only a Muslim is considered to be a competent guardian for a Muslim child (Hamilton 57:139) and a non-Muslim stands disqualified even if she is the minor’s mother. Third, the courts emphasise the presence of an Islamic atmosphere and the mere fact that the mother is a Muslim is not considered sufficient for the granting of custody.

Insofar as the post-independence period is concerned, two additional factors seem to influence the outcome of custody/guardianship cases where the religion of the parents was an issue. First, no matter where the welfare of a minor otherwise lies, the courts will jealously guard the prerogative of the father to have the minor profess his religion regardless of what that may be. In *Christine Brass vs. Dr. Javed*
Iqbal, the court held that the father had the right to determine the religion of his infant children and this right subsisted even after his death. A study of case law shows that this rule is applied invariably to all cases where the proposed guardian follows a religion different to that of the father. Thus in Ghulam Fatima vs. Chanoomol (1967), where of a Hindu couple, the wife converted to Islam after the death of her husband, the court held that welfare of the minor demanded that custody in these circumstances be given to the Hindu uncle and not to the Muslim mother. Similarly, in another case, the minor was the offspring of a Muslim father and a Jewish mother. The court ruled that it would be improper to hand over custody to the mother who was of Indian nationality and residing in India. In this particular case the mother’s residence in India (always seen as a potential enemy) seems to have weakened the mother’s case. In Atia Warris vs. Sultan Ahmed Khan (1959) the court followed the same reasoning. The facts were as follows:

On the death of her husband, the mother of the minor (appellant) who was primarily a Christian but converted to the Muslim faith after her marriage with the deceased, left her parents-in-law and went to live with her Christian parents. Though the mother was still a Muslim when she went to live with her parents, the court held that she was not likely to bring up the child according to the Muslim faith. Custody was therefore granted to the paternal aunt to ensure that the child was brought up in the religion of his father.

A further trend revealed by case law is that where non-Muslim foreign mothers claim custody of their children born of Muslim Pakistani men, courts will favour the fathers. The grounds given are the ‘unsuitability’ of the foreign social environment as well as a lack of opportunity for practicing the religion of their father. The courts do not deny the right of mothers to custody of their minor children but often make this conditional upon their remaining within the jurisdiction of the Pakistani courts. Interestingly, where the mother is a Muslim but a foreign national, the court has ruled that she would be entitled to the custody of her infant child with her and be entitled to return to her native city (provided the marriage had taken place there) however distant it might be from the residence of the father. In Hina Jilani vs.
Sohail Butt (1995), the judge specifically stated that a foreign non-Muslim mother is not usually granted custody because of the difference in religion but this was not at issue here. Both the Pakistani father and the Uzbek mother were Muslims and thus subject to Muslim law which granted custody of a minor to the mother. The fact that the mother was from Uzbekistan, a Muslim country with friendly ties with Pakistan, and that the Uzbekistan Consular had given written assurance that the father would be permitted to see the child whenever he wished with the Embassy facilitating these meetings, were also important considerations in giving custody of the child to the mother.

The custody of a child-wife

Cases regarding the custody of a child-wife comprise a negligible proportion of reported case law on custody and guardianship of minors. There are several possible reasons for this. The first, and perhaps overly optimistic, inference that may be drawn is that there has been a decline in the number of child marriages in Pakistan. But this conclusion may be totally misleading; reported case law reveals that custody of a child-wife is generally sought by the parent(s) of the minor girl when she has contracted a marriage against her family’s wishes. In Dilshad Akhtar vs. the State (1996), an FIR lodged against the couple who had lawfully married was quashed by the court as it was considered an unnecessary cause of harassment. The judge accepted the radiological proof that the girl was not a minor over the school certificate produced by the state. In Naziran Bibi vs. SHO (1996), the court also stopped police proceedings against a woman petitioner who had married of her own choice. The police were said to be harassing the couple and interfering in their marital life. The conflict arising between statutory law and Muslim personal law as to what constitutes the age of majority for girls is another reason that has made it easier for parents to initiate litigation of this nature.

Traditional Muslim law states that “a boy or a girl who has not attained puberty is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.” (Mannan 91:380-381). Puberty is thus considered the sole legal determinant of adulthood regardless of how early this may occur. In the absence of evidence to the contrary, a Muslim girl is presumed to have attained
puberty at the age of fifteen. A number of statutes affect the privilege
given to guardians under Muslim law. The first is The Majority Act
1875 (Act IX of 1875) which fixes eighteen years as the age of majority
for citizens of Pakistan but neutralizes its impact by saying “the
capacity of any person to act in the following matters (namely),
marrige, dower, divorce and adoption”.\textsuperscript{51} Thus, for all practical
purposes, the provisions of the Majority Act 1875 do not change
Muslim personal law regarding the age of majority. Secondly, the Child
Marriage Restraint Act 1929 (Act IX of 1929) makes it an offence to
marry off a female of less than sixteen years of age and a boy under
eighteen years of age. But, as the title of this law suggests, it is meant
simply as a restraint and a marriage of a minor solemnized in
contravention of this Act is not invalid.\textsuperscript{52} Thirdly, the Muslim Family
Laws Ordinance 1961 (MFLO) requires all marriages of Pakistani
citizens to be registered; the printed form of the \textit{nikahnama}, or
marriage contract, contains a column stating the age of the bride and
bridegroom. But here too, there is a provision for a \textit{vaqil} or
representative of either or both of the parties to act on their behalf. This
means that if a bride is a minor she can be validly contracted in
marriage by her guardian.

It appears, therefore, that child marriages are quite acceptable in our
society and statutory laws aiming to restrain such practices have, at the
most, initiated a gradual process of change. In most cases that reach the
courts there is a basic disagreement between the girl and her family as
to her choice of spouse. In a number of cases, the courts have accepted
the minor married female’s statement that she was unhappily married
and did not want to live with her husband allowing her to exercise the
Option of Puberty.\textsuperscript{53} The trend of the courts appears to be to grant
custody of a minor married female to the person who would otherwise
be entitled to have custody were she not married. Once she comes of
age, however, custody belongs to her husband. Another factor that the
courts consider is the opinion of the minor girl.

The courts have tried to draw a distinction between the ‘age of puberty’
and ‘age of discretion’. In \textit{Sajjad Hussain vs Superintendent Darul
Aman Multan} (1981), it was held that a female under the age of 18 (age
of discretion) cannot be set at liberty to go wherever she pleases -
despite the fact that the personal law to which she is subject recognises
her as an adult and capable of making an independent decision. The court held that her guardian, whoever he or she may be, is entitled to keep her in his/her custody till such time as she attains the age of 18 years. By arguing that the age of puberty and the age of discretion are two different stages of maturity that cannot be equated, the courts have once again moved beyond the rules of traditional Muslim law. Their purpose in doing so is dubious, however, and seeks to extend patriarchal control over women rather than recognising them as independent beings capable of making their own decisions. It is interesting to note that where the application of punishment for 'Islamic' crimes is concerned, as for example under the Zina (Enforcement of Hudood) Ordinance 1979 which criminalises sexual intercourse outside marriage, the age at which women are liable to harsh penalties such as stoning to death and one hundred lashes remains the age of puberty.

Conclusion

The attitude of the superior courts towards women claiming custody or guardianship of a minor reflects a clearly discernible shift away from the rules of traditional Islamic law. In deciding these cases, the welfare of the child is the overriding consideration and even unequivocal rules of Islamic law are disregarded in the pursuit of this aim. For instance, Islamic law clearly provides that if a mother remarries she is disqualified from obtaining custody of minor children; the father on the other hand is not disqualified if he remarries. The courts, however, often disregard these rules. Of the 37 cases reviewed on this subject, eighteen women were awarded custody of their minor children despite their remarriage. While the mother's remarriage is not necessarily a disqualification, the father's remarriage has been included as a factor to be considered in deciding which parent should have custody of the minor.

Where the mother or any other relative professing a religion other than that of the father claims custody of the minor, courts have taken the view that the welfare of the child can best be served only under the supervision of a co-religionist. This appears to be the only aspect of traditional law stringently adhered to.
In discourses on Islamic law, a distinction is drawn between custody and guardianship. Custody of minors (or guardianship of the person of a minor) is conceded to the mother until a certain age, whereas the father is termed as the 'natural' guardian of the child. The superior courts of Pakistan, however, apply the term interchangeably. The general view is that although a mother can be the guardian of the person of the minor, she cannot be called his/her legal guardian for marriage. Pakistani courts have generally employed the term custody in their judgments/orders even where they mean guardianship and we fail to understand whether this has been done inadvertently or whether the courts in their wisdom have accorded the status of guardian to the mother and female relatives of a minor. All case law studied so far discusses custody and guardianship as if they were one single concept. Further research in this area is needed, however. One does come across cases where, in the absence or disqualification of the father or other male guardians, the mother is accorded the status of guardian, but such cases are the exception rather than the rule. On the other hand, calculating on a purely statistical or an empirical level, cases where the mother has been given preference in custody cases by far outnumber cases where the father or other male relatives have been awarded custody of minors. The basic reason for favouring the mother is the presumption on the part of the court that the welfare of the minor, almost invariably, lies with the mother. Hence the occurrence of statements to the effect that there can be no substitute for maternal love and affection.

Finally, it has to be mentioned that although courts do invoke rules of personal law, it is primarily where acting on these rules would be in the interest of the minor. Wherever it is evident to the court that the welfare of the minor will be prejudiced by following a particular rule of law, the judges look elsewhere for guidance. The English concept of justice, equity, and good conscience has been retained as an underlying guiding principle.
Endnotes

1. Some provisions of Muslim personal law have been incorporated in statutes, but there is no one consolidated code covering all areas of personal law. Neither would one uniform code be possible primarily due to the divergent views of the various schools of thought.

2. Mokul also cites extensively from important works on Muslim Law such as Fatawa-i-Alamgiri, Hedaya, Baillie's Digest, Fatawa-i- Kazee Khan etc.

3. Section 3 of the Guardians and Wards Act 1890.


5. Ladli vs. Muhammad (1887) 14 Cal.615.

6. The prohibited degrees are described in Ali and Arif Marriage Dower, Divorce this volume.


11. Mohammad Bahir vs Ghulam Fatima PLD 1953 Lah. 73, 78-79.


21. For a detailed exposition see Mussarat Jabeen vs Khalid Nawab 1990 PCrLJ 686.

22. Imambandi vs Mut Saddi (1918) 45 AIR, 73.


33. Muhammad Zaman vs District Judge 1983 CLC 3165.

34. Abdul Razzak vs Pari Jan, 1989 MLD 1285.

35. For a discussion of the technical meaning of the term laches, see Brunyate. (1932) Limitations of Actions in Equity, 188.
References


The Law of Inheritance and Reported Case Law Relating to Women

Kamran Arif and Shaheen Sardar Ali

Abstract: This paper discusses the trends of the superior courts on succession and inheritance rights available to women in Pakistan. While analysing some relevant landmark judgments from independence to 1992, the changes and development in the law regarding succession and inheritance over a much longer period of time have been traced. The analysis of case law has shown that although courts have taken a sympathetic view of women’s right of inheritance, actual cases that have come to the courts are a bare minimum reflecting both a reluctance to approach courts and the difficulties women face when demanding this right.

Legislation on Inheritance and Succession

The area of succession and inheritance laws is one that has seen the dominance of custom over Muslim personal law mainly to the detriment of women’s rights. Although established Muslim jurisprudence gives women a share in inheritance, customary practices which deny this right to women were the overriding basis for deciding inheritance cases until the 1930s. Despite centuries of Muslim rule in the Indian subcontinent, local Muslim communities followed local customs and usages in matters of succession and inheritance in which women is rights were either extremely limited or non-existent (see Arif, this volume).

As the nationalist movement started to take hold at the turn of the twentieth century, with the formation of the All India Muslim League (AIML) Indian politics saw a mobilisation around the marker of a Muslim identity. One means of promoting the idea of Muslims being one was to be able to prove they were governed by the same set of laws. To be governed by customary laws as a set of communities or nations following different local usages and customs, went counter to the desire of the AIML for a unified ummah. Thus began the push for
various Shariat Acts to replace customary laws. On attaining provincial autonomy in 1935, the NWFP Legislative Assembly enacted the NWFP, Muslim Personal Law (Shariat) Application Act 1935. It became the first in a series of such enactments which intended to replace custom with Muslim personal law in certain specified areas for Muslims.

The Act included in its ambit agricultural land and “charities and charitable institutions and charitable and religious endowments.” Section 2 of the Act laid down that for Muslims, Muslim personal law shall be the rule of decision in cases relating to, amongst other matters, succession (whether testate or intestate) and special property of females. The Act was silent about limited estates held by Muslim females. The matter came before the Judicial Commissioner who held that if such an interest was acquired before the Act came into force, it was not affected and all heirs in existence at the time of the termination of the estate were entitled to succeed.¹ In 1950, Section 4 was added by the NWFP Act XI of 1950 which provided that on termination of such limited interest, the property would devolve on those entitled to inherit at the time of the death of the last full owner. Thus limited interests were recognised and protected under the Act, first through a judicial decision and later through a legislative amendment.

However, the main problem in the interpretation of the Act was the question of when Shariat should replace custom as the rule of decision. The Act did not contain a retrospectivity clause, but provided that when questions relating to succession arise in court, the rule of decision shall be Muslim personal law whether the succession opened before or after the Act came into force. This led to a lot of confusion and conflicting judgments.² Subsequently, after Pakistan became independent, the Act was further amended in 1953, to provide that in questions relating to succession, the rule of decision shall be Muslim personal law as if it had been applicable at the time of such death. The Act thus had a retrospective effect. The erstwhile West Pakistan High Court held that cases would be governed by Muslim personal law as they arise since the legislature had never intended to reopen past transactions.³

In 1937, the Central Legislature enacted the Muslim Personal Law (Shariat) Application Act (XXVI of 1937) which extended the
application of Muslim Personal Law to Muslims all over India except for NWFP which already a similar Act of its own. However, ‘questions relating to agricultural land’ and ‘charities and charitable institutions and charitable and religious endowments’ were expressly exempted from the purview of this Act. Questions relating to testate succession were exempted by inference since the Act was made applicable only to intestate succession. The reason for these exceptions, given at that time, were that these subjects were within the jurisdiction of the provincial legislature.

Section 2 of the Act reads:

2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including, talaq, ila, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts, trust and trust properties, and waqf (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Shariat).

Since the Act was not retrospective in its operation, it did not disturb settled transactions or dispossess persons who had lawfully obtained possession in the past. Thus persons holding an interest under custom before the passage of the Act continued to hold it under that custom, with all the limitations imposed upon it by custom. Only when succession reopened did the Act become applicable. However, by making a declaration under Section 3 of the Act, a person could make Muslim personal law apply to him immediately. This was provided to offset an earlier 1934 judgment of the Lahore High Court, Sardar Bibi vs. Haq Nawaz Khan, where it was held that it was not open to an individual whose family or tribe had for generations followed custom, to suddenly give up custom to the detriment of those who would be entitled to it under the law it was subject to, by merely making a declaration to that effect.⁴
This Act repealed all the previous Acts that gave precedence to custom over Muslim personal law, to the extent of their inconsistency with its provisions. An improvement on the NWFP Shariat Act was that its substantive provisions were not made subject to alteration or abolition by other legislation.

Landed interests dominated the West Punjab Legislature even after independence, and resisted the pressure to adopt Muslim laws of inheritance giving women inheritance rights in agricultural land. The earliest post-independence record of women's agitation is in fact to be found in the legislature on the issue of women's inheritance rights. The first legislature of Pakistan had two women representatives, Jahanara Shahnawaz and Shaista Ikramullah. In 1948, one of the first attempts was made to secure economic rights for women during the Budget session debate. A report on the Shariat Bill by a select committee was to be presented to the House in session. At the last minute, however, the Bill was taken off the agenda (Mumtaz & Shaheed 87:55). It was not until women protested and hundreds of them demonstrated shouting slogans outside the Assembly building that the West Punjab Muslim Personal Law (Shariat) Application Act (IX of) 1948 was passed, (Jalal 91:87) making Muslim personal law applicable throughout West Punjab even to agricultural land. Section 3 of this Act exempted limited estates held by Muslim females under custom till the termination of the estate. Again, the Act had no retrospective operation and customary law was retained in cases of persons already holding interests under custom till the reopening of succession. Initially, the Act did not apply to testate succession but it was later amended.

Following the passage of this Act, the Sindh Legislature amended the Muslim Personal Law (Shariat) Application Act 1937 in its application to the Province of Sindh by the Muslim Personal Law (Shariat) Application (Sindh Amendment) Act, 1950 (XXII of 1950). The amendment extended Shariat even to ‘questions relating to agricultural land’ as well as ‘charities and charitable institutions and charitable and religious endowments’ all of which were specially exempted in the Act of 1937.

With the passage of the Muslim Family Laws Ordinance in 1961 children of a predeceased son or daughter of the prepositus, living at
the time succession opens, became entitled to inherit what their parents would have received had they been alive. This provision caused much furore since it was held to be in direct conflict with traditional Hanafi Law (see Mumtaz this volume).

In 1962, the West Pakistan Muslim Personal Law (Shariat) Application Act (V of 1962) amended and consolidated the various Muslim Personal Law Application Acts applicable to the then province of West Pakistan.⁵

Sec 2 of the Act reads:

2. Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages, or institutions, including waqf, trust and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be Muslim Personal Law (Shariat) in cases where the parties are Muslims.

This meant that substantive provisions of Section 2 of the Act were now subject to provisions of other enactments for the time being in force. This was obviously done to protect the Muslim Family Laws Ordinance 1961.

Laws of Inheritance:

Inheritance is the involuntary devolution of property by which the estate of the deceased person is transferred to the heirs as his or her successors (Rehman 82: 402). The Islamic Law of inheritance as given in the Qur’an and laid down in effect by the Prophet was that ‘the blood relationship is cause of title to succession’. (Ghulam Ali vs. Ghulam Sarvar Naqvi⁶)

Under Muslim law, inheritance immediately opens on the death of the ancestor (prepositus),⁷ and the devolution of property takes place immediately without any other intervention.⁸ The ‘heritable property’
includes properties of all kinds and there is no distinction between movable and immovable or ancestral and self-acquired property (Mulla 91). However, heritable property is required to be free from encumbrances. Therefore, funeral expenses, debts (which includes dower debt i.e. dower payable to the widow of the deceased) and will, if any, are to be satisfied before the heritable property is divided among the heirs (for details see Annex).

Prior to the Shariat Acts, the courts decided cases according to local customs, provided that the custom was “not contrary to justice, equity and good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority.”9 Personal law was applied only in the absence of a local custom or usage.

We begin the analysis of case law from the year 1947, a period when the onslaught on customary laws had already begun. With the creation of Pakistan, however, the force behind the movement to replace customary laws with personal law weakened considerably and a complete transition could not take place until the early sixties. During this period, case law remained mostly fluid. Issues centered largely around which law (personal or customary) was governing the parties, rather than addressing controversies and innovations within the law. However, during this period, the courts did lean in favour of personal law (and hence for women’s right of inheritance) unless the existence of custom was proved beyond doubt.

In 1951, long before custom as a rule of law was abolished, the Federal Court in Fazal Dad vs. Mst Noor Nishan observed that in all cases an initial presumption arises that the parties are governed by their personal law and any person setting up a custom differing from and in derogation of personal law must establish that custom.10 This laid the foundations of case law favouring implementation of women’s succession and inheritance rights under personal law.

The law had hardly been settled when the Muslim Family Laws Ordinance 1961 (MFLO) was promulgated, radically changing the traditional Muslim law of inheritance by granting the right of succession to the children of a predeceased child.11 The MFLO was
readily followed, despite repeated observations by courts that it was a departure from the accepted Muslim law of inheritance.\textsuperscript{12}

Since the promulgation of the MFLO the courts have taken a very literal view of the provisions of Section 4. In numerous cases, the courts refused to extend the benefit of per stirpes share to the wife or husband of the predeceased child as they did not fall within the ambit of Section 4 of MFLO as discussed in \textit{Maqbool Begum vs. Taj Begum}.\textsuperscript{13} In \textit{Saeed Ahmed vs. Mahmood Ahmad}, the erstwhile West Pakistan High Court refused to extend the benefit of this section to a British Muslim as the provision was a departure from traditional Islamic law and was applicable to only Muslims who were citizens of Pakistan.\textsuperscript{14}

In wider interpretation of this section, Peshawar High Court in \textit{Abdul Gafoor vs. Anwar}, held that the female child of a predeceased father is entitled to inherit the entire estate that the father would have inherited if alive and not the share to which she would have been entitled under Islamic law.\textsuperscript{15}

During General Zia-ul-Haq’s Martial Law (1977-85), when the process of ‘Islamisation’ was initiated, the Shariat Bench of the Peshawar High Court held in \textit{Farishta vs. Federation of Pakistan} that a person must be alive to be able to inherit under Islamic law.\textsuperscript{16} Therefore it stated that Section 4 of the MFLO was against the injunctions of Islam and liable to be repealed. Interestingly, however, the Court felt inclined to favour the position that the children of a predeceased child should inherit the parents’ share and went on to suggest various means for relieving the distress of the children of a predeceased son or daughter under Islamic law. As reflected in case law on Section 4 of the MFLO, this provision of the law has always been a subject of controversy in legal as well as religious circles, as it is argued that it contravenes a clear Qur’anic injunction.

Case law was also found in instances relating to \textit{marz ul maut}. \textit{Marz ul maut} may be translated as terminal illness, a malady which induces an apprehension of death in the person suffering from it and which eventually results in death. (Mulla 91:90). Under Islamic law, the legal capacity of a person suffering from \textit{marz ul maut} is restricted in matters such as making gifts, pronouncing divorce upon his wife, making
acknowledgements of debts etc., primarily to protect the interests of prospective heirs. For instance, the practice of pronouncing divorce on the wife during terminal illness of the husband is usually to prevent the wife from getting her share in the husband’s property. Islamic law provides that although mutual rights of inheritance between husband and wife cease as soon as the divorce becomes irrevocable, if divorce is pronounced during the husband’s death illness, the wife’s right to inherit continues until the expiry of her iddat, unless she repudiates this right at her own request.

In the few cases of this nature that are reported, courts have consistently held that if a person suffering from a terminal illness divorces his wife under fear of death, such a wife is not deprived of her right of inheritance if the person dies during the period of iddat. This trend of the courts is a reiteration of the traditional Islamic law on the subject and is a welcome step towards the protection of women’s rights.

Various means are adopted to deprive female heirs of their share of inheritance by male heirs. These include producing relinquishment or gift deeds in favour of the brothers as well as the plea of money spent on behalf of the female heir. Following are some examples of how the courts have dealt with such situations.

In Ghulam Ali vs. Mst Ghulam Sarwar Nagvi (1990) in the back drop of brothers claiming the ‘ouster’ of their sister from the inherited property on the plea of adverse possession, in a landmark judgment the Supreme Court held that “brothers were required by law to protect the property of their sister if they came into possession of the land in any capacity” and that brothers could not claim adverse possession against their sister much less ouster. The Court after a lengthy comparison of women’s rights of inheritance under Islam with such rights under other religions and legal systems, reached the conclusion that Islam afforded the best protection to women’s rights of inheritance, and the scope of such rights was so large and their trust so strong that it was the duty of the courts to protect them.

In Seith Salam vs. Malik Mahmood Hasan (1989), the Supreme Court held that a sister could not be deprived of her share in inheritance on the plea of money spent by brothers on her behalf.
In Azhar Hussain Alvi vs. Khursheed Akhtar (1992), the Karachi High Court refused to accept a relinquishment deed observing that Islamic law affords special protection to Muslim females and that relinquishment deeds from inheritance executed by a female while she was living under the roof of her father, brother, husband or any other male relative had no value whatsoever and she could not be deprived of her property on the basis of such a deed.\textsuperscript{20}

In Ami Chand vs. Fajroo (1991) the Supreme Court struck down a gift deed allegedly executed by a man without a male issue in favour of his male relatives (challenged by the alleged donor himself).\textsuperscript{21} The court held that the donees had failed to explain why the alleged donor could have made a gift that deprived his own three daughters of their share. It was held that such a gift ran counter to the Islamic principles regarding protection of the interests of female relatives.

Courts have also repeatedly struck down, as in Sohab Kuli vs Balour Jan (1989) mutations depriving female heirs of their share of inheritance effected by ‘illiterate and backward womenfolk’ and changes in Revenue Records made by the male heirs in connivance with revenue officials.\textsuperscript{22}

Conclusion

At first glance, a perusal of Pakistani case law on inheritance and succession rights of women is very encouraging. From 1947 to date, we find that where a woman has approached the courts for the protection of her right to inherit, she has met with a very positive response. But a closer analysis of the various strands of case law raises some important questions. First of all, in comparison to other areas of family law, the quantum of cases raising issues of inheritance and succession rights for women are extremely low. For instance, of the over 700 cases that we initially found raising guardianship and custody issues in the superior courts, we took up for analysis about 265. Similarly, we came across more than a 1000 cases concerning substantive issues of dissolution of marriage, dower, maintenance, divorce, etc. On the other hand, one does not see more than a 100 reported cases covering succession and inheritance rights. There could be several reasons for this: that there are very few disputes in this area due to a religious compliance with the
law; given the countless obstacles and inhibitions that women face, they rarely make it to the courts to secure their rights; the pressure from both family and society to forego one’s inheritance is so compelling that women are simply unable to raise a voice and are forced to settle out of court. To determine the factors inhibiting litigation in this area and the level of influence of each would require an empirical study beyond the scope of this paper.

Despite the relief given, the tone of most judgments is one of condescension. Women are generally favoured because, they are perceived to be a ‘weaker section’ of society needing protection and not because it is their right as equal citizens.

While the tendency of the courts to reject relinquishment deeds executed by women signing away their inheritance to male relatives may appear to be a very positive trend, the theoretical premise on which these judgments are based are prone to long term defects in so far as promoting women’s rights are concerned. It is presumed that women are not adults and as such, incapable of taking important decisions. They are thus likely to be deceived and tricked out of their possessions by scheming men; hence the constant need for male protection. In the present socio-economic set-up, this protection is indeed required and the sensitivity of Pakistani courts to the problem is welcome. But the danger in this patronising attitude is that it may become the norm. This means that women run the risk of being permanently marginalised in matters dealing with wealth, both cash and kind, decisions which, as it is, are taken mostly by men. Rejecting relinquishment deeds etc., therefore, may only bring short term benefits leading to adverse long term effects for women by reinforcing the attitude that women are incapable of serious decision making.

With the Islamisation era came the assault on progressive laws such as the MFLO. Judgments especially favourable to women on the basis of ‘Islamic’ justice were also targeted. Chief Justice Afzal Zullah’s judgments are noteworthy in this regard and representative of the ongoing conflict. For instance, in Ghulam Ali vs. Ghulam Sarwar Naqvi (1990), the question was whether adverse entry and non-participation in the profits of the property would not amount to an ouster of the co-sharer.23 The issue had been adequately dealt with in
Mst. Sahib Jan Bibi and others vs. Wali Dad and others in 1961 where it was decided that female heirs are deemed to be in possession of their share of estate by succession as co-heirs even though their names were not entered in revenue records. But the court’s judgment consisted of a comparative discussion of various religious systems and the superiority that Islamic law enjoyed over them. In arriving at his decision, the Chief Justice, speaking for the court made a highly innovative interpretation of verse 4:4 of the Qur’an to prove that there was non-discrimination in Islam. This verse has to date been regarded as the main verse creating and establishing gender hierarchies and male superiority since it clearly states that men are the providers and maintainers of women. The judgment says that because they are providers and protectors, brothers can never hold their sisters’ share in adverse possession against them! This interpretation of verse 4:34 of the Qur’an may be a genuine attempt by the learned judge to promote women’s rights, but the fact is that it entrenches the view of many people that women are forever in need of supervision.

Departures from certain principles of traditional Islamic law of inheritance have also been made in some cases where the guiding force behind the decision has been “justice, equity and good conscience.” But these ad hoc measures do not remedy the situation. The classic example dating from 1964 is Beguman vs. Saroo. In this case a man killed his nephews in the hope that under Islamic law, his sons, as the nearest male agnates of his brother, would succeed to five twenty-fourths of the estate, whereas the widow and two daughters of the prepositus would inherit one-eighth and two-thirds respectively. The court refused to allow the nephews their share and awarded the entire property to the women. Again, one welcomes this equitable stand of the court. But an isolated judgment cannot be an effective deterrent against people scheming to eliminate male rivals and inherit to the exclusion of female heirs.

As in other areas of family law, the trends of the superior courts in succession and inheritance rights of women reflect the views of society. The courts do not feel the need to address themselves to the issue of acknowledging women as useful and responsible citizens; only the compulsion to ‘protect’ them as the ‘weaker sex’ and, in the process strengthen patriarchy itself.
Annex 1

Brief Outline of the Islamic Law of Inheritance

Hanafi law divides the heirs into the following three classes: sharers, residuaries or agnates and distant kindred (i.e. uterine relations). Sharers are those heirs whose shares have been specified in the Holy Qur’an (Qur’an Chapter IV: Verses 7, 11, 12, 176). They are twelve in number, of which four are male and eight female. According to Hanafi law the sharers and the shares are:

**father:** 1/6 if there is a child or child of a son, how low so ever (h.l.s)

**true grandfather:** 1/6 if there is no child or son of child h.l.s. and no father or nearer grand father, otherwise he inherits as residuary

**husband:** 1/2 if there is no child or child of son h.l.s., otherwise 1/4

**wife or wives:** 1/4 if there is no child or child of son h.l.s., otherwise 1/8

**mother:** 1/3 if there is no child or child or son h.l.s., otherwise 1/6

**true grandmother:** 1/6 for both maternal grandmother (in the absence of a mother or nearer true grandmother) and paternal (in the absence of a mother or father or nearer true grandmother and there is no intermediate true grandfather)

**daughter or daughters:** if there is only one daughter, ½; if there are more than one daughters than their collective share is 2/3. However daughter(s) are sharers only if their is no son, with a son she becomes a residuary.

**son’s daughter(s) or son’s son’s daughter(s) how low so ever:** 1/2 if only one or 2/3 collectively if more than one, (but they inherit only if there is no son, daughter, or son’s daughter), and 1/6 (if one or more) if there is only one
daughter, or higher son’s daughter. With the son’s son she becomes a residuary.

uterine brother(s): 1/6 if there is only one; 1/3 collectively if two or more. However he (or they) inherit only when there is (a) no child (b) child of son h.l.s. (c) father or (d) true grandfather

uterine sister(s): 1/6 (if there is only one) or 1/3 (collectively if two or more). However she (or they) inherit only when there is no child, child of son h.l.s., father or true grandfather

full sister(s): 1/2 if there is only one; or 2/3 collectively if more than one. However she (or they) inheritance only if there is no (a) child (b) child of a son h.l.s. (c) father (d) true grandfather, or (e) full brother. In the presence of a full brother she (or they) come residuary(ies), and

consanguine sister(s): 1/2 if there is only one, or 2/3 collectively if more than one. However she (or they) inheritance only if there is no child, child of a son h.l.s., father, true grandfather, full brother, full sister, or consanguine brother. Their share is 1/6 (whether one or more) if there is only one full sister. With consanguine brother she (or they) come residuary.

Shia law recognises only nine sharers. True grandfather(s), true grandmother(s) and son’s daughter(s) are not included therein. As far as the actual share of the sharers is concerned, there is not much difference between Hanafi and Shia law (Ali 89:45). Six of these sharers i.e. father, grandfather, daughter, son’s daughter, full sister and consanguine sister under certain circumstances inherit as residuaries rather than their fixed prescribed share as sharers.

Residuaries (agnates) are those heirs who have no prescribed share but succeed to the ‘residue’ after the claims of the sharers are satisfied (Mulla 91:76). All residuaries are related to the deceased through a male. The uterine brother and sister are related to the deceased through a female and are therefore not included in the residuaries. The presence
of the prior class of residuaries in this order exclude all the later class of residuaries so that the residuaries, in the order of succession, can be classified into the following four classes: (a) descendants of the deceased; (b) ascendants of the deceased; (c) descendants of the father of the deceased; (d) descendants of the deceased’s true grandfather.

The principles of succession amongst the residuaries are:

1. That the nearer in degree exclude the more remote. Thus the father excludes the grandfather, the mother excludes the grandmother and so on.

2. The descendants of the deceased get preference to the ascendants of the deceased, e.g. the presence of a son would exclude the grand ascendants of the deceased.

3. Males get double the share of females of a parallel degree. Hence a son gets twice the share of a daughter.

The son of the deceased is the principle heir among the residuaries, who is never totally excluded. The son excludes all the other residuaries except the daughter, who inherits along with the son half of the son’s share.

Distant kindred (or uterine relations) are those relations by blood who are neither sharers nor residuaries (Mulla 91:76). Distant kindred are also called uterine relations i.e. those that are related to the deceased through females. The distant kindred inherit only if there are no sharers or residuaries (Mulla 91:111). If there is residue left after the shares of the sharers are satisfied, but there are no residuaries, then the residue reverts to the sharers in proportion to their shares (this reversion is called ‘return’ or radd) (Mulla, 91:106). And if the only sharers are husband or wife and there are no residuaries, then the sharers take their full share and the rest of the estate is divided amongst the distant kindred (Mulla 91:111). Uterine relations (distant kindred) cannot inherit in the presence of agnates (residuaries) (1987 SCMR 1560).

According to classical Hanafi jurists (PLD 1986 Kar. 269), the order of inheritance is:
(i) sharers;
(ii) residuaries;
(iii) return to the sharers by blood if there is no residuary;
(iv) distant kindred;
(v) person in whose favour paternity has been acknowledged by the deceased;
(vi) legatee for the whole of the property;
(vii) Bait-ul-Maal (property of the state).

The Sexless: A person’s share of inheritance is different for different genders in similar situations. This causes strange problems for persons whose sex cannot be determined (the sexless). If male characteristics predominate, then the person inherits a male’s share, if female characteristics predominate then the person inherits a female’s share. If neither the male or the female characteristics predominate, the person inherits the smaller share (i.e. usually female’s share) (Rehman 85:583).

Disinheritance, A’aq Under the Islamic law of inheritance, an heir apparent possesses a mere possibility to inherit but may inherit nothing if the prepositus disposes of his property during his life time (Ali 89:20). But a person cannot disinheret, a’aq, through a testamentary disposition or otherwise, a legal heir and debar him from inheritance (Rehman 85:541; Mulla 91:Sec 81, PLD 1986 Kar 269) nor can a prepositus enlarge or reduce the shares of the legal heirs through a testamentary disposition after his death or even at the extremis (at the point of death) (Ali 89:20).

Illegitimacy, Adoption and Stepchildren: An illegitimate child is considered to be only the child of the mother. Under Hanafi law, an illegitimate child inherits only from its mother and her relations and vice versa (Mulla 91:140). Under Shia law, an illegitimate child has no rights of inheritance (Baillie 65:172). Under Shia law, children born out of mut’a marriage inherit from their parents even though spouses in such marriages do not inherit from each other (Ali 89:360). A mut’a marriage or temporary marriage i.e. contracted for a fixed period is recognised only under the Shia law.

Islamic law does not recognise adoption as a mode of fixation (Mulla 91:480). Therefore, adopted children cannot inherit from their adoptive
parents nor the parents from their adopted children. Also, step-children do not inherit from step-parents and vice versa (Mulla 91:140).

**Principle of Representation:** The right of presumptive heir comes into existence only on the death of the ancestor. Till then, he cannot claim any interest in the property that he might succeed (Mulla 91:60). Under Hanafi law, the expectant right of an heir apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will (Mulla 91:60-61). Therefore, under Hanafi law, children of a predeceased son or daughter cannot inherit their parents’ share from the estate of their grandparents.

Shia law does not recognise the principle of representation which means that the children of a predeceased son or daughter may inherit from their grandparents.

**Endnotes**

1. AIR 1942 Pesh 27.
3. PLD 1936 Pesh 15.
5. By the Adaptation of Laws Order 1975, the Act was adopted into Punjab/Sind/NWFP/Balochistan M.P.L. (Shariat) Application Acts.
7. PLJ 1990 SC 139.
10. *Fazal Dad vs. Mst Noor Nishan* heard by the Federal Court of Pakistan on the 7th & 8th of Nov. 1951 reported 1969 SCMR 607.
11. Section 4, Muslim Family Laws Ordinance 1961 reads: “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 strips receive a share equivalent to the share which such son or daughter as the case may be, would have received, if alive.”
16. *Farista vs Federation of Pakistan*, PLD 80 Pesh 47.
19 Seith Salam vs. Malik Mahmood Hasan, 1989 Law Notes (SC) 1356.
21 Ami Chand vs. Fajroo, PLD 91 SC 1001.
22 Sohbat Kuli vs. Balour Jan, 89 CLC 407.

This verse runs thus:
"Men are the protectors
And maintainers of women,
Because Allah has given
The one more (strength)
Than the other, and because
They support them
From their means. Therefore the righteous women
Are devoutly obedient, and guard
In the husband’s absence
What Allah would have them guard."


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Confusion Worse Confounded: A Critique of Divorce Law and Legal Practice in Pakistan

Sohail Akbar Warraich and Cassandra Balchin

Abstract: This paper looks at dissolution of marriage in the light of the problems in Pakistan’s legal system, and analyses the impact of weaknesses and lacunae in family laws. Procedural problems are examined, notably where procedure stands contrary to customary practice and social perceptions. Discussing statutory provisions and case law regarding *talaq*, dissolution initiated by women, and other forms of divorce, the paper highlights the non-uniform application of law that leaves room for interpretations based on considerations of sects and custom. It reviews the complications arising out of the Hudood Ordinances and parallel judicial systems in the context of their clash with family law. The unstable trends in case law relating to divorce and the undermining of the Muslim Family Laws Ordinance are seen in the context of the political discourse of the Right. Finally, the paper briefly looks beyond formal law to analyse the impact of custom on instances of marital breakdown and situations where the courts are not accessed by women.

Introduction

According to the known jurist Syed Amir Ali, “Under Mohammadan Law marriage is essentially a civil contract. A marriage contract as a civil institution rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers, and, according to the majority of the schools, have the power to dissolve the marriage should circumstances render this desirable (Amir Ali: 243).

* This paper focuses, although not exclusively, on the rights of Muslim women, being part of the majority community in Pakistan.
There is no monolithic form of dissolution of marriage in Pakistan's statutory law and each form of dissolution carries different implications for the rights of the parties. On the one hand, the husband has the unilateral right of revoking the marriage contract without recourse to the courts - *talaq*. On the other hand, for the forms of dissolution most commonly accessed by women, the law stipulates that they must approach the courts. Statute law also recognizes *mubarat* - divorce by mutual consent, and *talaq-i-tafweez* whereby the husband delegates to the wife the power to pronounce *talaq* upon herself.

Despite the various forms of dissolution available to husbands and wives under Pakistan's law, the dominant culture is antagonistic to women initiating divorce and the only form of divorce enjoying wide social recognition is unilateral oral repudiation (*talaq*) exercised by the husband.

Customary practices regarding divorce ignore the rights granted by Pakistan's codified law. For nearly 60 years, courtesy of the Dissolution of Muslim Marriages Act 1939 (DMMA), Muslim women have had the option of dissolving their marriages through judicial divorce on a variety of grounds, including cruelty. Yet in the rare instances where women initiate the dissolution of their marriage, they invariably do so on the grounds of redemption (*khula*) which offers women lesser benefits than the DMMA. At the same time, since the promulgation of the Muslim Family Laws Ordinance (MFLO) in 1961, husbands exercising the right of *talaq* have been required to follow a certain procedure designed to offer women some element of protection from the effects of instant oral *talaq*. Yet husbands frequently fail to follow this procedure. (Balchin96).

The reality of marriage and divorce for Pakistani women is diametrically opposed to the straightforward principle of a contract, and existing divorce provisions fail to meet women's needs. This also raises the question of what, then, are the factors which come into play and often obstruct Pakistani women's access to their rights in instances where marriages break down.

Basic problems arise from the historical and political context of Pakistan’s formal judicial system. Muslim family law in Pakistan evolved over a period of some one hundred years, during which a substantial body of superior court precedent was built up, including precedents set by the colonial Privy Council (not presided over by Muslims). After the promulgation of the MFLO in 1961, a debate arose as to whether established precedent or the new statute should predominate. At the time of its introduction, the MFLO was notable in two important respects: first, it stood in stark contrast to related customary practices, and second, it did not follow any one particular school of jurisprudential thought.

The MFLO had just started building up a body of stable case law, with Privy Council precedents being increasingly overruled, when in 1979 case law was unsettled by the promulgation of the Hudood Ordinances. An added complication has been the parallel Shariat court system, introduced in 1980. The Federal Shariat Court (FSC) is the forum of appeal in criminal cases involving the offence of zina (fornication and adultery). A very substantial portion of cases under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 arise out of the disputed legal validity of a divorce in the event of a subsequent remarriage. In numerous cases, the courts have attempted to provide relief to individual women charged under zina, but have in the process profoundly undermined the MFLO, with broad and long-term implications for women’s rights within the family. This is discussed in greater detail below. Additionally, in certain instances the superior courts have decided a question of law, but instead of confining themselves to this point, the courts have added superfluous comments in their judgments, inadvertently leaving a door open for future litigation based on a misconstruction of the law. For example, in one case, it was upheld that the MFLO does not apply to persons who are no longer Muslim citizens of Pakistan. However, rather than restricting itself to this basic issue, the court discussed a Muslim husband’s right of talaq and the three recognised forms of talaq. As in this instance the parties were not Shias
but Hanafis and the *talaq* was pronounced thrice in one sitting, the court held that the *talaq* became effective immediately. This recognition of *talaq-e-bidat* has been used in subsequent cases to support *talaq-e-bidat*.

For women, this development of a parallel judicial system has been particularly detrimental in that *ulema* (religious scholars) with no judicial or legal background are included in the FSC, opening the MFLO to attack from orthodox elements. The various fora of the parallel judicial system have often cited completely opposing jurisprudential texts as authorities their judgments. This situation was further exacerbated in 1985 by the incorporation of Article 2-A in the Constitution under the 8th Amendment. The ensuing debate over the supreme source of law led to contradictory declarations from the superior courts on the repugnancy of various Sections of the MFLO. The net result has been dual - and opposing - precedent flowing from the superior courts, leaving the lower courts without clear direction.

Moreover, even where the Supreme Court has given clear guidelines as to the handling of cases related to family law, trial and even appeal courts frequently fail to follow such precedent. In 1963, the leading case of *Ali Nawaz Gardezi vs. Lt. Col. Muhammad Yusuf* settled no less than seven substantive issues related to procedure for divorce yet these issue continue to be debated today even in the High Court. While general trends in superior court case law have often been favourable towards women, this has not been adequately reflected in the lower courts, which often hold social practice above statute law, negatively affecting women’s access to justice.

A number of family law cases appear as writ petitions in the superior courts. There is, however, no stable pattern regarding the provision of full relief. In some instances, following a writ, the court refers the case back to the appropriate forum for action. In other cases involving identical issues, full relief is provided and the matter resolved without further ado. An additional tendency in writ petitions is for the court to go beyond the matter requiring immediate relief and to debate, for example, the repugnancy of an entire statutory provision. This tendency has been criticised by the Supreme Court in 1994 while reversing a decision of
the Sindh High Court declaring Section 7 of the MFLO repugnant to Islam:

[The] Court would not formulate a rule of constitutional law broader than was required by the facts to which it was to be applied...[The] High Court was thus not justified to consider the validity of MFLO especially when such questions were not raised before it and it did not observe the principles governing jurisdiction.\(^7\)

The repeated overruling of Family Court decisions by the superior courts and related declarations that the subordinate judiciary has misapplied and misconstrued the law indicates that an additional problem is the lack of adequate training for judges handling family law cases. Apart from the issue of inadequate training in the law, judges have recognised the need for gender sensitisation of the judiciary. In addition, the possibility of gender sensitisation of Union Council Chairmen needs to be urgently explored.

Inadequate training is also central to problems arising from the role of the Union Council in dissolution. Many functions crucial to family disputes are delegated by the MFLO to the Chairmen of Union Councils, the lowest tier of local government. Directly elected, the Chairmen are simply local influential, amenable to social pressure and with no minimum educational requirement or legal training and understanding of the laws they administer. The result is a tendency to be guided by customary perceptions rather than the text of the law. Additionally, their lack of training leads to a misconstruction of law. While the law allows for *talaq* to be completed 90 days after the receipt of notice, there are cases where a final decision has come some 14 years after the initial pronouncement and following a legal process going all the way up to the Supreme Court. The source of the dispute in many cases reaching the superior judiciary lies in the initial action taken by the Chairman. One case\(^8\) where the Chairman's order was without lawful authority, illustrates the problems created by a Union Council Chairman's misconstruction of his functions under the MFLO. The Chairman had refused to accept as valid a couple's written notice regarding *mubarat* and had therefore refused to proceed further with the dissolution. Other
cases where Chairmen have failed to act in accordance with the law have clearly revealed their ignorance of the law. Meanwhile, in the frequent absence of elected Chairmen, their role has been performed by Administrators who can be executive or judicial magistrates, judges of the subordinate courts or even non-judicial figures. Administrators are not actually situated within the Union Council for which they are responsible and invariably have other judicial or executive duties which leave them little time for administering family law. This leads to unnecessary complications and the prolonging of dissolution procedures.

By requiring certain aspects of family law procedure to be administered by Union Council Chairman, the MFLO raises questions of jurisdiction at the practical level. Under the Family Courts Act, decisions on the validity of marriage and divorce fall under the sole jurisdiction of the Family Courts. However, Chairmen are the initial forum to be involved in several forms of dissolution (talaq, mubarat and talaq-i-tafweez). Through case law, the courts have had to clarify that validity remains the jurisdiction of the Family Courts and that Chairmen are only obliged to check the genuineness of a notification. This is indeed a fine line and Chairmen’s current level of training leaves them completely unprepared to handle such subtleties. In practice they often go beyond checking genuineness and effectively determine the validity of an act.

In instances of dissolution initiated by women and granted through the courts there is confusion as to whether it is the responsibility of the court or the wife to send the decree to the Union Council and a copy to the husband, setting the final procedure in motion. In Punjab, this confusion was compounded following an amendment in Section 21 of the Family Courts Act. The Lahore High Court has declared that the Family Court is obliged to send a certified copy of the decree within seven days to the Union Council concerned. However, a brief survey of Family Court judges in Lahore by Shirkat Gah found them uncertain about the required procedure.

Union Councils and parties to dissolution are also confused over which Union Council is to be sent notification. This is particularly problematic in instances where the husband and wife have been separated for a long time or where one or both of them are no longer residing in Pakistan.
This issue has remained largely undiscussed but it appears to be an increasing problem given the extent of emigration. A 1982 case\(^{14}\) settled the application of Rule 3(b)(i&ii) of the Rules under the MFLO in instances where the wife is not residing in Pakistan at the time of pronouncement of *talaq* but the couple are still Muslim citizens of Pakistan. It held that notice of *talaq* is to be sent to the Union Council where the couple last resided together or, in the event that they never resided together in Pakistan, to the Union Council of the husband’s permanent residence; it additionally held that a person may have more than one permanent residence. The situation is more complex where the couple are no longer citizens of Pakistan. One case\(^ {15}\) deals with a couple who were temporarily residing in Pakistan but were no longer citizens. The dispute was over the jurisdiction of the Pakistani courts. After the case had gone through the Family Courts and a series of appeals, the Supreme Court settled that family disputes can be heard by the Pakistani civil court in whose jurisdiction the couple falls; that the petitioners are to approach the court under the Civil Procedure Code and the case is to be heard under Private International Law.

However, general problems in the legal system, such as confusion regarding the functions of the various fora and inadequate training and sensitisation, are just one set of factors obstructing women’s access to their rights in the event of divorce. Family law as a whole is undermined by numerous practical problems arising out of a lack of procedural clarity. This is particularly significant for women given that customary practice and social attitudes, while often in contradiction to statutory rights and procedures, moderate the behaviour of the legal system and influence trends in interpretation.

In the case of *talaq* and *talaq-i- tafweez*, the MFLO sets forth five basic procedural steps: pronouncement, notification to the Union Council, copy of notice to the spouse, arbitration, and finality on the completion of *iddat* in the absence of revocation. However, while the law provides for penalties in the event that procedure is not followed, it is silent on the actual effect of such a situation, nor does it specify whether the absence of any single one of these steps vitiates the entire process.
Significant lacunae include the MFLO’s silence regarding: the mode of
pronouncement, which leaves open to question the validity of the talaq;
and a precise time period within which notification of a pronouncement
of talaq must be provided to the Union Council.\textsuperscript{16} There is also a
controversy over whether mubarat and khula are revocable (discussed
below). Where such issues have come up for debate in case law, the
courts have relied upon Sharia for guidance. However, since there are
frequently conflicting interpretations and viewpoints on jurisprudential
questions, this too has produced unstable trends in case law.

Dissolution Initiated by Men: Statutory Provisions and
Issues of Pronouncement and Notification

Under statute law, men have the absolute right of talaq, without having
to specify grounds and without having to return any of the benefits
gained from the marriage.\textsuperscript{17} The MFLO has provided a form of talaq
distinguished from those recognised in traditional Muslim
jurisprudence.\textsuperscript{18} Section 7(1) of the MFLO requires that:

Any man who wishes to divorce his wife shall as soon as
may be after the pronouncement of talaq in any form
whatsoever, give the Chairman a notice in writing of his
having done so, and shall supply a copy thereof to the wife.

Subsequent procedure is outlined in Section 7(4):

Within thirty days of the receipt of notice under sub-section
(1), the Chairman shall constitute an Arbitration Council for
the purposes of bringing about a reconciliation between the
parties, and the Arbitration Council shall take all steps
necessary to bring about such reconciliation.

The Arbitration Council comprises the Union Council Chairman and a
representative of both parties. In the event that arbitration fails and the
notification of talaq is not revoked by the husband (Section 7(3)), talaq
becomes effective and the Union Council issues a divorce certificate on
the expiry of ninety days (or delivery in the event that the wife is
pregnant, whichever is later - Section 7(3) read with 7(5)).
Confusion Worse Confounded

This relatively simple divorce procedure under the MFLO had several objectives: to protect women from instantaneous oral *talaq*; to ensure there was documentary evidence of the divorce and thereby clarify women’s status and facilitate their claims to certain rights; to provide an opportunity for reconciliation. While men’s right to *talaq* was in no way curtailed, the introduction of a specific procedure involving the authorities - in the shape of the Union Council Chairman - was an indication that the state regarded divorce as a matter requiring regulation and state intervention. The MFLO’s provisions regarding *talaq* clash with customary practices which widely accept an oral, unregistered *talaq* or at best regard written notice to the wife as completely sufficient, ignoring the state’s claim to a role in the event.

Since people commonly assume that *talaq* requires a pronouncement in the wife’s presence, the legally required written notification is often returned by a woman’s natal family (to where the notification is usually sent) in the vain hope that this will prevent the divorce from becoming effective. Unfortunately, the only effect is that repudiated women then find themselves obstructed in their claim to any of the rights due to a divorced woman such as *haq mehr* or maintenance during *iddat*.

Section 7’s failure to specify the form of pronouncement is central to many cases. In the absence of clear direction from the law, the courts are left to interpret required procedure on the basis of jurisprudence. Under Muslim jurisprudence the form of pronouncement changes the very nature of the *talaq*. Pronouncement is the first step in any dissolution and thus if the first step is invalid or its status uncertain, all subsequent procedural steps are open to question. In a number of cases procedure has been challenged on the basis of the varying personal law of different Muslim sects, with the superior courts laying aside statutory provisions and upholding procedures followed by a particular sect. This is despite the fact that the MFLO does not provide for the application of the varying jurisprudence of different Muslim sects.

The validity of a *talaq* has been challenged on the basis of whether or not a pronouncement has been made and, if so, its form. Where there has been no pronouncement and where the parties are Hanafi, the courts have been clear that under Hanafi law it is not necessary to orally
pronounce *talaq*, and notice by the husband to the Union Council under his own signature is sufficient compliance with Section 7.¹⁹ Where there has been a pronouncement, in instances generally involving Shia or Hanafi litigants, the courts have sometimes allowed the interpretations of particular sects to prevail. The issue was first raised in 1963²⁰ when a husband successfully challenged the validity of his own pronouncement of *talaq*. In a more recent 1988 case,²¹ despite all subsequent requirements of Section 7 having been fulfilled, the wife successfully challenged a *talaq* and proceedings under Section 7 by arguing that Shia law requires an oral *talaq* in the form of *segha-i-talaq* recited in Arabic and in the presence of two witnesses. When the Government of Pakistan took the case in appeal before the Supreme Court, the requirement of Shia procedure was upheld even though on another point the High Court was overruled.²² In instances involving Hanafis where there has been a triple verbal *talaq*, the courts have upheld the *talaq* as being immediately effective without requiring further procedure under Section 7.²³

Questions of the parties’ sect and the form of pronouncement have also also been taken into consideration. For example, a Shia husband challenged his Sunni wife’s use of *talaq-i-tafweez* on the basis that because this is a right delegated by the husband, the pronouncement should have been in the Shia form.²⁴ The court held that in *talaq-i-tafweez* the personal law of the woman applies, and thus in this instance the form of pronouncement by the Hanafi Sunni wife was valid. Lastly, in certain instances the courts have altogether avoided answering the question of the validity of pronouncement and have judged the case on the basis of other facts. This occurred when the above case went in intra-court appeal.²⁵ Here the husband’s plea regarding the requirement of pronouncement under Shia law was not taken into account and the *talaq* was upheld as valid on the basis of other issues.

Section 7(2) of the MFLO states that failure to follow the prescribed procedure under 7(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.
Nevertheless, the question of the validity of *talaq* in the event that the procedure under 7(1) and 7(3) has not been followed remains open to dispute with the courts interpreting the issue of validity in the light of Sharia. Case law regarding the validity of *talaq* in the event that procedure under Section 7 is disputed is highly unstable, leading to lengthy litigation, often up to the Supreme Court level. For women, who generally bear a disproportinate burden of the impact of lengthy litigation, this has overwhelmingly negative implications. For example, courts very rarely provide for interim maintenance, and where they do, it often provokes a separate round of litigation. Since most *talaqs* are not registered with the Union Council, the magnitude of the problem can be appreciated. This has been aggravated following the promulgation of the Zina Ordinance in 1979, under which women who remarry following an unregistered *talaq* have become potentially liable to the death penalty.

If there has been a pronouncement of *talaq* (either verbally or in the form of a written deed) but the Union Council has not been notified, there are a number of possible subsequent developments. In many instances, the wife approaches the Family Court for clarification of her status, generally under a jactitation suit. Alternatively, the local Union Council is approached. It is here that the confusion over the role of the Chairman comes into play. As local influential, Chairmen often also sit upon local traditional adjudication forums and may fail to distinguish between their role under the MFLO and their traditional authority. If a woman approaches the Chairman claiming that she has been pronounced divorced, Chairmen with greater awareness of the law may refer her to the Family Courts and do not proceed without formal notice. Alternatively, the Chairman may call the husband and insist on formal notification under Section 7(1) in the event that he acknowledges having pronounced *talaq*. However, when Chairmen in their traditional role give a verdict regarding a dissolution, this leaves a wide margin for the entire procedure and *talaq* to be subsequently challenged in the courts.  

The required form of notice was the subject of dispute for some thirty years until 1991 when the court ruled that:

> no particular form of notice has been prescribed by either the [MFLO] or the Rules framed thereunder. The objective of
notice ... is to communicate to the wife and Chairman ... that the husband has dissolved the marriage so that proceedings for reconciliation may be undertaken. Consequently, even if a document may strico senso not be in the form of a notice, but otherwise contains the requisite information, it would constitute sufficient compliance of Section 7.\textsuperscript{27}

However, there have been contradictory superior court judgments on other validity issues in instances where, following a pronouncement, there has been no notification to either the wife or the Chairman. One reason for this unsettled trend is that the Shariat Courts have tended to hold Sharia above statutory provisions, while the ordinary courts have tended to uphold statutory provisions.

It has been held that failure to provide the Union Council notification of talaq does not render the talaq ineffective.\textsuperscript{28} In this case, the former husband challenged the validity of his own written but unregistered divorce deed. The Lahore High Court concluded that the divorce was not invalid despite the failure to follow Section 7 procedures by drawing an interesting analogy from the MFLO itself. It stated that violation of Sections 5 and 6 (respectively relating to registration of marriage and securing of Arbitration Council permission for polygamy) does not invalidate the marriage itself. By analogy, therefore, non-conformity with the provisions of Section 7(1) would not render the divorce ineffective but would only make the husband liable to a penalty as provided for in Section 7(2). The court clarified that:

\[ \text{[t]he step of issuing notice to the Chairman is a step subsequent and not a step preceding to or a qualification necessary for the pronouncement of talaq.}\textsuperscript{29} \]

The court supported its ruling by noting that 90 days had passed since the receipt of the divorce deed by the wife and there was no proof that the husband had revoked the talaq, also according significance to the fact that the former husband had filed his complaint three months after his former wife's second marriage.
Similarly in another case, the Shariat Appellate Bench of the Supreme Court made clear its reliance on the provisions under Sharia. Overturning the FSC’s conviction for *zina*, the court observed:

> It is generally found that people do not send notice of *talaq* to the Chairman as required under the MFLO and we have held in the case of *Allahdad vs. Mukhtar* (1992 SCMR 1276) that the failure to send a notice to the Chairman does not render the divorce ineffective under Sharia. Therefore, if the appellants have proceeded on the assumption that the *talaq* given was effective in Sharia, they have committed no offence.  

In yet another case,  where the requirement of notice under Section 7 was effectively laid aside, the court’s focus was less on the issue of required procedure and more on the particular circumstances of the case. Clearly illustrating the Zina Ordinance’s potential as a tool for the harassment of women, in this case a relative of the former husband filed a complaint of *zina* against a woman and her second husband. This was done soon after the Ordinance’s promulgation but involved a couple who had been living unchallenged as husband and wife for more than a decade. Acquitting the couple of *zina*, the court observed that the technicality of notice under Section 7 of the MFLO could not be made “too cumbersome” on parties who had been living as husband and wife without any challenge for 10/12 years. An additional factor which the court took into account was the couple’s apparent lack of knowledge of the requirements of the MFLO leading to their firm belief that they were validly married.

In contrast, there is a body of case law where procedure under Section 7 has been upheld. A landmark case cited in almost all cases revolving around the issue of notification is *Ali Nawaz Gardezi vs. Lt. Col. Mohammad Yusuf*. Here, it was held that in the event of failure to provide notification of *talaq* to the Chairman the *talaq* is deemed revoked, i.e., strictly upholding the application of Section 7. This precedent is invariably used to support a plea that absence of notification renders the *talaq* ineffective. In addition, the case was also decided on the basis of other supporting factors such as the fact that
Col. Yusuf had married Gardezi’s wife before the expiry of *iddat*. In a post-Hudood case\(^33\) which involved an allegation of *zina*, the court referred to the Gardezi case but added that in this instance no benefit of doubt could be given largely because the unregistered divorce deed presented by the accused couple was dated nine months after the registration of the case against them.

Trends in case law have been equally unstable in instances where there has been no pronouncement directly to the wife who has instead learnt of the *talaq* either through the copy of the husband’s notification sent to her by the Union Council or when she receives from her husband a copy of the notification he sent to the Chairman. It has been held that mere absence of communication of divorce to the wife before supplying notice to the Chairman under Section 7(1) may be an offence but cannot prevent subsequent proceedings nor can it invalidate the *talaq*.\(^34\) Effectively holding that it is not necessary that a pronouncement directly to the wife if the requirement of sending notice to the Chairman is fulfilled, the court held that the wife stood divorced.\(^35\)

In the leading case of *Inamul Islam vs. Hussain Bano*\(^36\) the court apparently took a contrary view. The case however illustrates the utter confusion that prevails in the matter of notification and pronouncement. Hussain Bano denied that her husband had sent her a copy of the notice of *talaq* he had sent to the Chairman in 1971, and following her husband’s failure to appear before Arbitration proceedings, the Administrator acting as Chairman shelved the case in 1973. When the husband, four months later reminded the Administrator of his earlier notice, he proceeded and declared the *talaq* effective. Meanwhile, the wife had initiated a suit for maintenance claiming she was divorced on 12 May 1972, but also claiming that the Administrator’s order to shelve the case meant no *talaq* had taken place. In a writ petition by the husband challenging the decree for maintenance, the court held that if any one of the procedural steps under Section 7 - starting from pronouncement to declaration of finality - is not satisfied, the *talaq* does not become effective even after the passage of 90 days. Having thus upheld a strict interpretation of the requirements under Section 7(1), the court went on to declare:
This, however, would not conclude the matter because independently of the duty of the petitioner to prove these facts [fulfillment of the three important conditions], the [wife] in her own plaint admitted that she had been divorced by the petitioner in 1972. The learned lower courts acted without lawful authority in ignoring this important admission by the respondent.

The question then remained as to which of the three possible dates of pronouncement would be accepted in order to determine the date of effectiveness of the talaq. It is interesting that the court accepted the 1972 pronouncement as valid and determined the effectiveness of the talaq from that date, adding 90 days iddat, whereas the original notification had been in 1971 and a reminder sent in 1973. The upshot was that the High Court overturned lower court rulings that Hussain Bano was entitled to maintenance until 1973. The confusion created by the Inamul Islam case was revealed in a later case.\(^{37}\) In this case, the court overruled the order of a Chairman who, relying on the Inamul Islam case had annulled a divorce because of non-supply of a copy to the wife, even though the court in Inamul Islam had ultimately allowed a divorce where there had been no proof that a copy was sent to the wife.

Whatever the courts’ stand on the issue of notification to the wife, as regards the step of arbitration subsequent to pronouncement and notification, case law appears fairly stable that even if one of the parties fails to appear in person before the Arbitration Council, this should not act as a bar to procedure under Section 7.\(^{38}\)

**Dissolution Initiated by Women:**
**Statutory Provisions and Case Law**

Dissolution initiated by women falls into three broad categories: judicial divorce, where there are specific grounds and although the wife is initiating the process, the ‘fault’ essentially lies with the husband; *khula*, where the woman seeks dissolution due to her inability to continue living with her husband; and *talaq-i-tafweez*. 
Under the Dissolution of Muslim Marriages Act of 1939, Muslim women can seek a judicial divorce on ten distinct grounds, any single one of which is sufficient. Derived from a variety of jurisprudential sources (Zafar 91:32), these include desertion, husband’s failure to provide maintenance, husband’s failure to follow legal procedure for a polygynous marriage, husband’s extended imprisonment or impotence, option of puberty, cruelty, and ‘any other ground recognised as valid under Muslim Law’. The grounds of cruelty have been fairly widely defined in the DMMA and include mental cruelty, interference with wife’s property, failure to treat wives equitably, forcing her to lead an immoral life and obstructing her in the observance of her religion. Procedure involves approaching the Family Court (any civil court declared to be a Family Court). If the court grants the dissolution decree, procedure then takes place under Section 8 of the MFLO:

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.

The primary distinction between dissolution under the DMMA and under khula has been dealt with in Farida Kuman vs. Maqbul Ilahi.39

In [judicial divorce] the dissolution results from acts of commission or omission on the part of the husband while in khula the wife is allowed to free herself from the bonds of matrimony as it is impossible for the parties to live together as husband and wife within the limits prescribed by God.

In khula, legal practice, which is derived from the Qur’anic verse 2: 229, dictates that the wife return in some part the benefits received by virtue of the marriage in the form of zar-i-khula. This compensation to the husband for divorce through khula is largely interpreted as the surrendering of her haq mehr.40 Khula requires a procedure similar to that prescribed for the DMMA although evidence requirements are generally less exacting. The wife’s failure to pay the zar-i-khula ordered by the court when issuing the khula decree does not invalidate the
decree,\textsuperscript{41} and the husband is required to file a separate suit for recovery. Indicative of a general trend moving towards acceptance of women’s rights to divorce, the superior courts have also refined and clarified the concept of zar-i-khula in ways which have frequently been to women’s benefit. In one interesting judgment, the court insisted that reciprocal benefits received by the husband should be taken into account; continuous living together, bearing and rearing of children, housekeeping, etc. could also be counted as benefits, thereby off-setting the benefits that the wife had to return.\textsuperscript{42} Nevertheless in the final analysis, potentially obliging a woman to forego economic benefits for the privilege of terminating the marriage contract, when the same does not apply to men, places her at a legal disadvantage.

Under the MFLO, the husband may also delegate the right of talaq to the wife (conditionally or unconditionally) by specifying this in clause 18 of the nikahnama (marriage contract deed). However, social constraints and the enduring lack of awareness that this is sanctioned by Muslim jurisprudence mean only a tiny minority of women are granted this right in their nikahnama. In the rare instances where talaq-i-tafweez has been granted, instead of simply stating ‘yes’ and noting whether it is conditional or unconditional, the wording of Clause 18 is faulty largely due to misperceptions. One common misperception is that a dissolution initiated by the wife can only be in the form of khula and thus in some women’s nikahnamas Clause 18 states ‘in the form of khula’. Another common mistake is to write ‘according to Sharia’, which opens the woman’s right up to debate. For women this form of dissolution has several advantages: the right to haq mehr is retained and talaq-i-tafweez is the only form of divorce initiated by the wife which does not require the intervention of the courts. In this event, she need simply send written notification that she is exercising her right to the Union Council (and a copy to her husband) which then proceeds under Section 8 and Section 7.

However, case law reveals ignorance on the part of Union Council Chairmen regarding talaq-i-tafweez. Thus even in situations where women have secured the maximum divorce rights through their nikahnama, implementation of the law at the lowest tiers can obstruct women’s access to their rights. In general, case law indicates that the superior courts have rejected negative customary perceptions of talaq-i-
tafweez and upheld the rights granted by statute law. In Caroline Rehman vs. Chairman Union Council, the court cut through the apparent complexities of the case and upheld the wife’s right to talaq-i-tafweez, ordering the Chairman to proceed accordingly. Caroline Rehman had married her husband, a Muslim, under the Christian Marriages Act 1872 but had subsequently obtained an agreement from him granting her talaq-i-tafweez. When she attempted to utilise this right, the Chairman refused to take cognisance of her notice. The court however held that as the MFLO applies to all Muslims and as her husband was Muslim, she could exercise this right on behalf of her Muslim husband. In instances where a conditional talaq-i-tafweez was written into the nikahnama (granting the wife the right in the event of specified misconduct on the part of the husband), the superior courts have decided the issue on the merits of the case. Wherever a contingency has been attached, it clearly serves to undermine the effectiveness of this right, not least because it inevitably leaves the door open to litigation. In one case, where the right had been delegated subject to the ‘permission of elders,’ the Chairman failed even to read the divorce deed attached with the notification and declared the notice ineffective as the conditions had not been fulfilled. The court dismissed the Chairman’s act declaring that he had no jurisdiction to assume the role of Family Court and determine the validity of the pronouncement.

Superficially, it would seem that problems in the law and its implementation notwithstanding, Pakistani women have a variety of divorce options under statute law, and, at least in the case of talaq-i-tafweez, may free themselves from an unhappy marriage more rapidly and less painfully than women in many other countries. Case law, however, reveals that despite a number of positive developments clarifying, redefining and to some extent expanding relevant provisions of statute law in women’s favour, Pakistani women do not have equitable access to divorce.

The relative paucity of superior court case law on the DMMA as compared to case law on khula, indicates that the former law is rarely accessed by women even though it has the advantage that the wife retains her right to haq mehr. Even more striking is the marginal number of women who have successfully used the DMMA provisions relating to
maintenance and cruelty - Sections 2(ii) and 2(viii) - despite positive case law in this area. For example, it has been held that verbal abuse constitutes cruelty\textsuperscript{46} and it is no defence to the claim of cruelty that it was the result of the wife’s own conduct,\textsuperscript{47} that it is for the husband to prove maintenance\textsuperscript{48} and that poverty or unemployment does not excuse the husband from the obligation of maintenance.\textsuperscript{49} Regarding the grounds of maintenance (the most commonly used provision of the DMMA), the question arises as to whether the reasons for the husband’s failure to provide maintenance are material or not. This issue generally arises when the wife leaves the marital home during which time the husband fails to maintain her and she subsequently files a suit for judicial divorce under S.2(ii). Case law in this area is still unstable, with the small amount of litigation failing to settle the matter and with the debate continuing to the detriment of women’s rights in divorce.

Lawyers tend to advise clients against pursuing a case purely under the DMMA. The general trend is to write a petition requesting the marriage to be dissolved on the basis of grounds cited in the petition as well as on the grounds of khula. The reasoning behind this is that under the DMMA the evidence requirements are more exacting leading to an inevitably greater duration of the case.\textsuperscript{50} In instances where a woman has no significant haq mehr, such reasoning probably does accord with women’s practical needs. But in those rare instances where a woman does have a significant mehr, such advice serves to undermine one of the few economic cushions guaranteed to married women under the law. It additionally reinforces the common assumption that a case under the DMMA is a losing battle. Lower courts often decree a dissolution on the grounds for khula and thereby order the wife to forego dower and even her claim to maintenance, even when the grounds for dissolution under the DMMA are proven in the same suit. In one significant case,\textsuperscript{51} the High Court overruled the trial and appeal courts, and held that since the grounds of cruelty, misappropriation of dowry and non-maintenance had been accepted, there was no need for Farida Khanum to forego her dower of Rs 25,000 and right to claim maintenance.

The DMMA was introduced by the colonial authorities largely under pressure from the Muslim community and ulema to respond to a growing trend of Muslim women’s conversion to Christianity purely in
order to dissolve their marriages. History has since been reversed, with a trend currently visible of Christian women converting to Islam in order to dissolve their marriage given the virtual impossibility of divorce under out-dated Christian personal law. Cases where such a dissolution has been challenged and *zina* proceedings have been initiated, have failed to settle the matter of procedure largely because in the absence of clear direction from the statute, the matter is settled on the basis of Muslim jurisprudence. The result is often a clash of two religious laws. But case law reveals that in the FSC (where only Muslims can be judges) the benefit of doubt is extended to women who have converted to Islam. In *Sardar Masih vs. Haider Masih*, following her conversion a married woman married a man newly converted to Islam. The FSC upheld their acquittal for *zina* but noted there is a sharp difference of opinion among the known *imams* of the Sunni school on a number of related issues: whether the woman after conversion should have offered her first husband Islam; had he converted what would have been the validity of her subsequent marriage; whether a marriage is dissolved immediately on conversion or on the first husband’s refusal to embrace Islam; whether the woman has to observe *iddat*; if the first husband embraces Islam, will their existing *nikah* subsist or will the couple have to perform a new *nikah*. The court did not settle any of these issues and instead upheld the couple’s acquittal on the basis of the circumstances in the case:

Under the circumstances, we understand that the woman did not offer Islam to her former husband and if she is Hanafi Muslim she has committed a mistake under jurisprudence. But in this case it is settled that her former husband knew of his wife’s conversion and he did not take any action and the woman and her second husband who are new converts genuinely believed that the first marriage stood dissolved and their subsequent *nikah* is valid so they have not committed any adultery and the trial court’s decision of acquittal is not against Islamic law.

In another case, the FSC set aside a couple’s conviction by the trial court where conversion and remarriage of a Christian woman was challenged many years later by her former husband on the basis that
Christian personal law does not recognise divorce. The court strongly rejected the former husband’s plea and commented that:

The argument that Christianity does not recognise dissolution of marriage does not benefit him. At the most it entitles him to go about the world saying ‘I have a wife on paper’ but no court can order a Muslim wife to go to him and perform sexual obligation - a natural incident of a marriage - because any cohabitation after her conversion is clearly and unequivocally forbidden in Islam.

The main tool used by women seeking to dissolve their marriages is the doctrine of khula, by contrast an area where significant post-Independence developments in case law are visible.

The 1967 the landmark Khurshid Bibi case,54 quoting verse 2:228 of the Qur’an held that “women have rights against men similar to those that men have against women,” effectively establishing that it is a woman’s right to seek dissolution through khula and that this is a right to be equated with a man’s absolute right of talaq. As a logical consequence of this interpretation and in a unique break with previous established jurisprudence, the court held that as a matter of principle khula is not conditional on the husband’s agreement. Pakistan was the first Muslim country to have followed such an interpretation. Nevertheless, customary perceptions regarding khula continue to determine the approach of the courts and lawyers. Courts will often accept a statement in cases where the wife has initiated the dissolution that ‘the wife has asked for khula from the husband.’ If the husband agrees, this is technically not khula but mubarat, or in instances where the court itself requires the husband to pronounce talaq, even if on the wife’s request, the dissolution is in the form of talaq.

While in subsequent case law there has been almost uniform application of the principle that the husband’s permission is not required, interpretation of the grounds of irretrievable breakdown for khula has been extremely unstable. The basic issue debated in case law is whether a woman seeking khula needs to provide proof of her inability to live with her husband and over what, exactly, constitutes hatred and aversion
- the ultimate grounds. In certain instances it has been held that *khula* was not be allowed on the mere asking of the wife,\textsuperscript{55} and in one case the court thundered that if any loose consideration or blanket authority was allowed to the wife, this would frustrate the very purpose and object of regulating rights through the courts.\textsuperscript{56} Contrast this with a judgment which observed:

\begin{quote}
[a]version of the wife for her husband might emanate from causes not very substantial...the courts were more concerned with her state of mind than with the basis thereof.\textsuperscript{57}
\end{quote}

A more recent judgment similarly held that the wife does not need to come out with logical, objective and sufficient reasons regarding her claim for *khula*, adding that the parties were the best judge as to whether they could live together amicably.\textsuperscript{58} In a 1995 case, the court reiterated the three basic principles of *khula* established through case law.\textsuperscript{59} It relied on the first landmark judgment regarding *khula*\textsuperscript{60} where it was expressly held that the wife is entitled to *khula* as of right if she satisfies the conscience of a court that it will otherwise mean forcing her into hateful union. The court then referred to *Khurshid Begum vs. Muhammad Amin*\textsuperscript{61} which held that if the wife had incurable aversion to the husband it was sufficient basis for *khula*. Lastly, it referred to *Shahid Javed vs. Sabba Jabeen*\textsuperscript{62} where it was considered that the right of *khula* was an independent right and the wife’s failure to establish grounds other than *khula* taken by her would not prejudice her right; the Family Courts have to see this right independently.

Despite the generally positive trends in superior court case law regarding *khula*, the lower courts frequently ignore these precedents and reject suits for *khula*, forcing the wife to take up the matter in a writ petition before the High Court - adding to the expense and delay in obtaining dissolution. Indeed, the failure of the superior judiciary to ensure that the lower courts follow superior court precedent has consistently undermined women’s access to justice. Further, while it is a largely settled principle of law that *khula* is to be available to a woman as a right, statements asserting this principle raise a number of interesting questions from the perspective of women’s law. While decreeing *khula*, judges favouring women’s legal equality often comment that *khula* is to
be equated with a man’s right of talaq. However, a clear distinction needs to be drawn between the theoretical nature of a right and its procedural implications, since the latter may, in fact, so severely control access to a right as to render it meaningless. Thus, talaq requires no intervention by the courts, no lawyer, no visits to distant court premises. It is virtually cost-free, requires no payment on the part of the spouse initiating the action and, providing the legal procedure is followed, is bound to end rapidly and ultimately cannot be prevented. Khula is the complete opposite on all counts. Given that women have limited mobility, and less access to the resources required for litigation, and are less likely to be able to influence the courts in their favour (often a significant factor in the lower courts), the claim of equality is unsustainable. It is, however, undoubtedly a positive development in Pakistani case law that khula and talaq, while procedurally poles apart, are nevertheless increasingly regarded as the absolute right of the wife and the husband respectively.

Case law and the Issue of Revocation

Revocation has been debated both in instances of talaq and dissolution of marriage initiated by women. The MFLO, one of whose stated objectives was to ensure opportunities were provided for reconciliation, brought about a major change in tradition by effectively making all forms of divorce revocable (Section 8 and Section 7(4) read with Section 7(3) and 7(5)). Once again, the MFLO’s failure to specify exact procedure has led to case law revolving around revocability and the form of pronouncement of talaq on the one hand, and the revocability of khula and mubarat on the other. Here too, trends have been unstable and while in some instances individual women may have benefitted from the conflicting judgments, the overall effect has been to undermine the protective thrust of MFLO provisions for reconciliation.

In Zubeida Khatoon, the parties to the case relied on the substantial body of conflicting case law, thus prolonging the case. Interpreting the law in the light of jurisprudence rather than upholding procedure laid out in the statute, the court held a verbal triple talaq to be irrevocable and immediately effective. In this case, the decision was in the wife’s favour as she sought to be freed from a situation where the husband had thrown
her out of the house, pronounced talaq, given notice but subsequently claimed he had revoked the talaq whereas Zubeida Khatoon sought the talaq to be finalised through the issuing of a certificate. However, this stands contrary to one of the declared objectives of the MFLO, namely to protect women from instantaneous, oral divorce.

In the case of khula and mubarat, Section 8 states that Section 7 shall apply ‘mutatis mutandis and so far as applicable,’ leaving room open for interpretation and confusion. In the case of Princess Aiysha Yasmin Abbasi vs. Maqbool Hussain Qureshi,65 having held that the couple’s written notification of mubarat was in accordance with the provisions of Section 8 read with Section 7, and that the Union Council Chairman had not acted lawfully in rejecting it, the court further held that khula and mubarat are irrevocable as far as the unilateral authority of the husband to revoke the dissolution is concerned. However, the court also held that proceedings under Section 7, notably arbitration, are necessary because the possibility remains in mubarat that both may revoke the dissolution. In this case following notice of mubarat, during Arbitration Council proceedings the Chairman accepted the husband’s plea that the notice did not constitute a notice under Section 7(1) and therefore no dissolution could become effective. In one particularly complicated case67 regarding the revocability of mubarat, the trial and initial appeal courts’ decisions were reversed by the High Court whose decision was in turn reversed by the Supreme Court. Ghulam Fatima approached the jirga (a tribal adjudication forum) for a divorce. After her husband Mohammad Sadiq divorced her before the jirga, a divorce deed was written. However, Mohammad Sadiq subsequently filed a suit for restitution of conjugal rights claiming he had revoked the talaq, to which Ghulam Fatima responded that she had been divorced. One year later, Mohammad Sadiq died abroad, following which Ghulam Fatima’s in-laws rejected her claim to inheritance on the grounds that she was divorced. In the trial court and first stage of appeal, it was held that Ghulam Fatima was not divorced. The High Court in appeal overturned this decision declaring that the divorce was mubarat which is irrevocable and, in contrast to the Aiysha Abbasi case, declared there was no need of procedure under Section 7 whose application:
is to unilateral action by either of the parties. It is not applicable in cases where both parties have agreed. Muslim law does not contemplate revocation in such cases, nor is there any purpose to efforts at reconciliation.

The Supreme Court on leave to appeal declared that this had not been a dissolution in the form of mubarat as Mohammad Sadiq had been under compulsion by the jirga, and from the evidence it appeared that he had revoked the talaq, therefore the marriage subsisted until his death.

In a 1987 case, the entire parallel judicial system came into play over a situation involving the revocation of a written but unregistered khula agreement and charges of zina and bigamy. These two charges had followed their separate routes through the trial and appeal stages. The FSC had acquitted the couple of zina charges while the High Court had convicted them for bigamy. Malik Javed filed complaints of zina and bigamy against his wife Rehana Khanum and her second husband, claiming she was still his wife as Rehana Khanum had lived with him and given birth to a child by him some three years after the deed was written, implying revocation. Although the Supreme Court held the khula agreement to have been revoked and held the previous marriage still valid, it declared that the couple’s acquittal on zina charges by the FSC on the grounds that “there was no direct evidence of their having committed sexual intercourse” was of no consequence to the bigamy case. Because the previous marriage was still valid, the Supreme Court upheld Rehana Khanum’s conviction by the High Court under bigamy, although reducing her sentence to that of imprisonment already undergone.

The Interface between Civil Law, Criminal Law and Custom

While, from women’s perspective, the general thrust of the MFLO’s provisions for divorce was protective, the promulgation of the Zina (Enforcement of Hudood) Ordinance in 1979, has rendered this ‘protection’ questionable. The controversy over Section 7 can be pivotal since a subsequent remarriage following a talaq of questionable validity raises a criminal liability. Prior to 1979, the Pakistan Penal Code had
maintained the colonial legislation on bigamy and adultery. For bigamy punishment extended to a maximum 7 years with fine, while adultery and enticing a married woman carried the lesser penalties of up to five years and up to 2 years respectively and/or fine. In the Gardezi case, Lt. Col. Yusuf was convicted of enticement but ultimately sentenced merely to a fine.

Discriminatory legislation was introduced by the martial law regime of General Zia-ul-Haq in the late 1970s, and compounded by a political atmosphere which moved the entire judicial system in a direction prejudicial to women’s rights. The pre-existing clash between family law provisions and customary practice within a patriarchal system has been further complicated by a clash between the MFLO and the Zina Ordinance. The MFLO and the Hudood Ordinances are not ordinary laws; both enjoy constitutional protection; state that their provisions apply ‘notwithstanding anything contained in any other law’; and have extra-territorial jurisdiction. When the two clash, confusion abounds, with disastrous consequences for women.

Penalties for any form of extra-marital intercourse are severe under the Zina Ordinance, with adultery potentially carrying the death penalty. At its most extreme, this has led to the pronouncement in trial courts of a death sentence for zina on a woman who remarried subsequent to her unregistered divorce. Zina is a cognizable offence and can be registered on the complaint of any third party. Since registration of talaq is the husband’s responsibility, the Zina Ordinance has placed a powerful weapon in the hands of husbands who seek to retain control over women they have discarded through an oral, unregistered talaq. Thus a husband may divorce his wife through oral talaq or in writing without registering this with the Union Council, and since this is customarily accepted as a valid divorce she believes herself to be free to remarry. However, on remarriage, she finds a case of zina and bigamy registered against her and her new husband on the basis of faulty procedure under Section 7.

Section 7 of the MFLO lies at the centre of the clash between civil and criminal law - each with their own set of courts, evidentiary requirements and special procedures. A substantial portion of zina cases
are in essence bigamy cases where, following a *talaq* of doubtful validity, the wife has subsequently remarried. Since the validity of the divorce is questioned, doubt is thrown on the validity of the second marriage. According to Section 4 of the Zina Ordinance:

A man and a woman are said to commit *zina* if they willfully have sexual intercourse without being validly married to each other.

However, 'valid marriage' has not been defined in the Zina Ordinance, while jurisdiction for determining the validity of marriages and divorces lies with the Family Courts. Soon after the promulgation of the Zina Ordinance, the chaos it created became evident. It threw open the question of which forum was to have precedence in the event that a *zina* case was proceeding in the criminal courts while at the same time a civil case regarding the validity of a *talaq* and subsequent marriage was proceeding under the MFLO in the Family Courts. In the early 1980s, with 'Islamisation' at its height, women were the focus of a full-scale attack under the guise of the Hudood Ordinances. Trends in superior court case law regarding the staying of criminal proceedings were highly unstable as observed by the Supreme Court in 1984. In one case, the Division Bench of the High Court refused to overrule a High Court order for the registration of a criminal case, adding that it had not gone into the merits of the case lest it prejudice either party in the event that the accused are challaned (formally charged) and the trial proceeds. In this particular case, the woman had filed a jactitation suit in the family court seeking to clarify the status of her previously dissolved marriage, as well as a case of perpetual injunction against her parents. In another case from a similar period, where the new husband moved for quashment of criminal proceedings under the Zina Ordinance and bigamy, the Lahore High Court observed that in the absence of a declaration by the civil court that the written divorce deed is not a genuine document, the continuation of the criminal complaint would be a clear abuse of law and the proceedings were quashed.

In 1984 a full bench of the Supreme Court Shariat Appellate Bench issued a detailed judgment setting forth guidelines for cases involving a charge of *zina* and the questionable validity of a marriage. These
guidelines are in theory favourable to women who have remarried and face charges of zina lodged by their former husbands. The guidelines summarised are:

1. When a superior court decides the validity of a marriage in a criminal case of zina, res judicata will apply and the Family Court will not be able to decide it again.

2. The judgment of the criminal trial court will not have any determinative effect on the decision before the Family Court if the issue and the parties are the same. The reverse, however, does not hold; if the question of valid marriage already stands decided by the Family Court, it will have precedence.

3. Criminal proceedings (even at the appeal stage) should be stayed until a decision by the Family Court if during a criminal trial the plea of valid marriage is taken and the matter is before the Family Court. In the event of a stay, the accused may be released on bail with refusal/cancellation only possible in exceptional cases. Compromises between the parties reached before the family court decree are to have a binding effect on the criminal trial.

4. The criminal court may ask the accused to seek a decision from the Family Court which 'will also serve as a test for the genuineness of the plea'. The parties' refusal to file such a suit would allow the criminal trial court to make the 'necessary presumptions.'

5. A District & Sessions Judge could try the two cases together but the family case should be decided first.

6. If both the civil and criminal cases reach the higher appeals stage in the High Court and Federal Shariat Court respectively, and the decisions in each are different, the High Court proceedings should be stayed until the decision of the FSC.

These relatively clear guidelines are not followed by trial courts. Criminal trials are not stayed unless a family suit is already pending and the High Court is approached for a direction on the matter. More commonly, both trials proceed side by side with a common verdict being
announced. Sometimes cases are of such a complex nature that it is impossible to separate the criminal charges from the civil dispute. Here, the additional problem is the differing standards of proof required in civil and criminal matters. Divorce and marriage are civil matters where the standard of proof is in accordance with general standards of proof required in civil cases - i.e., 'probability'. On the other hand, zina is a criminal matter, where the standard of proof for conviction is 'beyond reasonable doubt.' In remarriage cases, the basis of the matter is the validity of the previous dissolution which is a civil matter. When these two matters clash in a criminal case of zina, the problem arises that the definition of marriage under the Zina Ordinance is different from the requirements mentioned under the MFLO:

Zina Ordinance Section 2(c) 'marriage' means marriage which is not void according to the personal law of the parties, and 'married' shall be construed accordingly.

Under MFLO Section 5 and related rules, the standard nikahnama form has to be filled, signed by the parties, witnesses and Nikah Khwan (person performing the marriage ceremony), and registered with the Nikah Registrar. Thus, in numerous instances, the courts have acquitted a couple of the criminal charge on the basis of the standards of proof required in a criminal case, even though the procedures required under the MFLO have not been followed. While giving the benefit of doubt to an accused couple, the overall effect is to undermine the provisions of the MFLO. Moreover, if the case goes in appeal before the Federal Shariat Court or the Supreme Court Shariat Appellate Bench, the court gives a ruling on the entire matter before it (which is binding on the Family Courts), often disregarding the MFLO altogether, as illustrated by the Allahdad vs. Mukhtar case discussed above.77

This case also illustrates the problem that even where criminal proceedings are stayed following a divorce of doubtful validity, the criminal case, unless quashed as above, has ultimately to come to a conclusion. In this case, the FSC followed the SC guidelines and directed the case to be heard by the same Sessions Court with the civil case being decided in 1986. It took a further four years for a decision of acquittal in the criminal trial, following which the former husband went
in appeal all the way up to the Supreme Court Shariat Appellate Bench, where the acquittal was finally upheld in 1992. Allahdad’s original complaint against his former wife was filed a decade earlier in 1982, a year and a half after he pronounced an oral divorce on her. As stated before, given women’s generally inferior social status and economic insecurity, the burden of prolonged litigation and imprisonment while under trial falls disproportionately on women. This is not to mention the impact on the three children who were born to Allahdad and his first wife.

*Li’an* (see Ali and Naz, this volume) is another form of dissolution derived from Muslim jurisprudence and recognised under Pakistan’s statutory law (Section 2(ix) of the DMMA) but now complicated by the promulgation of the Hudood Ordinances. While the DMMA does not provide for any criminal liability, Section 14 of the Offence of Qazaf (Enforcement of Hadd) Ordinance provides for imprisonment in the event that a woman fails to take the oath or accept her husband’s accusation as true. In addition under Section 14(4) a wife who accepts her husband’s accusation shall be punished for *zina*.

In a pre-Hudood laws case, a woman went in criminal proceedings against her husband charging him with defamation on the grounds that in his *talaq* notice to the Chairman he had alleged that she had become pregnant while living in separation from him. While rejecting the husband’s plea for quashing in the High Court, the court observed that the law does not require the husband to provide reasons for the *talaq* but if he does so and the stated reasons are, per se, defamatory, the law will not hesitate to take its course.

A 1982 case dealt with the complications raised by the Hudood Ordinances. Although the case settled a number of issues and acquitted the woman in question through a 3:1 majority decision, the debate covered in the judgment illustrates the impact of discriminatory legislation and negative changes in attitudes towards women in the post-1979 period. It noted that many cases reaching the courts under the Zina Ordinance are essentially *li’an* cases where there is no evidence other than the husband’s accusation. The court’s majority decision settled that in such instances, simple *li’an* proceedings should be completed and the
matter ended, adding that there can be no punishment for zina in the event that a woman denies her husband’s accusation on oath because the matter then rests with God. The dissenting judge however insisted that li‘an proceedings do not acquit a woman of criminal liabilities in totality. The case underscored the fact that li‘an proceedings themselves are subject to debate among different schools of thought. One school is of the view that once the husband accuses the wife under oath and she refuses to take the oath, she should be immediately convicted of zina under hadd. The contrary view is that she should be imprisoned until she agrees to take the oath or confesses. In this judgment, while the court followed the letter of the law and acquitted the accused woman, the court made the additional comment that:

[In the present case and other similar instances there is no provision either under the Hudood Ordinances or in the Penal Code making it cognisable for an unmarried girl to disappear from the house of their parents without consultation and of their free will to contract a nikah and go away with unknown person. Similarly, if a married woman goes away with a namehram [man outside the prohibited degrees of marriage] this act is not cognisable under any law. From the Islamic point of view this is a great vacuum which should be filled through legislation.

It is important to point out that on completion of li‘an proceedings the court is to dissolve the marriage and no appeal lies against such a decree.

Court attitudes based on social assumptions have often worked to women’s benefit but only where women have not violated social norms. In one case, the court considered parental sanction for a woman’s remarriage and a public marriage ceremony important factors and accepted that divorce must have taken place, thereby quashing criminal proceedings lodged by the wife’s former husband. The court observed:

It is obvious that the second marriage of Mst. Shahid Farhat has been solemnised with the blessings of the parents of the spouses, and not in any clandestine manner, but by way of
public ceremony, in accordance with Muslim rites and the customs of the prevalent society, and therefore, I am quite satisfied that the parents would have married their daughter only on obtaining the divorce deed.

By implication, couples who do not have parental sanction for the union will face an uphill battle attempting to prove the validity of an oral talaq and subsequent marriage. In a habeas corpus petition filed against a father who refused to accept the validity of his adult daughter’s nikah, the court said it would not debate the issue of the nikah’s validity, but it nevertheless relied upon the parents’ statements that no such nikah had taken place and refused to allow the woman to go with her husband. It commented that it did not wish to unwittingly become “a party to facilitating a relationship that may not have the sanction of law and may militate against the norms of morality and the dictates of religion”. Indeed, a large number of zina cases are registered on the complaint of the woman’s parents.

Bound by a highly discriminatory law and faced with continuing customary practices which augment the law’s negative impact on women, the courts have sought innovative ways around the text of the law in other divorce-related areas. Unfortunately, efforts to spare one woman have threatened the rights of a wider group by opening up for debate areas once considered settled. Thus, in one case where a woman faced a zina charge after remarrying during her iddat period, the court did away with Section 7 proceedings and ruled out a uniform pattern of 90 days for iddat. It introduced a complicated formula based on jurisprudence for the calculation of iddat, holding that iddat could be as short as 39 days. This judgment lays a dangerous precedent for shortening the protective period of iddat and threatens possible benefits such as maintenance during iddat - as well as undermining the divorce procedure laid down in the MFLO.

The Attack on Section 7: The impact of Political Discourse on Family Law

The general political environment has had a significant impact on women’s options in the area of divorce. In the post-martial law period
starting in 1988, the political atmosphere has fluctuated; interludes of improved attitudes towards women's rights have alternated with more discriminatory spells. These almost cyclical trends have been reflected in superior court case law, noticeably in areas such as family law and Hudood cases. Even when a woman overcomes the obstacles posed by customary practices and approaches the formal judicial system, the lack of stability in relevant case law means there are no guarantees that she will secure relief.

The MFLO faced opposition even before it was promulgated. Maulana Thanvi, a member of the 1955 Rashid Commission whose recommendations formed the basis of the MFLO, wrote a dissenting note to the Commission's report. His objections, which focused on Section 7 and provisions regarding polygamy, have largely been followed by orthodox judges while handling divorce issues. From the late 1970s onwards, women's rights have been made the focus of political discourse (Mumtaz and Shaheed 87) and this has been reflected in contradictory case law, particularly in cases involving a combination of the provisions of the MFLO and the Zina Ordinance as mentioned earlier. When Federal Shariat Court was introduced, it was empowered to "examine and decide the question whether or not any law, or provisions of law, is repugnant to the injunctions of Islam," but Muslim personal laws were excluded from this purview. Following the incorporation of the Objectives Resolution as a substantive part of the Constitution in 1985, the MFLO - notably Section 7 - became the victim of a highly charged debate over whether the statute law or the injunctions of Islam are to be supreme, and whether the superior courts had the power to declare a law repugnant.

This debate largely took place within the parallel shariat court system in cases reaching both the Federal Shariat Courts and the Shariat Appellate Bench of the Supreme Court. The landmark cases in this area are Mirza Qamar Raza vs. Tahira Begum and Mohammad Sarwar vs. The State. In 1987 the Sindh High Court, which later heard the Qamar Raza case, argued in a banking law case that following the constitutional amendment the courts had jurisdiction to declare laws or provisions repugnant to Islam if they were violative of the injunctions of Islam. Following this, in the Qamar Raza case the same court held Section 7
repugnant to Islam, thereby sweeping aside the requirements of notice and 90 days waiting from the date of receipt of notice by the Chairman. Until this case, the Federal Shariat Court had largely side-stepped Section 7 on various grounds, arguing that if talaq was otherwise effective, mere technicalities (i.e., non-compliance with Section 7) could not render it ineffective. However, in Mohammad Sarwar vs. The State, the FSC used the precedent regarding the repugnancy of Section 7 set in the Qamar Raza case to dispense with the proceedings required under Section 7. While in its judgment the FSC acknowledged that Muslim personal law lies outside its jurisdiction, it noted that the FSC is obliged to follow statutory law as interpreted by the Supreme Court and, in its absence, by the High Court in whose jurisdiction the matter would fall otherwise. Thus since the SHC had declared Section 7 repugnant, the FSC could now follow suit.

It is important to note that this verdict saved a couple from the verdict of stoning to death pronounced by the trial court. However, in effect, the protective aspects of Section 7 procedure were severely undermined to women's detriment since this judgment set the precedent of customary and unregulated forms of talaq being regarded as valid.

The debate went a step further in June 1988 when former martial law ruler Gen. Zia-ul-Haq as President of Pakistan (after dissolving the Assemblies) issued an Enforcement of Shariah Ordinance. This empowered the High Courts and Supreme Court to strike down any law found to be repugnant to Islam. Although the Ordinance was only re-promulgated once and lapsed in February 1989, it encouraged further attacks on the MFLO on the basis of Article 2-A. While debating the constitutional protection granted to Muslim personal laws (under the Constitution's fundamental rights Article 8(b)), the court stated:

> The MFLO comes into conflict with Article 20 of the Constitution [freedom of religion] as it prevents Muslims to practise their religion.\(^7\)

The matter was finally settled by Hakim Khan vs. Government of Pakistan\(^8\) which held that Article 2-A (Objectives Resolution) is not a supra-constitutional provision. The SC held that an interpretation which
would allow all provisions of the existing Constitution to be challengeable on the grounds of their repugnancy "would result in undermining it and pave the way for its eventual destruction." This was subsequently upheld in a case involving a dispute over dissolution of marriage.  

In numerous instances, the courts have sought to provide relief to individual women who have remarried following an unregistered divorce, but have achieved this through interpretations which have further eroded the regulatory effect of the MFLO. Thus in Allahdad vs. Mukhtar, the Supreme Court Shariat Appellate Bench upheld the stand taken in the Qamar Raza case, adding to the debate on the validity of marriages subsequent to talaqs which fail to follow Section 7 procedure. The court observed that since valid marriage was not defined in the Zina Ordinance it was to be constructed in the light of Islamic injunctions and by keeping in view that Section 3 of the Zina Ordinance has given it overriding effect on any other law:

[T]he logical result of this scheme is that if there is a clash between an existing law [i.e., Section 7 MFLO] and the injunctions of Islam with regard to the validity of marriage, the injunctions of Islam will prevail for the purpose of the [Zina] Ordinance. Thus if a marriage is valid in Sharia, it shall be valid for the purpose of this Ordinance even though it is not recognised as valid in any other law...Therefore even if it is assumed that Section 7 of the MFLO is a good law, the same cannot affect the validity of a marriage contracted according to Sharia at least to the extent of the criminal liability envisaged in the [Zina] Ordinance.

It is a short step from this to arguing that the entire procedures laid out in the MFLO for registration of marriages and divorces are repugnant, thereby bringing women back to their precarious position prior to the introduction of the MFLO in 1961.
Statutory Provisions and Case Law: Family Matters related to Divorce

An examination of divorce laws and practices in Pakistan would be incomplete from the women’s perspective without an accompanying analysis of issues which, although by law the subject of separate civil suits, are in fact an integral part of the termination of the marriage contract as they arise out of a single cause of action. More importantly, for women the accompanying issues surrounding a divorce are often the major factors determining whether or not a woman will seek dissolution at all.\(^91\)

Issues such as claims for past maintenance, post-divorce maintenance, and recovery of dower - invariable corollaries to a divorce whether initiated by the husband or wife - are all dealt with by the Family Courts (created under the Family Courts Act 1964) in accordance with the MFLO, while custody of children is dealt with under the Guardians & Wards Act of 1890. It has been an immensely positive development for women that the courts have increasingly seen fit to combine these multiple civil suits in a single suit for relief. More recently, a welcome amendment to the Family Courts Act in 1997 has provided for suits for the recovery of dowry (jehez) to also be heard by the same Family Court hearing other related suits.

Just as custom denies women access to many of the positive provisions in statute law relating to women’s divorce rights (e.g., the option of *talaq-i-taqweez*), in the area of auxiliary issues custom denies women the opportunity to have certain ‘affirmative action’ stipulations written into their marriage contracts - as permitted by law. For example, post-divorce maintenance is not provided for in law and is not an issue being addressed in Pakistani case law. However, an agreement can be made and attached to the marriage contract providing for post-divorce maintenance; in one rare example of case law on the issue dating back to 1921, this was upheld as valid.\(^92\) Similarly, the courts, notably the superior judiciary, have shown themselves favourably disposed towards women’s suits for recovery of *haq mehr* following *talaq* or dissolution under the DMMA.\(^93\) Moreover, the wife may refuse to consummate the marriage or refuse to continue living with her husband until payment of
prompt dower, non-payment being accepted as a complete defence to a husband’s suit for restitution of conjugal rights. This latter is one of the most odious and misused provisions governing family affairs and is often filed by the husband as a counter suit to the wife’s suit for maintenance or *khula*, and forces the wife to battle on dual fronts. Should the wife change her place of residence and file for *khula* from her current place of residence (frequently her natal home), the suit for restitution is an additional burden in that it is filed in the husband’s district.\(^{94}\)

Despite the generally favourable developments in case law, a woman’s access to *haq mehr* - literally ‘right’ to *mehr* - is routinely undermined by customary practices, ironically in the name of Sharia. Many communities recognise that *mehr* is a requisite of Muslim marriage, but obviate its usefulness by writing the purely symbolic so-called ‘*shara’i mehr*’\(^{95}\) into the marriage contract. With the exception of certain communities, *haq mehr* is rarely treated as the important right that Muslim jurisprudence intended it to be. Even in the North West Frontier Province where certain communities customarily write over immovable property as dower, women almost never exercise practical control.

Conclusion

To say that women in Pakistan fail to take advantage of whatever legal rights they do have in the area of divorce is a gross over simplification since it overlooks the variety of factors contributing to this situation. This requires not only a plunge into the ‘judicial void’ (Dahl 87) which exists beyond formal law but equally a conscious effort to plug the empirical and normative void with solid research.

The impact of custom on human rights is recognised by no lesser law than the 1973 Constitution of Pakistan.\(^{96}\) This recognition and bold statement of good intent has, however, done little to mitigate the overwhelmingly negative impact of custom on women in all issues surrounding divorce whether initiated by women themselves or by their husbands. Yet ‘custom’ is by no means monolithic. Pakistan is an immensely complex society with lifestyles varying from the rural tribal and feudal to urbanised middle-class. The specific impact of custom in
each individual case is in large part determined by class, educational background, age and ethnic/community status. Singly and combined together, these factors are crucial in determining whether it is socially appropriate, or even economically possible, to take a family matter to the courts. Given the variety of structural, cultural, and individual factors involved in each woman’s particular circumstances, it is clear that provisions for divorce need to be able to respond to the consequent variety of women’s needs.

Generally most communities do not regard divorce favourably irrespective of whether it is initiated by the husband or the wife although there are important exceptions, such as among sections of the working class and urban elite (Balchin 94). However, research needs to go one layer deeper, distinguishing between ‘custom’ as ‘tradition’ - the reflection of apparently immutable power relationships within a given community - and Falk Moore’s ‘semi-autonomous social fields’ (Moore 78). We need to explore why women choose not to get divorced and the values positively regarded by women which obviate divorce as an option in their lives (e.g., family continuity, economic security if the husband agrees to maintenance, the desire for the children to ‘have a father’).

Custom accepts lifelong separation and therefore a woman’s natal family (notably the male members who invariably determine her choices in the matter) generally only opts for dissolution once a suitable match for remarriage has been found or, as a last resort, when it is clear that nothing can be obtained from the existing husband. Custom also operates as a practical obstacle to divorce for women. Marriages continue to be oral and unregistered, leading to procedural problems in securing a judicial divorce; the woman has first of all to go through the procedure of proving she is married through a separate suit for jactitation. Hence, one organisation’s activities in the area of legal consciousness have focused on preventive measures aimed at helping women and communities understand the value of a written, registered marriage contract (see Naheed and Iqbal, this volume).

The courts and those offering legal aid services to women have observed that divorce - and specifically divorce initiated by women - is a growing phenomenon in Pakistan (Balchin 95). However, empirical studies have
yet to substantiate this observation. Nor have the reasons behind this trend been investigated. Indications are that whereas in the past the woman’s natal family preferred the option of separation to the socially abominated option of divorce, the economic crisis has meant that families are no longer willing or able to support an additional person (or persons in the quite likely event that the woman has children who are in her custody and the husband is paying neither her nor the children’s maintenance). Thus, divorce and eventual remarriage may be an increasingly preferred option - not necessarily one preferred by the woman herself but perhaps by her natal family.

Other factors possibly leading to a rise in dissolution initiated by women include urban migration and the breakdown of the joint family system whose structures undermine woman’s decision-making powers; economic changes and specifically women’s growing economic autonomy; and growing consciousness on the part of women combined with an increasing social recognition of the need to address women’s rights within the family. The rising trend of dissolution initiated by women may not only be indicative of the growing acceptance of equality of rights in divorce practice, but may also indicate a displacement of traditional forums of adjudication, whether an informal family tribunal or the more formalised jirgas and panchayats. These developments have different implications for women’s interrelationship with the statute law and formal legal system.

Finally, some women may not simply be languishing in unhappy marriages because of discriminatory judicial systems but may prefer separation to divorce. If a family or community-mediated financial agreement regarding maintenance can be arranged - and in this area the law and the courts have proved singularly ineffective - for many women lifelong separation, which offers an element of financial security and social acceptability greater than divorce, may be a preferable option.

It is widely observed that throughout the country it is largely the lower and lower middle classes as well as the non-feudal, urban upper middle class which seek redress from the courts. This does not necessarily indicate that in the area of divorce, women of the lower classes have greater access to justice or that women from the feudal elite, for
example, are more ‘disadvantaged’. It does however, raise the need to examine what forums of adjudication, mediation or negotiation outside the formal legal structure are being accessed by women from other classes. Meanwhile, trends are changing across the country, with all classes exhibiting a greater tendency to move towards the courts, some out of choice and others given the lack of an alternative.

The low number of women filing suits for dissolution obscures the fact that many women may actually be reaching out of court settlements through community or family intervention and then simply registering the divorce as a *talaq or mubarat* since this does not require the socially less acceptable process of court intervention. While this view has yet to be substantiated through empirical research, it appears that this particularly holds true for the upper and middle classes, where the greater financial and social power of the parties ensures that a satisfactory settlement can be enforced. Among other classes where settlements are being reach out of court, a primary factor seems to be the failure of the formal judicial system to implement maintenance and other decrees related to family matters.

Weaknesses in the text and implementation of law related to divorce as well as social problems facing women in divorce matters have been recognised in the 1997 Report of the Commission of Inquiry for Women. In addition to an entire section on termination of marriage, the Report’s recommendations include: automatic delegation of the right of divorce (*talaq-i-tafweez*) to the wife in the event of polygyny; a positive rephrasing of clause 18 to read “Whether the husband has refused to delegate the power of divorce to the wife”; and an amendment to the Family Courts Act requiring the consolidation of all issues arising out of the same divorce proceedings. Recommendations under the section on termination of marriage include a strengthening of the grounds allowed under the DMMA as well as their broadening to include irretrievable breakdown and separation for over one year; restraint orders in the case of separation; provisions for post-divorce maintenance. Regarding *khula*, the Report effectively recommends that the current practice of courts requiring proof of hatred be dispensed with and that the wife simply record her statement. Running perhaps counter to the trends visible in certain case law regarding Section 7, the Report also notes the
importance of registration of divorce, even oral talaq. Here The Report highlights the beneficial effects of registration, stating that a “record is needed, among other things, for subsequent legal decisions, as on maintenance, custody of children, settlement of mutual obligations, etc.” Also seeking to improve the working of the Family Courts, the Report recommends that “all matters arising out of termination of marriage be decided within 90 days” and that “judges be appointed with due care and be sufficiently experienced”.

While relevant statute law is by no means perfect from the women’s perspective and is not prescriptive in divorce-related issues (with the exception of the registration of talaq), it does not bar couples from agreeing to conditions which strengthen the wife’s rights (e.g., talaq-i-tafweez, provision of post-divorce maintenance). Potentially, under existing provisions, women could have far greater equality in the area of dissolution yet custom largely operates to deny this.

Arguments that legal reform and public discussion of the issues surrounding Pakistani divorce law are obstructed by religion are undermined by the fact that existing legislation is drawn from a diverse jurisprudential base and has evolved both through case law and legal reforms. That there has been no substantial legislative reform in the area of family law since 1961 despite huge societal changes and repeated suggestions for reform from various Commissions, reveals that the true barriers to change are political.

The existing gulf between statute law, legal practices and women’s lives indicates that the approach of legal pluralism is the only viable means of understanding how the different centres of power determine how and why existing divorce laws fail to meet Pakistani women’s needs.

The reality is that Pakistani women are oppressed (Mumtaz and Shaheed 87), but the parallel reality is that they are also strategising for their survival within the framework of their existing resources and circumstances and this applies equally in the area of family matters (Balchin 96). However, most of this strategising is taking place outside formal law both because women deem this better suited to their needs and because their access to relief from formal judicial systems is
obstructed by weaknesses within the statute law, legal practice and customary practices.

Endnotes

1 Both men and women can also exercise the option of puberty, the right to have their marriage nullified on attaining puberty in the event that it was contracted when they were minors. However, annulment is not dealt with in this paper.
3 Presidential Order 14 with effect from March 2, 1985.
5 Similarly, the case of Khurshid Bibi vs. Baboo Muhammad Amin PLD 1967 SC 97 apparently settled the principle of khula yet this remains disputed; in Syeda Khanum’s case in 1952 (LHC) and subsequently in Ghulam Sakina vs. Umer Bakhsh PLD 1964 SC 456 the distinction between khula and mubarat was settled, yet the courts continue to confuse the two.
6 Federation of Pakistan vs. Tahira Begum 1994 SCMR 1740.
7 ibid.
8 Princess Aiysha Yasmin Abbasi vs. Maqbool Hussain Qureshi PLD 1979 Lahore 241.
10 Mohammad Shabaz vs. Sher Mohammad 1987 CLC 1496 (Lahore).
11 Family Courts (Punjab Amendment) Ordinance XXIV of 1971. The confusion is that, after this amendment to section 21, whether the original provisions which dealt with the court’s responsibility to send a certified copy of the decree, still stand. This confusion has been reflected in the differing ways in which law manuals have reproduced Section 21 and the amendment.
12 Khadim vs. Judge Family Court Samundari 1991 MLD 1250.
13 Dr. Masood Khan vs. Chairman Arbitration Council Wah PLD 1982 Lahore 532.
14 Dr. Masood Khan vs. Chairman Arbitration Council Wah PLD 1982 Lahore 532.
15 Masood Ahmad Malik vs. Fouzia Farhana Quddus 1991 SCMR 681.
16 Mohammad Sarwar vs. The State PLD 1988 FSC 42.
17 They are however obliged to pay any outstanding hasg mehr due to the wife.
18 Talq-e-ahsan (a single pronouncement followed by a three month period of abstinence); talq-e-hassan (a series of three pronouncements at monthly intervals during which abstinence is observed); and talq-e-bidat (pronouncement of ‘I divorce thee’ three times in one sitting, widely recognised among Hanafi Muslims but not Shias). The latter form is instantaneous and irrevocable, while the former two are revocable until such time as the process has not been completed. The term ‘bid’ literally means ‘something added’ and bidat carries the stigma of something that lacks approval.
22 The Sindh High Court had declared Section 7 MFLO repugnant to Islam, which was overruled by the Supreme Court.
25 *Qambar Bokhari vs. Chairman Arbitration Committee, Lahore* 1995 CLC 1524.
26 *Shaukat Hussain vs. Rubina* PLD 1989 Karachi 513.
29 ibid.
30 *Zahida Shaheen vs. The State* 1994 SCMR 2098.
31 *Noor Khan vs. Haq Nawaz* PLD 1982 FSC 265.
32 PLD 1963 SC 51.
33 *Shera vs. The State* PLD 1982 FSC 229.
34 *Parveen Chaudhry vs. Senior Civil Judge Karachi* PLD 1976 Karachi 416.
35 Since 1993, *Maj. M. Hayat Tarar vs. District Collector, Gujranwala* (1993 CLC 219), which reiterated the position taken in PLD 1976 Karachi 416, is being commonly referred to and the ordinary courts are upholding this.
40 Note, however, that Surah 2.229 does not specify the return of *haq mehr*.
41 *Caroline Rehman vs. Chairman Union Council* 1985 MLD 2486.
43 *Aklima Khatoon vs. Mohibur Rehman* PLD 1963 Dacca 602.
44 1985 CLC 2855.
45 *Shema vs. Chairman Union Council* NLR 1995 Civil 560.
46 PLD 1955 Sindh 378.
48 NLR 1989 SD 582.
49 NLR 1989 SD 487.
50 In a 1995 amendment to the Family Courts Act it was specified that cases must be decided within four to six months. Research is needed to investigate whether case duration has in fact been reduced and whether this has since encouraged lawyers to advise clients to opt for dissolution under the DMMA.
51 *Farida Khanum vs. Maqbul Ilahi* 1991 MLD 1531.
52 *Sardar Masih vs. Haider Masih* PLD 1988 FSC 78.
53 *Zarina vs. The State* PLD 1988 FSC 105.
54 PLD 1967 SC 97.
55 *Aali vs. Additional District Judge-I Quetta* 1986 CLC 27.
56 PLJ 1986 Quetta 159.
57 *Ghulam Zohra vs. Faiz Rasool* 1988 MLD 1353.
58 1992 MLD 2289.
60 Bilquis Fatima vs. Najm-ul-Ikram Qureshi PLD 1959 W.P. Lahore 566.
61 PLD 1967 SC 97.
64 That a husband is obliged to pay any deferred dower or unpaid prompt dower on talaq is not a price for the divorce per se. Haq mehr is, according to Muslim jurisprudence, a consideration for the marriage contract and a right due by virtue of the marriage - not the divorce.
65 1996 MLD 1689.
66 PLD 1979 Lahore 241.
67 Ghulam Fatima vs. Abdul Qayyum PLD 1981 SC 460.
68 Malik Javed vs. Abdul Kadir 1987 SCMR 518.
69 Pakistan Penal Code, 1860, Sections 494, 497 and 498.
70 PLD 1963 SC 51.
71 Muhammad Sarwar vs. The State PLD 1988 FSC 42.
72 1988 SC 186; Allahdad vs. Mukhtar 1992 SCMR 1273. (See also Jahangir 90).
73 Mohammad Azam vs. Muhammad Iqbal PLD 1984 SC 95.
74 Mohammad Rafiq vs. Ahmad Yar PLD 1982 Lahore 825.
75 Amanullah vs. Eidat Shah NLR 1981 Criminal 164.
76 Mohammad Azam vs. Mohammad Iqbal and others, PLD 1984 SC 95, decided on 26 October 1983.
77 1992 SCMR 1273.
78 Nisar Ahmed vs. The State PLD 1977 Lahore 1027.
79 Afadat vs. The State PLD 1982 FSC 52.
81 Mukhtar Ahmad vs. Ghafoor Ahmad PLD 1990 Lahore 484.
82 Alladad vs. Mukhtar 1992 SCMR 1273.
83 Articles 203(D) and 203 (B)(c) of the Constitution.
84 PLD 1988 Karachi 169.
85 PLD 1988 FSC 42.
87 Shaukat Hussain vs. Rubina PLD 1989 Karachi 513.
88 PLD 1992 SC 595.
89 Kaniz Fatima vs. Wali Mohammad PLD 1993 SC 901.
90 Alladad vs. Mukhtar 1992 SCMR 1273.
92 Muhammad Muinuddin vs. Jamal Fatima (1921) 43 All 650.
93 e.g., Khurshid Ahmad vs. Attiya Nigar 1990 CLC 297, NLR 1990 SD 541.
94 There are provisions allowing women to seek the transfer of their cases to their district of residence, but for inter-district transfers, an application has to be filed in the High Court. This procedure is often very lengthy and at times the original
court hearing the suit may reach a verdict before transfer orders arrive, raising further complications.

95 Rs 32.50 (approx 80 US cents) which is mistakenly perceived to have been the Prophet’s practice.

96 Article 8, the first in the Chapter on Fundamental Rights, declares that “Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter shall, to the extent of such inconsistency, be void.”

97 The three cases of mubarat discussed above appear to fall in this category.

References


Faislo: The Informal Settlement System and Crimes Against Women in Sindh

Nafisa Shah

Abstract: Based on research carried out in interior Sindh, this paper looks at the traditional forum of settlement, faislo, prevalent in the area. The paper details the structure and mode of functioning of the faislo institution that is apparently one of the strengths of the tribal system. Over the years the faislo system has not only survived, but has adapted to changed circumstances making an impact on the psyche of both the state justice system, and the communities which use the informal settlements. The paper, which includes case studies, looks at how women are used in the settlement and the manner in which the concept of honour is used in acts of tribal crime, in the compensation of crime, in the overall background of the relationship between women and honour and its association with women’s bodies.

Introduction

The traditional and informal settlement system called faislo is still the predominant institution in rural and tribal Sindh to resolve conflicts, deriving its name from the word ‘faisla’ or ‘decision’. It is versatile and is used to settle issues as wide ranging as disputes over time allocation for irrigation water and grazing rights, to marriages and tribal feuds. Completely different in spirit and approach from the formal criminal justice, the faislo is a settlement and not a trial to prove anyone guilty or innocent. Unlike the formal legal system, faislo is not punitive. In theory it is supposed to remove enmity and hatred and bring the accused and the victim to agree to a decision made in the traditional ‘court’ and settle all differences, to live in peace and harmony ever after.

The formal justice system introduced by the British displaced, but never entirely replaced the traditional faislo system. After independence, the formal justice system has been eroded over the years and therefore the traditional systems are being modified to fit the changing needs of the
communities. *Faislo* sometimes also called *jirgo*, or *rajuni faislo*, has seen a revival and is increasingly used to resolve differences and disputes ranging over a vast canvas: from petty theft to issues of marriage to murders. Settlement itself has become a contractual arrangement – more like modern day civil courts – where damages are charged, where there is a giving and a taking, negotiations and deals, and where compensations are meticulously calculated.

In the patriarchal tribal and feudal societies, the commodification of women and children is a norm. Therefore, along with money, women and girls are used as commodities of exchange to compensate for any damage done to life, honour and property. Women are given as blood money – *khoonbaha* – to compensate the aggrieved in case of murder. Unborn girls are written down in the name of a relative they will be betrothed to as part of an agreement. Interestingly, the use of land to settle disputes is very rare in the modern day traditional settlement.

This study is an introduction into an institution which is seemingly one of the strengths of the tribal system. Over the years it has not only survived, it has also adapted and changed and in fact has impacted on the psyche of both the state justice system, and the communities which use the informal settlements. The *faislo* has also strengthened the tribal system, in some cases ‘tribalising’ formerly non-tribal societies. What has remained a constant, however, is the commodification of women in these settlements which complicates justice, makes communities manipulative and may lead to a complication of tribal relationships leading to feuds which, in many instances, are then waged on the bodies of women.

This paper is divided into three sections. The first deals with the *faislo*, its structure and how it works. In this section I discuss the views of different *sardars* (tribal heads) about the evolution and change of the *faislo* institution. The second section deals with the concept of compensation and the use of women in the settlement of crime and is largely descriptive in style. This section looks at the concept of honour in crimes and includes three cases of honour killings and the use of the informal justice system. These are largely quotes of the interviews with very little commentary but the quotes are self-explanatory and the reader
can judge the arguments discussed earlier. The third section sums up the trends, and directions that the *faislo* is taking *vis a vis* the state instruments of justice.

Most of the material gathered for this research was during field trips conducted between April to November 1997. Only one trip was made exclusively for this research. The others were tied to the community work which Shirkat Gah, a women’s resource centre is engaged in (see Naheed and Iqbal, this volume). The interviews were conducted in two visits to Hyderabad, one visit to Larkana, two visits to Sukkur and adjoining areas. Four local *sardars* (tribal heads) who were active in *faislo* were interviewed, numerous women affected by the enforcement of tribal customs through the *faislos* were also interviewed. Discussions were also held with different community groups involved in resisting such customary practices.

**The Structure of Faislo**

The word *faislo* can mean several things in the Sindhi language. It can mean the resolution of a dispute, a decision and a judgment all at the same time. The *faislo* system exists at multiple levels: within an extended family, the tribe, at the village and community level, and also at the intra-tribal and inter-tribal levels. The structure of the *faislo* differs with the nature of cases.

A *sardar* is normally the head of one or more tribes. The head of all the Jatoi and Sher tribes is Khadim Hussain Jatoi. Similarly the head of the Sunderani and the Brohi tribes is Nawab Sunder Khan Sunderani. The head of the Bugti tribe is Nawab Akbar Khan Bugti. The *sardars* would head *faislos* that are of a serious tribal or intertribal nature. Otherwise the *sardars* appoint a *mukh*, or representative, in different areas who deals with the day to day disputes. A *sardar* is not necessarily a person who wields political power. In fact, a *sardar* is seen more as an apex of the tribe (or tribes) whose primary responsibility is to take decisions on behalf of the tribe(s). The *jirga* system was recognized by the British colonial rulers who organized a council of these *sardars* who were granted magisterial powers on behalf of the state. Under colonial rule,
therefore sardars had formal state sanction to arbitrate, hold courts and make judgments.

The faislo of today is a remnant of the old jirga system. It is less formal, and the rules as well as structures are fluid varying with region, tribe and geographical location. Ordinary thefts can be decided by a headman, a community leader, a sardar or just a chango murs – a noteworthy and respectable elder who may be assisted by an ameen or advisor. In the extended family system, the family elder would sit with different complainants and settle the matter. This is a very causal setup, and the strength of this structure is entirely dependent on the degree of respect commanded by the head of the extended family whose final word would prevail. Disputes arising in the family can range from a fight over the use of language, insults, to marriage deals (sangh) to fights over property etc.

Disputes arising among sharecroppers would be settled by the owner of the land they work who enjoys a paternalistic authority. Tribal societies make a distinction between the head of a tribe and a landowner, even though the head of the tribe in most cases is a landowner as well. The rais or landowner can - and does - settle disputes but in most cases these are not tribal issues. A dispute within a tribe would be settled by a mukh – appointed by the sardar in that particular area. In case of complex tribal disputes, the sardar himself would preside. In such cases each side is represented by a vaqil (also the word used for 'lawyer') who speaks on its behalf. Ameens or advisors, are neutral and are frequently called upon to swear on the Qu’ran as witnesses for and against an action. In a conflict involving more than one tribe, there may be representation of different tribal sardars.

In most cases faislo comes into play only after a charge has been proven or conceded to by a party or an individual. It is often the guilty party or the accused who first expresses the intention of requesting and their willingness for a faislo. This in fact is also a point of prestige for the other side, who would then consent and give the name of the sardar they would like to have settle the case. Mostly, however, this is not an issue since the tribes have traditionally appointed different leaders, sardars, to settle their cases. For instance a Baluch agricultural community would
settle issues of grazing rights through the landowner but their tribal differences would be taken to their sardar to settle.

Evolution of the Faislo: How the System Works

The jirga system of the olden times was a good system. Nowadays there is no justice with the police. The jawabdar (accused) is released by bribing the police and then the tribes start fighting again. In the courts it takes years to decide the case. But with us we decide within days and sometimes within hours. We have three to four respectable elders who have links with the community and know all about the family and the back ground against which the crime occurs. The police know nothing. We use Qur’an Pak (Holy Qur’an) as the main instrument to settle disputes. The thief will not be given the Qur’an, instead a good, respectable man who is not likely to lie on the Qur’an will pledge on it.

(Sardar Sultan Ahmed Mugheri)

The above sums up three characteristics of the faislo that are repeated by most elders, or sardars in their interviews. First that it is speedy; the faislo is not dependent on lawyers, or ledger papers, typists and any other courtroom paraphernalia. The second is that it seems to be a community justice system since the communities themselves are empowered to steer the faislo and to participate in it as well. The perpetrator of the crime and the victim are known to all, so the issue of witnesses and sureties does not take time and the process is believed to be based on truth. The third is the use of the Holy Book. The Qur’an is given not to the culprit or the witness but to someone who is known by all never to cheat or speak untruths.

In practice, however, the speedy trial, the community knowledge and the surety and guarantee by the Qur’an can - and are - manipulated. Nonetheless these perceptions remain the characteristics which help the faislo subsist as a still very effective and popular institution. Mehboob Shah – an educated man and a practicing doctor - holds the same view: “I used to do faislos even as a child. And have been doing so for twenty years now. Justice is delivered instantaneously.”
Previously in some areas, the jirga used to function through a vote of the majority elders. But now every khalifa, sardar or mukh has his own method. Most of the queries and judgments are verbal but some families demand that judgments be written on stamp papers (a legal document with locus standi in a court of law). Having experienced the rigmaroles of court battles, the communities realise that the written word is perhaps more binding as a contract than an oral one. Hence, increasingly the sardars are writing their judgments on stamp papers. Only a few sardars maintain records. The Pir of Pagaro’s1 - faislo structure for instance has borrowed a lot from the formal judicial system, where the court sits and decides the case after a hearing and where all records are written and judgments signed and stamped as well.

In contrast to the formal justice system where the aggrieved files a report with the police against the accused, in the faislo system the alleged accused or the guilty individual, family or tribe has to ask for the faislo. This reversal is in keeping with what is being sought in each system. In the formal court system, the aggrieved is asking either for compensation for damages inflicted and/or punishment of the party proven guilty. In the settlement system of faislo the guilty party is trying to counter the aggrieved party’s wish to either take revenge (or badlo) in which case the latter can either agree to the faislo request or refuse such a request.

As explained earlier, the faislo is not punitive in the physical sense. Rarely does it use jails, chains and fetters. The methods of punishment vary according to the crime committed. The culprit can be either someone who commits a crime of honour (or some other crime) or someone who is not following the order of the faislo. In the first type of cases, fines (or avezo and mavzo) are used. Someone charged with violating the faislo decision is tried at several levels. If the person or a tribe does not abide by the faislo, the elders try and convince him by taking a delegation to his family who had served as surety. This is called a mairh – gathering. But, if despite this, there is no settlement, then there is a boycott by the community and the case is given over to the police to handle. The social boycott is the most prevalent form of punishment used in the faislo. It is based on the concept not of the physical isolation of jail cells but of psychological, and social seclusion within or by the community.
Hathabandi or social ostracism, is used as the main tool for enforcement of judgment by the Hurs or the murids (followers) of the Pir of Pagaro. Literally meaning ‘binding of hands’, when hathabandi has been imposed on a member of the community, he is to be socially ostracised by the Hurs. No-one may invite him, eat or drink with him or go to his house. Hathabandi is imposed as a way of isolating anyone who does not follow orders, or who may defy a faislo. It may also be used to enforce a decision that is made in the faislo.

A similar case of isolation occurs informally at the community level and is called perpandh band. Again, literally meaning ‘stopping of steps’, perpandh band means that the two warring sides would stop all social communication. In most cases, this is a self imposed decision by two factions or families who may have grievances with one another. But this may also be imposed in a faislo to isolate the party who does not conform. Once perpandh band is imposed, the two families will not eat each other’s food, they will not invite each other and they will not attend each other’s weddings and funerals - the two most important social events in rural Sindh, indeed, throughout Pakistan. This is called perpandh chatty. ‘Per’ translates into ‘feet’, and ‘pand’ into ‘steps’. Khattam is ‘end to,’ Perpandh khatam therefore means a social boycott.

When crime becomes rampant and disputes irreconcilable, communities or tribes will leave the village, an act known as ladano, or exodus. This could be for self-protection. In many cases, however the families of those who shed the blood would leave, fearing retaliatory attack. In one case in 1996, Leila, a young Baluch woman, was slaughtered as related by Mir Zadi from Sanghar:

The day Leila, a Baluch woman from our village was shot, it was hot, very very hot. But when they shot her, clouds appeared from nowhere and a cool heavenly breeze came over. The angels had come to take her. She was innocent and that was proof enough……

Lashkar Khan’s son killed her. Lashkar Khan is the wadero of our village. They said her entrails came out when he hit her in the abdomen. She asked for water, and they poured
water all over her but she couldn’t survive. Meanwhile her husband and her brother in law had also been shot, but they survived the attack. The survivors and their relatives left the village last year. This decision was self imposed.

In many cases, those whom the community considers guilty of violating honour are obliged to leave. The settlement system also uses this method to ostracise those guilty of violating honour. In a settlement in the case of Amina and Shah Khatoon discussed below, the guilty were asked by the traditional settlement –faislo – to leave the village.

When the communities do not physically separate how do they live together with differences? Bhith, meaning ‘a wall’ in Sindhi, symbolises the dispute in the village. Two families who have known each other for generations and have been eating together (a powerful symbol of social proximity or distance in South Asia), will in case of a dispute ask for a bhith to be built between them. The physical barrier symbolises social boycott, and also serves as an announcement to the whole community that the two are now no longer on talking terms. The bhith creates spatial hindrances – far more than we could imagine. In one Syed haveli (large house or manor) for instance, a dispute between two cousins led to the ‘erection’ of a wall. The bhith isolated one cousin whose only access to the haveli now is through the streets. This is both inconvenient and absurd. The bhith connotes humiliation, isolation and separation. Like a village, a haveli is a communal housing system, the residents and rooms being inter-linked through a network of entrances. Blocking one unit is humiliating for that unit, and is again an expression of social ostracism.

Normally, demands for the building of a bhith-wall come from the aggrieved party. An Odho woman whose daughter had been murdered by some relatives - apparently to avenge the insult of being refused the girl’s hand in marriage - demanded that a wall be erected between her house and the house of the relatives allegedly involved in the murder. She expressed her underlying reasons in saying, "How can I see them? My heart burns at their sight. The faislo had directed them to erect a wall. But a year has passed and there is no wall."
One of the methods the *faislo* uses to accentuate conflicts is to direct one family to raise a wall as a barrier. The barrier can be raised as a means of protection as well. In the case of Pari the barrier or wall was asked to be raised by Mahboob Shah to protect Pari from abuse by her brothers in law. The story of Pari and Mussarat as related by Mehboob Shah is as follows:

Mai Pari and Mussarat – two women came to the house of Sobedar Mastoi. Both belonged to the Silra village. They said they wanted refuge. I called comrade Urs and Saleh Silro and they asked me to do something. I was anxious to settle the issue since I did not want to take the responsibility of two women in my house as this seemed to be a very sensitive issue. I talked to Pari. She said that her brothers-in-law were doing *najazi* (committing incest) with her, and her husband could not stop them. She had two children. [In the case of] Mussarat [she] did not want to marry the man her father had engaged her to.

Both sides said they wanted me to make the *faislo*. Fifteen days later, all the Silras came. Pari’s husband Abbas said, ‘I will use her and said she is *achi* (clean)’. I kept some conditions that the brothers in law would not visit her. I said a wall should be built in the middle of the house so that the brothers cannot enter Pari’s portion. I got Urs and Saleh to give surety and wanted to hand over the *amanat* [safekeeping]. I also ensured that there would be no case in the court, and I got surety that the brothers in laws will not bother her and there will be a wall in between the house so that they could not enter.

For Mussarat, I made her father pledge that he would take action and in Pari’s case I got her husband to pledge that he would not hurt her till such time that a proper *faislo* was done. In this case we also took a statement from Pari. Haji Saleh was the guarantor and said he would ensure that nothing would happen to the two girls.
The brothers in law swore on the Qur'an that Pari wanted to get rid of her husband and so she had run away and brought this disgrace to the family.

Some days later Pari was killed. I have the affidavit and dastavez (document) that she is begunha (sinless or innocent).

Mahboob Shah had given shelter to Pari and Mussarat. Although he felt responsible for them he was unwilling to give them total protection. So he quickly disposed off the matter using all the available formalities within the informal system: stamped papers, affidavits etc. Significantly, it was also declared by all those whose honour Pari represented that she was innocent.

Mussarat’s deal was made by her father and a price has been paid for her already which put her under constant threat of murder (the case is still not decided). For her part Pari did not survive the settlement, despite the wall erected according to the faislo of Mehboob Shah, as one of the bothers in law killed her because she had run away.

The story does not end here. Pari’s father had married her off in a deal in which he received money for his daughter’s hand in marriage, but in exchange for which he pledged that a daughter born to Pari would be returned to him to give to any of his relatives. Pari’s father used the initial money he received to get himself a wife. In this case, however, he was more concerned about Yasmin – Pari’s surviving daughter – and with demeaning Pari’s in-laws than in bringing the criminals (who had killed his daughter) to task. His honour was damaged and he could only retrieve it by getting Yasmin back as stipulated in the original agreement or deal.

The triple murder case of two Khoso brothers and a young pre-pubert girl illustrates the complicated nature of the cases that come before the faislo system and also how this system does not always function as intended. The two Khoso brothers were killed by two boys - Omar and Limoo - of another branch of the same tribe. The accused also killed their own sister and presented the case as that of karo kari. This event took place in Kandiaro in April 1997. It is an entangled story in which
one side of the clan had a longstanding dispute with the other side. One reason was also economic disparity. The ones who kept charging the other side of being karos were poorer and less educated. The first murders took place some years ago and the recent ones erupted in April 1997. The faislo in this case resolved the earlier issue but then the dispute arose again and this time, the faislo was violated as was the oath taken on Qur'an.

According to Ali Hasan Khoso, a relative of the slain boys, the saga which culminated in the murder of two very young men and a 13 years old girl had its roots in earlier disputes and murders. He said:

The [sub-]tribe which has drawn the first blood are people who have committed murder before. Previously as well, they killed a naujawan – young man. Then the other side killed an old man in revenge. They had charged a young man, Ghulam Hyder, of being a karo. Then there was a faislo. They were given 25,000 rupees as settlement. They first took the 25,000 rupees but then returned the very next day saying they didn’t want money. They would instead take revenge. That’s when they went and killed the poor boy. After that, as revenge, our side killed one of their men. The same night, the cousins of Ghulam Hyder fired and killed [another man] Qadir Baksh – which was not intentional. There was another faislo. The case was finished. In that we were to pay them money for the honour issue but the two murders were compensated having cancelled each other out.

In the current case, the two brothers were killed by boys who knew them well. Having accused the boys of being karos (i.e. being guilty of sexual relations with a woman of their family), Omar and Limoo also killed their thirteen-year old sister accusing her of being the kari. The distraught mother cannot get over the fact that those who killed her sons had, until then, behaved as friends:

I don’t know anything. I was in the field... I heard a gun shot. In my heart I thought, ‘what is this gun-shot?’ They had come to kill them. I don’t know why... They were just
sitting in the autak (verandah). They were friends with those who had come to kill. [My boys] were young, very young. They had just recently married. Look at these two young widows: they are sisters...

They were friends. The whole day they [the killers] would be here. My sons would say 'Our friends are here,' then we would make tea. They had objected to them [coming] one month ago. But it started with some other fight on something else. They said, 'Why do they come to our house?' Those boys made an ilzaam (accusation) against my two sons. They called the elder one in the ghitti (lane) outside their house. And they said 'don't come to our house: you are a karo' with one of their girls, a very young girl. In the post mortem, the girl had not even reached puberty. She is only 13 years old. It is a zulum (cruelty). The boys just went there when there was work. Nobody can prove that our boys would go there without khushi or gham [occasions for celebration or condolence]. They minded their own business. They used to go to Karachi with the mal (stock) – we do business in livestock.

The matter had been settled apparently, and my boys were not afraid. They did not believe their friends would do this. We told them if anything is wrong we will take you outside the village but they said there is nothing.

We had even told them that if we are to blame then take faislo but they would not take a faislo. The boys had sworn on the Qur'an that they were not guilty and the other side also swore that there would be nothing. They told the wadero [landlord] that there is nothing. But then they killed them. The boys were in their autaq resting. They came and shot them. I don't know, I was in the fields.

My insides are burning. I have no other son. They have also gone, my pair has gone, left me.

The girl's cousin told me:
[She's] my cousin, a real cousin, she is my relative. She is my husband's zaal sahiri... I don't even know if she is an adult or not. Omar, the brother killed her. He was on the mari, and from there he killed her. Three shots. One in the leg, one in the arm, one in the chest.

It does not seem that the matter will end there. As Ali Hassan Khoso says:

They are in the jungle and still attacking us. So the boys' father went and asked the DC [District Commissioner] for an arms licenses but he said there are no more licenses. The licenses are closed. Now we don't get [firearms] here we have to go to the Punjab and get them. In Peshawar we give some money and get them made.

As Sher Khan, the wadero (landlord) involved in the faislo says:

The ones who have murdered are chor (thieves) and dakoo (dacoits) and loafer (good-for nothings). They do not listen to our instructions. We are poor. I am not a wadero. I am a poor man. I don't have the strength. I do small faislos and then they don't listen to me. I cannot do faislo's involving khoon [literally 'blood', meaning murder]. We did some anyway. This time it is najaizi (injustice). They are respectable – the boys who were killed... We want to get hold of [the culprits]. They have taken refuge in the jungle.

The Concept of Honour and the Use of Women in the Settlement of Crime

Ghairat (what is sacred and inviolable) is izzat (honour, dignity) and this comes with money and property. And if izzat is violated – then it is justified to kill and die for honour. For a Baluch, for instance, if you are a guest, you symbolise his honour, and he will even die to protect you from the enemy because you are in his territory.

(Sardar Sultan Mugheri)
Under the *faislo* system, crime is mostly seen as damage to honour and property. The settlements must therefore consider the issue of honour as primary to settlement. Punishment by the formal courts, where concepts of honour may be less validated or simply different, is not necessarily a guarantee to end disputes. People do not recognize the state when the issue is that of avenging honour. A murderer can be sent to jail – serve twenty years and still return to face *badlo* – revenge – because those whose honour he had violated take the position that the twenty years was punishment from the state that has nothing to do with our revenge in our system. They would still therefore demand or want *mavzo* or compensation before considering the matter closed.

There are several such reported cases. One example is from the Rinds in Kandiaro where Misri Rind was given a 10-year prison sentence by the formal court for killing Jaffer Rind over an honour issue. Jaffar’s son who was enrolled in the police killed Misri Rind after Misri’s release from prison.

The monetary compensation of honour can be retrieved by any male member of the family. If the woman is married, the compensation would be taken by the husband. If she is single, it could be distributed amongst her relatives depending on whose honour has been damaged the most.

The accused is one who has damaged honour and is not necessarily a criminal therefore in the eyes of the formal criminal justice system. In cases of *karo kari* (honour killing), the murderer is often treated as the victim. A man who has murdered his wife and who is unable to find and murder the man alleged to be her lover, would be compensated by the tribal courts. In one case, for example, Jamali Baluch who was atop a palm tree when a young woman from his village passed by was accused of being a *karo*. The young girl was murdered by her husband but Baluch escaped. The *faislo* charged him one lac rupees (Rs.100,000 or approximately US$ 2000) since he was responsible for tarnishing the honour of the husband of the young woman.

Another incident was related to me in 1994 by a woman in a *Darul Aman* (government run shelters for women):
A man in my village shot his niece in Ghotki. The girl had just reached puberty. Her uncle accused her of being a *kari*. The man she was supposed to be seeing was living far away and a liaison was probably not even possible in the circumstances. The uncle who killed her was compensated with 30,000 rupees as bloodmoney under a *faislo* given by the local *wadero*. (*Newslime*, 1994)

Occasionally, the sum is distributed among the many claimants to the injury of honour as explained in the case study of Shah Khatoon and Amina in Shahdadpur as told to me journalist Ishaq Mangrio:

On the first day of Ramazan on 22nd January, 1996, at the time of the *azaan* [call to prayer], 16 year old Shah Khatoon, and 13 year old Amina were hacked to death in Shahpur Chakar. According to the report, Shah Khatoon daughter of late Limoo Khashkheli and Amina, daughter of Ghulam Rasool Khashkheli, had left their homes with Zulfiqar Chandio two days before they were murdered.

Fakir Mohamad Bux Khashkheli – an MPA from the area and Majnoon Chand, a respected notable, sat for a *rajuni faislo* in which they had decided to send both the girls back to their parents.

Shah Khatoon was married to Rafiq who drove a taxi. They had been married for 6 months. Amina was unmarried. Rafiq with the help of his younger brother Amir Ali Khashkheli murdered the two women on the night they returned.

No one registered a case with the police. The police itself filed a case and arrested the accused. Zulfiqar Chandio and Moharram Chandio with whom the women had escaped left Shahpur Chakar the day after the *faislo*. Following the murders, the Khaskhelis put pressure on the Chandio clan to compensate for the honour killings. At the time another Chandio influential took a letter from Pir Pagaro for the *faislo* to prevent the enmity from turning into a blood feud.
The elders of both the families set 6th February 1996 as the date of settlement. But the elders of Khaskheli tribe demanded two women in marriage as compensation for the killings. The Chandios refused to submit to this demand. Instead they offered to pay bloodmoney. There could therefore be no decision that day.

Pir Pagaro meanwhile constituted a committee to decide the case. The committee decided the case on April 8th 1996 at the Dargha Pir Jo Goth.

They fixed a sum of 6 lac rupees [approximately US$12,000] on the Chandios for the two murders. This sum had to be paid within one and a half months. The Chandios gave the fine on time. It was also decided that Zulfiqar Chandio will leave Shahpur Chakar and the other Chandios will also leave that area and move to another part of the town.

The accused were to be released three months after this faislo because of the razinama (agreement). Chandios and Khaskhelis celebrated the settlement by giving khairat (alms) in which both the killers Amir Ali and Rafiq were allowed to participate.

This story illustrates the use of money, the demand of women to settle disputes, and the distribution of money among those whose honour was damaged. Added to this, there is also the use of khairat – alms-giving. The killers were set free after the settlement following the rajuni faislo. There is hardly any mention of the two women who were murdered. Money was given to the killers of Shah Khatoon and Amina because they killed their women to salvage their honour, and in the process one of them also suffered the loss of his wife, a development which had to be compensated for. Having refused to give them sangh (a woman in marriage) in return for the murders, the other side would therefore have to compensate the aggrieved party through money.

Most settlements involve compensation in the form of money. The rates for the murder of a man, woman or a child differ in different areas. They may range from one and a half lac rupees. (Pakistan Rs.150,000 or
approximately US$ 3000) to up to 6 lac (Rs. 600,000 or US$ 12,000) rupees depending on the nature of the crime, and the circumstances in which the crime was committed. The one who draws first blood is charged more. Similarly, the person who strikes from the back is fined a larger amount since this suggests either cowardice or slyness. Consequently a person stabbed or hit in the back is compensated more.

Another case related to me during my visit was of the murdered bodyguard. Nawab Yusof’s son, Mir Ghulam Mustafa Khan, killed Mir Sikandar Khan’s bodyguard and went to Karachi. The bodyguard’s family suspected that he had been killed and when they went to the area they found his bones as evidence of his murder. They filed a case against Mir Ghulam Mustafa Khan and Sikander Khan who were then arrested.

In the faislo, the murderers were charged 5 lac rupees (approximately US$ 10,000): two lacs for the murder, two lacs for concealing the body, fifty thousand for not informing the bodyguard’s family of the murder, and fifty thousand for the money the family spent in lodging the formal court case.

According to the different sardars interviewed, the murder of a child and a woman has the same weightage. In fact they stated that they took very strong notice of the murder of women and children especially if they were innocent. One of the sardars, Mehboob Shah, relates how he settled the compensation for a murdered woman:

A Mastoi woman left her husband and went to her father’s house. In the faislo she said that her brother-in-law had tried to rape her. We charged a fine of rupees 40,000 to the brother in law and returned her to her husband. But they did not accept the faislo. And three months later, her husband killed her. Since the woman was innocent we charged him one and a half lac rupees which was paid to the father of the woman.

Compensations go to the custodian of women — father, brother or husband depending on who has the custody of the woman concerned at that time.
Men or women who are not even accused but are murdered as ‘proxy’ because they may be the only ones of a particular family or tribe present when the culprits, come are not compensated for if the actual accused escapes. In the interviews, Sultan Mugheri provided an example of such an incident:

The Brohis used to come down the hills in winters and sell their little girls.... There arose a dispute between the Umrani and Brohi tribes. A Brohi man was charged with siyakari (adultery) with an Umrani woman. When the woman was returned to the father, he sold her off and she is now living in Wada Silra. The Umranis warned that they wanted to kill the Brohi but when they could not find him, they killed his brother. The Brohis vowed revenge and they attacked the Umrani village injuring an Umrani and killing a Khosa who was only visiting. So I settled the case and got bloodmoney for the Khosa – 2 lac 40 thousand rupees. The Brohi was killed for gunahi (sin) so there is no aveza [compensation]....

Even though the actual culprit escaped, since the murder was to avenge honour and in this case became a tribal issue, it didn’t matter which Brohi ended up being killed – the important thing was that the aggrieved party retrieved its ‘honour’ by killing off someone from the guilty man’s tribe. So an innocent man was killed but his death was not compensated for. The other man killed in the process was from a different tribe and had nothing to do with the original dispute. His death therefore was compensated, since this was an extra murder.

Women are used in various ways to settle disputes; they are often used as a means of transaction between families; in lieu of, or as bloodmoney in different tribal conflicts; they are exchanged in marriage and a female baby may be pledged or ‘handed over’ to a family or a clan even before her birth. Women are also used in another way in the faislo system. Women are used as mediators to settle long drawn differences where they are made to go and beg forgiveness, or for sulah – settlement.
In the settlements, women are handed over to the aggrieved by the accused, the accused being the one who has violated the honour – and not necessarily a person who commits a murder. The two are different. A killing done in the name of honour is done to retrieve or save the honour of the man, family or tribe. Therefore, if a man kills his wife on suspicion of adultery, the act of killing is accepted as a justified means of saving the honour of the tribe. Consequently, in the faislo settlement system it is he who must be compensated. If in honour killings, instead of killing the man he suspects of adultery, he kills his friend or brother, this is considered as a settlement itself even though the person concerned may have nothing to do with the crime. The Shah Khatoon and Amina case discussed above is a clear reflection of this. Shah Khatoon’s husband murdered his wife because she had run away with a Chandio man. The Chandios had to give monetary compensation (khoonbaha or bloodmoney) to the husband’s tribe.

The fine system called dandh, is the most popular method of settling feuds. Different standards prevail in different areas. The tribes in Larkana have decided on equal rates of compensation for the murder of men and women, one and half lac rupees. However if it is first blood, (i.e. the incident that sparks off further violence) the compensation would be more.

At times women are given as the price or compensation for a murder. According to one sardar in Kashmore, “the idea is to cool tempers and what better way to do it than to give a girl in exchange?” However, he went on to admit that exchanging women was unfair to those who are ‘given away’ through no fault of theirs, and continued, “sometimes we use land to settle dispute. But we discourage the use of women to settle disputes because there is a lifetime of torture of the woman who is then branded and called dandh mein ayal, the one given as fine…”

Mehboob Shah concurred with this view, saying, “we have decided not to exchange women as khoonbaha – since it is not fair to the woman who suffers all her life – dandh mein ayal ahai – we also never allow the fine to be an exchange of land.”
There is no consensus amongst the sardars, however, and notable sardars like Khadim Hussain Jatoi say that "khoonbaha is a very good way of bringing warring tribes together. If we don’t do that, there is no settlement, you see". When I asked him whether they obtained the woman’s consent since their faislo was based on Shariat which specifically states that a woman’s consent is important for any marriage, Jatoi answered with conviction: "No we don’t because that does not appease the tribes and we have to do sulah. Puchar san sulah na tho thiye (there is no settlement if we ask for the woman’s consent)." Clearly women then are not willing parties to the faislo system insofar as the commodification of women is concerned.

All the sardars interviewed stated that the khoonbaha or bloodmoney is the same for the murder of men, women, or children. It is not the identity of the victim but the circumstance around the specific crime that determines the khoonbaha: how the victim was murdered, hurt, or maimed, who drew the first blood, and who was in the right and who in the wrong.

Each tribe, clan and family has its own method for sangh, the custom of giving a woman in marriage. The sangh (or sangahwatti i.e. marriage contract) is both a cause as well as a means of settling conflicts. In the normal course of events, women are exchanged in marriage. When they are not, there may be disputes. When there are disputes; new settlements are made and new deals brokered. When there is no exchange, the family who gives their daughter away in marriage think for the rest of their lives that they have done a great deed or a sacrificial act. "We give her away in the name of God" they say, an expression used when one gives charity. If the woman is kojhi – ordinary looking - then it is not even binding on the man she is pledged to wed to marry her. Refusal is strictly a male prerogative. Even though the man be old or inadequate, the girl has no choice but to marry him.

Women’s fate may be written off long before their birth at the time of their mother’s marriage. This custom is called peth likhi diyan and is still common in many parts of Sindh. In the traditional system in Larkana, the father often exchange his daughter for money and in addition peth – in effect, a daughter who would be born to the daughter
would be returned to the father and he may give her to whomsoever he wishes. When women are not exchanged, valvar or bride price is charged for them. This custom in Upper Sindh is called taken main diyan and may be a point of conflict but can also be used by the faislo to settle conflicts. When there is disagreement, a faislo settlement may be requested, though it is not always followed as one of the respondents’ story indicated:

We had an agreement of peth likhe diyan that my girl, Shama, would be married to my brother’s son in return for my marriage to my husband. However, my husband refused and said he would give money instead.

We arranged a faislo in which the wadero (landlord) decided that my daughter should be given in marriage to my brother’s child. After the faislo, my husband got very angry and he threw me out of the house. When I was thrown out, I said I would not live with anyone and would go to a Darulaman [government-run shelters for women].

He gave my daughter in marriage for 40,000 rupees to his relatives and gave some money as a fine to my brothers. One of my children was born here [at the shelter]. My husband does not want me back and he says I am a kari. I now want a khula [dissolution of marriage] from him. My daughter lives here close by.

The traditional settlement system also intervenes when women are sold into marriage, a custom which graphically represents the commodification of a woman, and may directly lead to crimes against women. Ajiban’s story is a case in point.

Ajiban and her husband, Ghulam Ali, were stopped as they were leaving their home in the Khairpur Mirs area and stabbed to death by Ajiban’s brothers. The brothers alleged that their sister had an illicit relationship. Ajiban had been sold several times for money by her family. She was forced to leave her first husband for another man who had paid them 40,000 rupees. Then two years later Ajiban was forced to leave her second husband and marry a young boy, her present husband. She had
one child from Ghulam Ali and was seven months pregnant when the brothers killed them both. The police of Khairpur Mirs claim that the brothers killed the couple for their money. Ajiban was sold thrice over and eventually killed for money and jewellery by her own family.

Violations of deals that are cut can make either of the parties guilty of maligning honour in which case the *faislo* may be called. In the case of Mussarat, a deal was made between her father and some Baluch men and a deposit had been paid for her. On learning about the deal, Mussarat left her house in protest, leading to a major conflict for which a *faislo* is still awaited. The Baluch are demanding that Mussarat be given to them since they had already paid for her and would therefore kill her if she was not ‘returned’ to them for the money they had paid.

If a woman intervenes in a case, then there is *bakhshish*. The *faislo* therefore may use a woman to settle differences. In fact, one often hears that a woman’s mediation is the best bet to ending a dispute. In an ongoing blood feud between the Bugti and Kalpur tribes, women were sent ceremonially to settle the differences. It is often said that murders and blood feuds are forgiven if women, who embody honour, go to the aggrieved party. Although, it is not clear how often this practice takes place and whether it has any effect at all. I have encountered many women whose families are embroiled in disputes who speak of how they even put their *potis* or *dupattas* (the long scarf used by women in Pakistan) at the feet of the person they want to settle differences with, but this has no effect whatsoever. Placing the *dupatta* or *poti* at someone’s feet is akin to men doing likewise with their turbans (*pugs* or *safas*). For men the act symbolises complete submission. This holds true for women as well, but the symbolism is even stronger since the veil is associated not only with dignity but equally with a woman’s chastity. The practice of sending women as intermediaries for settlement is often used politically. During elections, when women campaign for votes in the villages the tribals will say “Look, *mani* (women) are here and now you cannot refuse”.
The Circuit House: A Point of Interaction between the Administration and the Jirga

There is a collusion between the arms of the state and the informal settlement systems at every level. It would therefore not be wrong to say that these settlement systems have state sanction and therefore one can even argue that it makes the very charter of the state tribal. In a large number of cases of tribal warfare, the area administration has been instrumental in faislos. It is interesting to note that many of the present community leaders who hold faislos, have links with law-enforcement as well. Large cases involving several murders and intertribal disputes are settled in Circuit Houses which are district level state guest houses, under the direct supervision of the District Commissioner. Most of the challenging intertribal disputes are decided or settled in the Circuit Houses with state support. An illustration of this was provided by Mahboob Shah in relating a dispute that took place in Larkana:

In Kambar, there was a blood feud between the Rind and the Mastoi tribes, a Mastoi woman was killed and a Rind woman ran away. The feud took the lives of seventeen people. It started in 1990 with Ghulam Mustafa Magsi. Nine persons from the Rind tribe and eight from the Mastoi tribe were killed. We had the jirga in the Circuit House in 1995. The feud had destroyed whole villages and there were no people in these villages which had been evacuated and torched.

Many of the modern day chieftains, and sardars have links to the older tribal system. In Mehboob Shah’s case, his grandfather, Pir Nabi Shah, was an expert in the jirga system. "He was a member in the jirga council as was my grandfather. His father was an SP (Superintendent Police)." Khadim Hussain Jatoi’s father also had a permanent place in the jirga council and in fact was given magisterial status. However, political and local influence is enough to make the faislo. In practice, the faislo is also used by political party representatives to reinforce their social hold over their constituents. This is a dangerous trend since the communities can also manipulate the faislo, making their votes for the sardars conditional to a settlement of their choosing. In one incident in
the 1997 elections, a Junejo woman was married into another tribe. The Junejos approached the party incumbent insisting that he have the woman returned to them. When the person contesting the election refused, fearing that the woman may be killed as was increasingly happening in the region, the entire tribe boycotted the elections, costing the politician many votes.

In many cases the influentials use the administration to enforce the judgements. The police are used especially when the tribes are not able to pay their installments on time. But they are also called upon when one side backtracks on the faislo for some reason or the other. For example, in one dispute involving the Utheras in Kharipur in a case of sanghawatti, the Utheras had refused to abide by the faislo. The police was called in and not only did the police lock up all the men of the family, they also drove out their cattle.

The police culture operating in a tribal setup makes for an interesting study. Operating in semi-autonomous setups where local warlords and influential call the shots, the police is always under some political pressure or the other. The police act as agents of the particular system in which they operate. Hence in the tribal setup, the police and the area administration would in fact encourage traditional settlements which would in turn reinforce traditional customs.

Conclusion

In a number of places in Sindh, the informal faislo settlement system is increasingly superseding the formal justice system. Lawyers and even judges concede that while the formal system may punish the culprit, it does not resolve the long term enmity which continues for generations. Mediation therefore, is one way to resolve feuds. The question remains as to whether and for whom the faislo system achieves this resolution.

The faislo is also extremely anachronistic and can lead to a vicious cycle of killing and mayhem, reinforcing the tribal psyche. Although, in theory, faislo is supposed to bring the warring tribes/families together, it is very common for the tribes to resume fighting after a temporary hiatus since the issues underlying these conflicts continue to exist whether they
are related to women, lands or grazing rights. Heavy fines - a characteristic of the settlement - indebts tribes, increasing a tendency to use women to make money (though (re-)marriage for example), sometimes to settle debts.

Increasingly, however, the distance between the state law and the informal codes is being bridged. The imposition of the Hudood Ordinances and the Qisas and Diyat Act (see Ahmad; Qadir Shah, this volume) relating to sexual offences and bodily harm including murder, has added tribal characteristics to the formal justice system; especially the latter which has made murder a compoundable crime. The concept of crime in the faislo settlement system is also different from that of the formal system: a murder committed in the name of honour is no crime at all in the eyes of the faislo system, in fact the murderer is the one who is to be compensated for the insult to his honour (or that of his family, tribe etc.). And, even though the formal judicial system may be brought into play, a compromise reached between the two tribes renders the verdict and intervention of the formal system ineffective because once an agreement has been reached, the state apparatus can only award mitigating sentences, which largely depends on the individual judge hearing the case. This makes it even easier for the tribal and informal system to acquire legitimacy. Hence Circuit House hearings are now common place and the District Commissioners become the new mediators, with women becoming party to the settlements in disputes between men, families, clans and tribes.

Women are not only used to ‘settle’ disputes but also to make them. Sanghawati or marriage contracts is an example where this ambivalence in the use of women converges. Marriages – which are defined in terms of exchange of women – are the cause for conflict, but at times marriages are also used to settle these conflicts. Crimes against women become more complex thanks to the intervention of the faislo which is prevalent but is being increasingly manipulated by political and economic factors. The faislo has survived through the ages and has assumed rather modern facets in some areas while in others it remains primitive. But insofar as using the woman as a commodity is concerned, the mental framework of the faislo has changed very little. It is therefore unlikely, irrespective of reforms that may be taking place, that in the
future the *faislo* system will provide women any better access to justice than they have had in the past.

Endnotes

1 A traditional, spiritual leader in Sindh with a strong politico-religious following called the *Hurs*. His father led a revolt against the British and was executed.
Reflections on the Law of Qisas and Diyat

Hassam Qadir Shah

Abstract: This paper traces the evolution of the law of Qisas and Diyat and presents some thoughts on the inherently discriminatory nature of the law as well as its practical application by examining some case law. It also raises the question of the practicability of applying qisas in cases of hurt and briefly examines the conflicting judicial views on certain aspects of the law which are not clear.

The Genesis

In 1978, Shariat Benches were set up in each of the four High Courts to examine and decide whether or not any law was repugnant to the injunctions of Islam. This was part of General Zia-ul-Haq's Islamisation process.

Between 1979 and 1980 approximately two dozen petitions were filed before the Shariat Benches of the High Courts in Lahore, Karachi and Peshawar. In all these cases, certain sections of the Pakistan Penal Code 1860 (P.P.C.), Criminal Procedure Code 1898 (Cr.P.C.), and Evidence Act 1872 were challenged as being repugnant to the injunctions of the Qur’an and Sunnah. Each of these Benches gave their own verdicts, declared some sections of these laws and their provisions repugnant to the injunctions of Islam. These judgments were challenged before the Shariat Appellate Bench of the Supreme Court by the Federation of Pakistan in a case commonly referred to as the Gul Hassan case. The final decision on all these petitions was taken by the Shariat Appellate Bench of the Supreme Court of Pakistan on 5th July 1989. The judgment was written by Justice Pir Karam Shah, with Justices Nasim Hassan Shah and Afzal Zullah agreeing with his reasoning. While Justices Taqi Usmani and Shafiur Rehman concurred with the main judgment, they added their views on some issues in the form of supplemental notes. The Order of Court is summarised as follows:

1. The existing provisions of the Pakistan Penal Code do not:
(a) Provide for *qisas* (retribution) in cases of deliberate murder and deliberately causing hurt as prescribed in the Holy Qur’an and Sunnah;

(b) Provide for *diyat* (bloodmoney) in cases of *shibh-i-amd* and *khata* (kinds of murder and hurt) as prescribed in the Holy Qur’an and Sunnah;

(c) Provide for compromise between the parties on agreed compensation in cases of murder and hurt;

(d) Provide that the offender may be pardoned by the victim in cases of hurt and by the heirs of the victim in cases of murder, while the court should retain the right to award punishment by way of *tazir* (any punishment other than *hadd* i.e. maximum allowed punishment, which is in the discretion of the court);

(e) Exempt a minor or insane person from the sentence of death in cases of murder; and

(f) Define the different kinds of murder and hurt in accordance with their respective punishments prescribed in the Holy Qur’an and Sunnah.

2. That Section 109 of the P.P.C., which deals with the punishment of an abettor to a crime in cases of murder and other offences against the human body, is also un-Islamic as abettors are liable to the same punishment as that of the actual offender.

3. Section 54 of the P.P.C. and Sections 401, 402, 402-A and 402-B of the Cr.P.C. are repugnant to the injunctions of Islam being against the Islamic principle of *hugooq ul ibad* or the right of an individual, as these sections empower the Federal Government or a Provincial Government to commute a death sentence in cases of deliberate murder or deliberately causing hurt.

4. Section 345 of the Cr.P.C. which deals with the list of offences which are compoundable is repugnant because it does not contain certain offences, including murder and hurt.
5. Section 381 of the Cr.P.C. is repugnant to Islam as it does not provide that the heirs of the deceased in cases of murder may pardon the offender or that they can enter into a compromise with an offender even before the execution of the sentence, upon which execution cannot take place.

6. Section 133 of the Evidence Act 1872 was against Islam as it stated that the evidence of an accomplice shall be competent against an accused for the conviction.⁵

7. Section 337 to 339-A of Cr.P.C., dealing with the procedure of pardoning an accomplice, the court’s relying on his evidence and of a judgment of acquittal for the accomplice, were declared repugnant to the injunctions of Islam as they permit tender of pardon to the accused without the permission of victim in cases of hurt and the heirs of the victim in case of murder.

During Benazir Bhutto’s first tenure in office at the head of the of Pakistan Peoples’ Party government, the Federation of Pakistan filed two review petitions against these judgments which were decided just over a year later in 1990.⁶ In this case, the Attorney General stated before the Shariat Appellate Bench of the Supreme Court that an Ordinance relating to the enforcement of the provisions of qisas and diyat had been drafted and that the proposed Ordinance would be enforced by October 3, 1990. The court accepted this submission and ordered that the new Ordinance incorporating provisions relating to qisas and diyat should be promulgated by September 5, 1990. Once the Supreme Court has given such an order and has mentioned a specific date from which an existing law will be null and void, the government is obliged to abide by the decision, introducing appropriate legislation.

Thus, qisas and diyat was introduced by way of the Criminal Law Amendment Ordinance VII of 1990 promulgated by the President. It remained operative in the form of Ordinances for a considerable length of time as it was never formally presented and debated in Parliament. Finally, after some seven years, it became an act on April 4, 1997 as the Criminal Law Amendment Act of 1997. This Act now covers all offences against the human body and provides for qisas and diyat.
The Changes in the Law

Under the previous Ordinance (re-promulgated several times) and now the Act, the entire basis of the trial, conviction and sentencing of an offender against the human body has undergone substantial change. Above all, the new law introduces a profound change in the conceptualisation of the role of the state. Now direct control over serious offences concerning the person and property does not lie with the State. In the Gul Hassan case judgment referred to above, Justice Taqi Usmani has commented on this change:

...Under the Anglo-Saxon jurisprudence, society represented by the state holds a direct control over serious offences concerning the person and property. The launching of the prosecution reprieve and pardon after conviction and sentence by the state, and its functionaries are all manifestations of this feature. The victim of the crime or his heirs have no say in the matter. Under the injunctions of Islam this is not so, at least in respect of offences against the person. In Islam the individual victim or his heirs retain from the beginning to the end, entire control over the matter including the crime and the criminal. They may not report it. They may not prosecute the offender. They may abandon prosecution of their free will. They may pardon the criminal at any stage before the execution of the sentence. They may accept monetary or other compensation to purge the crime and the criminal. They may compromise. They may accept qisas from the criminal. The state cannot impede but must do its best to assist them in achieving their object and in appropriately exercising their rights. 7

A second important point is that under the law, a new categorisation of murder has been introduced along with new categories of punishment. The one and the same crime of intentional murder (qatl-i-amd) can now be punished variously with death as qisas, death or life imprisonment as tazir (when a voluntary and true confession has been made or when there is evidence as outlined by Article 17 of the Qanun-e-Shahadat), or up to 25 years imprisonment (when qisas is not applicable). 8 Whereas under the previous law, there was no category of murder that did not
provide for imprisonment, under the new law one category of murder called qatl-bis-sabab, or unintentional murder, was exempted from the punishment of even a single day's imprisonment; the only punishment being the payment of diyat or bloodmoney. Additionally, in the old PPC the provision of "grave and sudden provocation" was one exemption through which a person accused of deliberate murder could not be sentenced to death; the existence of "grave and sudden provocation" being a matter that had to be proved in court. Under Sections 306 and 307 of the Qisas and Diyat Act, however, qisas (retribution) cannot be enforced at all in certain categories of murder and the court only has discretion to award diyat and imprisonment of up to 14 years as tazir. Under Muslim jurisprudence, when hadd (maximum) punishment does not apply, the court has the discretion to award tazir punishment.

Under the special rules of evidence introduced through the Act, proof of deliberate murder or hurt liable to qisas (Section 302 read with Section 304) requires either a voluntary and true confession by the offender before a competent court, or evidence as outlined by Article 17 of the Qanun-e-Shahadat. Article 17 specifies that the competence and number of witnesses shall be determined in accordance with the injunctions of Islam. Whereas Article 17(b) states that the court may accept the testimony of one man or one woman, Article 17(2)(a) places women on an unequal footing with men in matters of future financial obligation, a matter which has nothing to do with murder cases. It is unclear as to why the entire Article 17 was included with reference to qisas and diyat.

Categories of murder which have been made not punishable with qisas are laid out in Sections 306 and 307. Instances in which death is not a permitted punishment even as tazir and in which the offender is only liable to pay diyat under Section 308, with the court having the discretion to award a maximum of 14 years as tazir are when:

- the offender is a minor or insane;
- the offender kills his own child or grandchild; or
- any wali (heir) of the victim is a direct descendant of the offender,
From this brief resume of the law, it can be seen that instances in which husbands murder their wife or wives and leave behind children by these wives, are treated differently from instances where a stranger is involved either as the murderer or the victim. In this connection *Khalil-uz-Zaman vs. The State* is an important case. This judgment illustrates the discrimination contained in the provisions of the law whereby, if a husband murders his wife leaving behind a child by her, he cannot be convicted or sentenced for the normal penalty of death under Section 302 PPC. Instead, the lesser punishment of *diyat* is enforced which amounts to only about Rs.225,000 (approximately US$ 4500), providing that, if the Court thinks fit, it may additionally sentence him up to a maximum of 14 years imprisonment.

*Khalil-uz-Zaman* was tried by the Special Court for Speedy Trials Lahore and was sentenced to death under Section 302 P.P.C. In appeal, the Supreme Appellate Court (Appellate Court for Speedy Trial Courts) upheld the sentence of death awarded to him. The offender then tried his luck by invoking the constitutional jurisdiction of the Supreme Court under Article 184 of the Constitution. The Supreme Court held that because the murdered wife of the offender left behind a daughter Amina, who was her mother's legal heir and also the direct descendant of the offender, Section 302 P.P.C. was not applicable and, relying on the provisions of Section 306(e) the court held that the death sentence was against the law and was *coram non judice*. It set aside the sentence of death and the case was sent back to the Lahore High Court for a fresh decision under Section 306 read with Section 308.

The courts derive their authority to punish the accused from the statute and thus, if the statute under Section 306(b) does not provide the death penalty for instances where an offender causes the death of his children, then obviously the courts have no jurisdiction to award such a sentence. In one judgement, however, reading between the lines one can easily make out the court's displeasure over this flawed legal provision which under Section 308 merely allows for punishment as *diyat* or up to 14 years imprisonment as *tazir*. The case involved Muhammad Akram who murdered his wife, Azra, along with three daughters, Sughran, Kiran, Aniq and one son, Waqar. He was awarded the death sentence by the trial court under Section 302 P.P.C. While, due to the above mentioned provisions, the appeal court altered the
sentence of death, it awarded the sentence of 14 years imprisonment on four counts to run consecutively and not concurrently. Nevertheless, the decision to have the sentences running consecutively rather than concurrently is a matter of the court’s discretion and not all judges see fit to apply such an interpretation.

Apart from its discriminatory treatment of women as victims of violent crime, women as the heirs of victims have also been discriminated against under this law. Women have not been treated equally in the matter of disbursement of diyat. In certain instances, women have been treated unequally while, in others, they have been altogether excluded.

The law of Qisas and Diyat has made offences relating to the human body compoundable and in the event of murder, a person’s legal heir(s) have the right to make a compromise with the offender under Sections 309 and 310. In the first provision, legal heirs can forgive the murderer in the name of God without getting any monetary compensation in the form of diyat, while under section 310 the legal heirs can compromise after receiving diyat in their respective shares. The minimum value of bloodmoney is provided for under Section 323 PPC and is fixed by the Federal Government for each fiscal year. While this varies according to the price of silver, it currently stands at approximately Rs 225,000 (approximately US$ 4500).\textsuperscript{14}

The criteria for the distribution of bloodmoney is provided under Section 330 which states

\textbf{The diyat (bloodmoney) shall be disbursed among the heirs of the victim according to their respective shares in inheritance.}

If the husband of a woman is murdered, she gets only one eighth of the bloodmoney if she happens to be the sole surviving widow; in the event that the deceased leaves more than one widow, they will share the on eighth equally among themselves. On the other hand, if the deceased is a woman, the husband, according to inheritance shares, will receive one quarter of the diyat (and a half if they had no children), i.e. double what a widow receives. If the woman is the mother of the deceased, she would receive one sixth or, in the event that he leaves no children, one third of the bloodmoney. If the woman is the sister of the deceased, she
would inherit only if the deceased had no child, and lastly if the woman is the daughter of the deceased she would inherit along with her brother(s), receiving half of what her brother(s) would receive.

In the matter of compounding of qisas (sulh) in qatl-i-amd, a mother of minor children having the right to waive qisas, has been excluded from speaking or deciding on behalf of her children. Under Section 310, the right to compound qisas in qatl-i-amd rests with the wali (heir). Under Section 310(2) read with Section 313, if a wali is a minor or insane, the right to compound vests in their father or in his absence in the paternal grandfather. If the minor or insane has no living father or grandfather, the right to compound qisas devolves upon the Government, thus excluding altogether the mother and grandmothers.¹⁵

A further problematic effect of the law of Qisas and Diyat does not arise directly from of the actual text of the law, but indirectly from of the application of the law in Pakistan’s social circumstances, where women are not considered ‘decision-makers’. Under Section 309(2) if one wali waives the right of qisas, the offender cannot be sentenced to death if the case is one of qisas. Consequently, under such circumstances, other heirs are only entitled to their shares of diyat. This leads to a sort of lobbying amongst the various walis of the victim, with the wife/daughter as the weakest family member(s) being particularly susceptible to pressure from others. Murders frequently take place within the family. This creates conflicting pressures on a woman.

Where a man has murdered his brother, the victim’s walis will include the offender’s own parents and the victim’s widow. In such cases, the victim’s parents are unlikely to insist on qisas, and may at the most accept diyat, a decision that provides little compensation for the wife who is invariably the one most hard hit by her husband’s murder. The victim’s parents may even waive off qisas in the name of God, leaving no claim whatsoever to diyat, thus blocking the widow’s access to both retribution and compensation. In the event that one wali (in our example, the wife) has not waived their right to qisas, her sole right is receive her share of diyat. On the other hand, if a woman’s natal family should murder her husband - due to his misconduct or some enmity - this will also put the widow under pressure since she has an allegiance to both her natal family and the family she is married into - whether out
of affection or practicality. In such circumstances, the widow may be willing to waive the right of *qisas* while her in-laws (as the remaining *walis*) will be likely to insist upon *qisas* and place pressure upon her to acquiesce.

Nevertheless, the Act reserves the State’s right through the courts to punish offenders under *tazir* even after the waiver of *qisas*. In Islamic jurisprudence, this concept is known as *aulul amr* i.e. the State’s responsibility to intervene in cases of *fasad-fil-arz* (instances where there is a chance disturbance of the public peace and tranquility). This concept is applied under Section 338-E (waiver or compounding of offence), which is to be interpreted under the guidance of the injunctions of Islam (as provided in Section 338-F). The court’s power to punish the offender with *tazir* has been subject to criticism but as yet this right of the State has not been subjected to judicial scrutiny in the apex court. In a 1991 case, the court’s discretionary right to award *tazir* was discussed by the Lahore High Court.\(^{16}\) The court referred to the ‘Old Masters’ of Muslim jurisprudence whose views were divided on the issue.

In Pakistan, where there is a great disparity in wealth, there is every possibility of a rich person escaping punishment for murder by making the poor heirs of a deceased compromise and waive *qisas* while accepting *diyat*. While there has not been any research on the subject, it is possible that this situation may lead to increasing impunity for certain sections of society.

The renowned lawyer and former Attorney General, Senator Yahya Bakhtiar, has opined that there are certain provisions in this law which do not seem at all practicable.\(^ {17}\) For example, there is a Section which states that the execution of *qisas* for hurt shall be executed in public by an authorised Medical Officer who shall before such execution examine the offender and take due care so as to ensure that the execution of *qisas* does not cause the death of the offender or exceed that hurt caused by him to the victim. Senator Bakhtiar questions the practicality of applying *qisas*, for example, where a person A, in an attempt to kill B, failed to kill him but caused the following injuries:-

(i) knocks out an eye;
(ii) three teeth;
(iii) chops off part of his ear;
(iv) slashes his face in one or two places causing a lot of blood to flow.

The medical profession also has its ethics; a doctor would be committing a crime in knocking out or causing any hurt in the execution of qisas for a bodily injury. His profession authorises surgery only for the treatment of an individual and not to damage part of his body in the process of executing qisas. This matter has been discussed by various judicial and medical fora, including the following observation, which clearly reflects that qisas is in practice impossible to apply in cases of hurt:

If qisas is not executable keeping in view the principles of equality, it will not be exacted. Suppose an offender inflicts single blow with sword resulting in amputation/dismemberment of one-fourth of left-forearm, the punishment of qisas will thus be executable only if the authorised Medical Officer gives an opinion that similar result could possibly be achieved without any additional damage to the offender. The person causing such damage will be liable in action. In practice, therefore, it may rather be difficult for any Medical Officer to opine that qisas in a particular case was executable keeping in view the principles of equality. The court will, therefore, in each of hurt involving punishment of qisas, require the authorised Medical Officer appearing as a witness in the case to give opinion ‘whether qisas will be executable keeping in view principles of equality’.18

Grave and Sudden Provocation

Prior to the law of Qisas and Diyat the plea of grave and sudden provocation was available under exception (1) to Section 300 of the old P.P.C. which reads as follows:

Except in the cases hereinafter excepted, Culpable Homicide is murder if the act by which the death is caused is done with the intention of causing death
Exception (1) Culpable Homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of person who gave the provocation or causes the death of any other person by mistake or accident.

In the 1989 landmark *Gul Hassan* case (mentioned at the beginning of this paper) which decided the repugnancy of several penal provisions, Justice Taqi Usmani laid down that the defence of grave and sudden provocation is not recognized in Islam. It was observed that according to the injunctions of Islam, provocation of any gravity or suddenness was by itself not sufficient to mitigate the offence of murder. It was further observed that even if a man was to see his wife committing *zina* (adultery), he could kill her only if he was able to provide evidence of *zina* in accordance with the standard of evidence in Islam; under Muslim jurisprudence, the evidentiary requirement for *zina* liable to *hadd* punishment is that there should be four male witnesses to the act. Moreover, under Islam a husband who suspects his wife of misconduct is counseled merely to divorce such a wife.

The first time the plea of grave and sudden provocation was raised after the introduction of the amended law was in 1992 in a case before the Supreme Appellate Bench. In this case, the accused made a statement before the trial judge that he killed the deceased in his house when he saw him in a compromising position with his sister. This plea was rejected by the Bench which held that the accused could not benefit from this plea in the absence of the proof required by the injunctions of Islam (which considers the killing of a human being as the murder of humanity).

Justice Taqi Usmani had observed in the *Gul Hassan* case that under Islam the sentence of death for *zina* (*rajm* - stoning to death) is only possible if a married man commits *zina* (extra marital sexual relations) with a married woman. In view of this observation, mitigation from the death sentence is possible only on the proof of the commission of an offence on the part of the woman if she is liable to *rajm* and not otherwise. Confronted with a similar case, Justice Shafiqur Rehman was constrained to observe that if the strict view of injunctions of Islam is brought to bear, then in the event that an unmarried person commits
zina-bil-jabr (rape) with a man’s wife, the husband will have no right, even though the event takes place in his sight, to murder the accused of that crime because zina-bil-jabr or zina by an unmarried man is not punishable with death.

The exclusion of this section under the amendments introduced in the P.P.C. by the Qisas and Diyat Act was intentional and indicates that it was not intended that the claim of grave and sudden provocation could mitigate the offence of murder under the new law. However, judges have tried to read between the lines of the amended law to enable such a plea to be taken under the present law.

In an important case decided in 1996 by the Supreme Court, the accused was charged with murder. According to the prosecution, the deceased (Ramzan) with two others was going to their fields to avail of their turn of irrigation water at about midnight on 24 October 1990. The accused, Ali Muhammad, accompanied by four others caught hold of the deceased, put a cloth around his neck and physically carried him to their dera (a shelter on the lands) where he was strangled to death as the accused suspected an illicit relationship between the deceased and his wife. However, the accused gave a different version, stating that that night he was sleeping in a room while his wife Mst. Maqsudan and their children were sleeping in the another room. At about midnight he was woken by a noise. He went to the other room and there he saw the deceased and his wife lying on the same bed in an objectionable position. He picked up a danda (club) and hit Ramzan. His wife managed to run away. He then picked up the loin cloth of the deceased lying near by and put it around his neck and tried to drag him out of the room. In this process, the deceased was strangled to death. He added that he had acted under grave and sudden provocation. The trial court sentenced the accused to seven years imprisonment as tazir, whereas in appeal the Lahore High Court acquitted the accused. Ali Muhammad then challenged the judgment of the Lahore High Court before the Supreme Court.

Justice Fazal Karim who decided the case in the Supreme Court, considered the Abdul Waheed and Gul Hassan cases observed that such a plea is available to an accused by implication. However, he convicted Ali Muhammad for having exceeded the right of self-
defence. It is thus ironical that whereas the law, based on the 
injunctions of Islam, excluded the right to plead grave and sudden 
provocation, the courts have in effect brought back the concept, albeit 
under another name. In this situation, the judgments of the lower courts 
which accept the plea of grave and sudden provocation as mitigating 
circumstances cannot be considered as laying down good law.

Conclusion

The legal provisions for qisas and diyat came into being initially as an 
Ordinance imposed upon the people and the judiciary, and 
subsequently as an Act which was hurriedly passed without significant 
parliamentary or public debate. It is inequitable both in terms of the 
statutory provisions as well as its practical application, specifically 
detrimental to the rights of women and the poor, and has made murder 
a saleable commodity. As a result, it has strengthened violence within 
society, particularly traditions of revenge murders, as well as 
reinforcing assumptions regarding the private nature of murder within 
the family. Furthermore, the law of Qisas and Diyat has tied the hands 
of the judiciary, making it difficult to prevent compromise under 
pressure and ensure justice. Lastly, as has been discussed above, in 
practical terms it appears that qisas - particularly in cases of hurt - is 
impossible to apply, therefore raising the question of why a legal 
provision which was impracticable was introduced in the first place. 
With these observations in mind, it is clear that, in order to ensure 
justice in matters of murder and bodily hurt, the Qisas and Diyat Act 
should be repealed.

Endnotes

1 This is not to be confused with the 1984 Evidence Act, known as the Qamam-e- 
Shahadat Order which brought in substantial amendments to the 1872 Evidence 
Act.

2 Federation of Pakistan through Secretary Ministry of Law vs. S Gul Hassan Khan, 
PLD 1989 SC 633. For a history of the various petitions challenging the old penal 
provisions, see Muhammad Ashraf vs. the State PLD 1991 Lahore 347 at p.356.

3 ibid.

4 Section 315 Pakistan Penal Code (as amended in 1990) states: 
quatl shibh-i-amd. Whoever, with intent to cause harm to the body or mind of any 
person, causes the death of that or of any other person by means of a weapon or an
act which in the ordinary course of nature is not likely to cause death is said to
commit qatl shibh-i-amd.
Section 318 Pakistan Penal Code (as amended in 1990) states:
Qatl-i-khata. Whoever, without any intention to cause the death of or cause harm
to, a person, causes death of such person, either by mistake of act or by mistake of
fact, is said to cause qatl-i-khata.
5
Although contained in the original petitions, this challenge became irrelevant since
the 1872 Evidence Act was repealed by the Qanun-e-Shahadat Order in 1984.
6
Federation of Pakistan and another vs. NWFP Government and another PLD 1990
SC 1172.
7
Federation of Pakistan through Secretary Ministry of Law vs. S Gul Hassan Khan
8
Section 302 P.P.C.:
Punishment of Qatl-i-amd. Whoever commits qatl and shall subject to the
provision of this chapter be:
a) Punished with death as Qisas.
b) Punished with death or imprisonment for life as Tazir having regard to the facts
and circumstances of the case, if the proof in either of the forms specified in section
304 is not available; or
c) Punished with imprisonment of either description for a term which may extend
to 25 years, where according to the injunctions of Islam the punishment of Qisas is
not applicable.
9
(1) 304 Proof of deliberate murder liable to Qisas etc.
(a) The accused makes before a court competent to try the offence a voluntary and
true confession of the commission of offence; or
(b) By the Evidence as provided in Art. 17 of the Qanun-e-Shahadat Ordinance
1989 (Evidence Act).
(2) Provisions of sub-section (1) shall mutatis mutandis, apply to a hurt liable to
qisas.
10
Article 17 of Qanun-e-Shahadat Order (Evidence Act):
Competence and Number of Witness:
1) The competence of a person to testify and the number of witness required in any
case shall be determined in accordance with the injunctions of Islam as laid down
in the Holy Qur’an and Sunnah.
2) Unless otherwise provided in any law relating to enforcement of Hudood or any
other special law.
a) In matters pertaining to financial or future obligations if reduced to writing, the
instrument shall be attested by two men or one man and two women, so that one
may remind the other, if necessary, and evidence shall be led accordingly, and
b) In all other matters, the court may accept or act on the testimony of one man or
one woman, or such other evidence as the circumstances of the case may warrant.
11
306: Qatl-i-amd not liable to Qisas: deliberate murder shall not be liable to Qisas in
the following cases:
a) when the offender is a minor or insane;
b) when are offender causes death of his child or grandchild;
c) when any wali (legal heir) of the victim is a direct descendant (how low soever)
of the offender.
307 (1) Cases in which Qisas for intentional murder shall not be enforced: Qisas
for intentional murder shall not be enforced in the following cases namely:
a) when the offender dies before the enforcement of Qisas;
b) when any wali (legal heir) voluntarily, without duress, to the satisfaction of court
waives the right of Qisas under section 309 or components under section 310; and
c) when the right of Qisas devolves on the offender as a result of the death of the
wali (legal heir) of victim, or on the person who has no right of Qisas against the
offender.

Note: Sub-section (2) of this section is not as such relevant for our purpose.

13 Muhammad Akram vs. The State 1995 PCrLJ 110.
14 Section 323 Value of Diyat
   (1) Court shall subject to the injunctions of Islam as laid down in Holy Qur'an and
   Sunnah and keeping in view the financial position of the convict and the heirs of
   the victim, fix the value of Diyat which shall not be less than the value of 30
   thousands 600 and 30 grams of silver.
   (2) For the purpose of sub-section (1), the Federal Government shall by notification
   in the official gazette, declare the value of Silver on the first day of July each year
   or on such date as it may deem fit, which shall be the value payable during a
   financial year.

15 Section 313 Right of Qisas in Qatl-e-amd
   (1) Where there is only one wali he alone has the right of Qisas in Qatl-i-Amd but,
   if there are more than one, the right of Qisas vests in each of them.
   (2) If the victim (a) has no wali the government shall have the right of Qisas; or (b)
   no wali other than minor or insane the father or if he is not alive the paternal
   grandfather of such wali shall have the right Qisas on his behalf; provided that if
   the minor or insane wali has no father or paternal grandfather how high so ever
   alive and no guardian has been appointed by the court, the government shall have
   the right of Qisas on his behalf.

16 Muhammad Ashraf vs. The State PLD 1991 Lahore 347.
17 Dawn 12.4.92.
20 The State vs. Abdul Waheed alias Waheed and another 1992 PCrLJ 1596.
21 1992 SCMR 2047.
23 1992 PCrLJ 1596.
24 Federation of Pakistan through Secretary Ministry of Law vs. S Gul Hassan Khan,
   PLD 1989 SC 633.
Part III

Women's Activism
The Context of Women’s Activism

Farida Shaheed and Sohail Akbar Warraich

Abstract: Women’s activism does not take place in isolation but is very much a part of its political and social milieu. The present paper focuses on the context in which such activism has taken place, and reviews some of the over-riding issues confronting women in the political process as politicians and as interest groups. It specifically reviews women’s participation in the electoral process, the obstacles faced and the measures taken by governments and political parties to enhance women’s participation.

The Changing Context

Women’s activism expresses itself in so many forms and at such diverse levels, that it defies both short summaries and neat analysis. In Pakistan, women have participated in the legislative process and in political parties, but equally in groups and movements outside the electoral process. Activism has taken the shape of women’s organisations, trade unions and student unions as well as in human rights, advocacy and development NGOs. Locally, women have devised their survival strategies on a daily basis and, by the very fact of being actively engaged in the private and public sectors, they have both been influenced by and influenced their environment.

Others in this volume examine women’s activism in the legislative process (Mumtaz); the strategies adopted by the women’s movement •(Zia); the discourses and issues within and outside the movement (Shaheed); and an insider’s view of the strategy adopted by one women’s organisation (Naheed and Iqbal). Here we look at the political context in which such activism has taken place, and review some of the over-riding

issues confronting women in the political process as politicians and as interest groups.

The political context for women’s activism can be divided into specific periods: the national struggle for independence; 1947-58 that represents a modified continuum; 1958-68 that marks a break with the past and, with the first martial law, the entrance of new actors on the political scene; 1968-1977 a period starting with the anti-Ayub Khan movement and ending with the anti-Bhutto Pakistan National Alliance (PNA) movement, representing the greatest general political mobilisation of women;\(^1\) 1977-1988 the years of General Zia-ul-Haq; and 1988-98 the current new phase.

In the half century leading up to independence, women in India broke through numerous barriers and moved out of the confines of their traditional roles to become determined participants in the political arena. Muslim women were part of this process. The general political atmosphere dismantled a number of previous taboos and barriers and encouraged women’s involvement. Women organized themselves in societies and groups as well as in the formal political arena to lobby for women’s rights but equally to mobilize women in politics\(^2\) (Mumtaz and Shaheed 87).

By the time Pakistan became independent, women’s activism could count several major achievements including the vote and for Muslim women at least, the right to inherit property. As early as 1937 Baji Rashida Latif, a progressive woman for her time, was active in the trade union movement. She later joined the *Khaksars* (a militant political-religious movement against the British) and later still was elected president of the Women Self Defense League (1946-47), a progressive group advocating women’s rights. In 1946 two Muslim women, Begum Jahanara Shahnawaz and Begum Shaista Ikramullah, were elected to the Central Constituent Assembly.

By 1947, Muslim women had displayed their skills and activities in the political battlefield. They had organised funds for the Pakistan Movement, mobilised women, fought against oppression on the streets, and addressed women’s grievances such as education. Initially, most of
the women’s activism was confined to Lahore and Karachi, however, the Civil Disobedience movement of January 1947, mobilised even the Pukhtun women - considered the most conservative of the sub-continent - who marched publicly unveiled for the first time. Some also helped run a clandestine radio-station for the underground ‘War Council’.

1947-58 - Initial years

Independence brought universal franchise and the principle of equality in educational, political and economic participation, but it ended a period of vibrant activism in which anything seemed possible. The momentum built up in the run up to independence carried over into the early years with women’s activism visible both in the general political process as well as on their rights as women. Subsequently, however, the pace of activism slowed down for many reasons.

First, the initial years were taken up by numerous actors attempting to establish their political footholds. There were only two women in the Constituent Assembly (Begum Jahanara Shahnawaz and Begum Shaista Ikramullah) and only a handful of women lobbying for women’s rights and contending with immediate opposition by conservative factions who, though also small in numbers, had enough leverage to prevent a consensus emerging on key issues.

Second, not all women activists chose the same path. A few remained active in the parliamentary process, but a larger number devoted themselves to ‘building the new nation’ usually through immediate welfare activities (much needed at the time) but occasionally by joining government service. Others pursued their political agenda through non-parliamentary groups. For example, the Anjuman Jamhooriat Pasand Khawateen (Democratic Women’s Association) formed in 1948, had a Marxist orientation and primarily worked on labour issues for working class women in factories, railways and fisheries. The various strands of women’s political activism came together only occasionally. Pakistan’s first two women legislators helped form the United Front for Women’s Rights (UFWR) that actively lobbied for the enactment of the West Punjab Muslim Personal Law (Shariat) Application Act 1948, (IX of 1948) and its 1951 amendments ensuring women the right to inherit
property including agricultural holdings. Another collaborative effort came in response to the incumbent Prime Minister, Mohammad Ali Bogra, taking a second wife in 1955. Starting with a social boycott, this sparked off agitation by women against polygamy both within parliament and outside. Women's activism led to the government appointed Rashid Commission whose task included the review of family laws and culminated in the Muslim Family Laws Ordinance of 1961 (see Jahangir, this volume).

Non-political women's groups were not homogenous nor were they received uniformly. Early on, the establishment started distinguishing between those undertaking activities seen as non-threatening cum nation-building and those considered too radical for the times. For example, the welfare and development oriented All Pakistan's Women’s Association (APWA) created in 1949, was amongst the acceptable proposals. Formed under the leadership of Begum Ra’ana Liaquat Ali Khan, wife of Pakistan's first Prime Minister, APWA was not viewed as a threat and was fully endorsed by the government (it continues to flourish today). In contrast Begum Liaquat Ali's initiative to set up the Pakistan Women's National Guard (PWNG) and the Pakistan Women's Naval Reserve (PWRN) in 1949 met with vehement opposition from conservative elements, especially the maulvis (Muslim preachers) and, condemned as hot-beds of vice and immorality by some religious groups, the two corps had to be disbanded in 1954.

Women's groups engaged in non-controversial social welfare activities received the full support and blessing of the government. These themselves came to be dominated by personalities closely associated with the establishment, driving away more politically committed activists and, for example, Shaista Ikramullah resigned from APWA when Begum Bogra, (the second wife of the incumbent Prime Minister) assumed a key post. Some liberalism did allow exceptional women to be posted as ambassadors but on the whole politics was not seen as an appropriate arena for women's participation. From 1956 onwards, the constant re-grouping taking place within parliament displaced women's issues from the agenda and women faded from the formal political arena (see Mumtaz Annex 1, this volume for legislative history).
The period between 23 March, 1956, when the first Constitution of Pakistan was promulgated, and the assumption of power by General Ayub Khan on 27 October 1958, was dominated by political intrigue and tussles that led to the fall of four governments. Ayub Khan assumed power, abrogated the Constitution, dissolved assemblies and banned political parties. The following four years, spent under martial law without a constitution or a legislature, signaled the beginning of a new phase in the political scene during which all the previous important political actors were debarred from contesting elections through the infamous Electoral Bodies Disqualification Order. In their place, with few exceptions, a new brand of actors sponsored by the martial law regime emerged thanks to the Supreme Court verdict legitimising Ayub’s martial law orders and providing for a one-person rule.

In June 1962 a new Constitution replaced the principle of universal franchise with a five-tiered system in which only the local body representatives (Basic Democrats) were elected by universal franchise. This electoral college comprising some 80,000 members then voted for all higher tiers including the presidency. In the renewed but restricted political space available in the new assembly, opposition was formed by several new groupings (Pakistan Peoples Group, Progressive Group and Pakistan Independent group) (Kizibash and Muntaz 76:10). Gearing up for the January 1965 Presidential elections, the diverse opposition members joined hands to form a Combined Opposition Party (COP). When their nominated candidate, General Azam, suddenly died, the COP decided to field Fatima Jinnah (sister of Mohammad Ali Jinnah). While exceptional women managed to become Basic Democrats, hardly any women were able to participate in the presidential elections in which — ironically enough - Fatima Jinnah stood for the country’s highest political office.

In this contest, Ayub Khan, known for his dismissive attitude towards ‘backward maulvis’3, had no compunction when facing Fatima Jinnah, in rallying maulvis to give a fatwa3 stating that according to Islam women could not be head of government/state. Paradoxically those who supported Fatima Jinnah’s candidature included the well-known politico-religious party, the Jamaat-i-Islami, which until then had vehemently opposed the idea of a woman head of government and had a well known
aversion to 'uneducated' women voters and women's issues in general. They too claimed their position was formulated on the basis of Islam. Having clearly decided that it was politically expedient to support Fatima Jinnah, the Jamaat-i-Islami promptly issued a fatwa condoning women becoming head of government/state in special circumstances. Ironically, religion i.e. Islam was used by both sides in a tussle in which the eventual end of promoting or reducing women's status and participation was tangential - as always - to the main purpose of advancing the position of those engaged in a tussle for power.

Between 1958 and 1968, the Ayub government encouraged women to participate but not in the political process so much as in the social welfare sector and government departments. Nor, it would seem, did women seriously consider politics a career. On the other hand, Ayub's martial law regime was paternalistic rather than aggressively hostile towards women. Women became far more visible in non-political arenas though the vast majority of women's organisations established during this period were urban-based and welfare oriented. The Soroptimist Club (January 1967) was somewhat different and focused on organizing seminars on education, vocational training and careers for women.

1968-1977: A New Beginning

A new era of political activity opened up after 1967. The anti-Ayub movement brought to the fore new leadership in both the wings of Pakistan and a new era of political discourse coloured by left rhetoric in which the issues of the masses were addressed and specific attention paid to peasants and workers. Perhaps inspired by the 1968 student movements throughout the world, students were pivotal to the movement. Progressive left forces were also an important factor in the anti-Ayub movement with students often using the events of the Vietnam war, and the Arab-Israel war to come out onto the streets. Many women joined left groups, and even larger numbers actively participated in the anti-Ayub movement. The movement culminated in the National Assembly being prorogued in February 1969, and the Commander-in-Chief of the Army, General Mohammad Yahya Khan, assuming power in yet another - albeit short-lived - martial law regime on 25 March 1969. This was followed by the announcement of general elections to be
held in 1970 on the basis of universal franchise. That Ayub was overthrown in consequence of a people's movement gave people a sense of achievement. This, coupled with the fact that for the first time each person was going to be able to cast a vote for the national and provincial assemblies, provided an instant charge to the political activism of men and women.

The Z.A. Bhutto era (1971-77) was a period of progress for women. The 1973 Constitution accorded a much better status to women with Article 25 specifically stating that there shall be no discrimination on the basis of sex alone. Widespread politicization of women was undertaken by Bhutto's Pakistan Peoples Party (PPP) and extended through the setting up of a Women's Wing with provincial links. In 1972 all government posts and services were opened to women and for the first time women were appointed as Provincial Governor, University Vice Chancellor and Deputy Speaker of the National Assembly. The 1975 International Women's Year was actively celebrated. Begum Nusrat Bhutto, wife of the Prime Minister, led the Pakistani delegation to the Mexico Conference and signed the Mexico Declaration. The Pakistan Women's Institute was set up to mark the occasion, APWA broadened its agenda to include development, and other women's groups emerged to push for the uplift of both urban, and rural women. In January 1976, a 13 member Women's Rights Committee was appointed to recommend measures to improve and facilitate women's social, legal and economic conditions and in October that year the government launched a Declaration on the Rights of Women in Pakistan. The Committee's report and recommendations were largely ignored although in 1976 a recommendation to form a Women's Division under the federal cabinet was approved.

Yet, disillusionment with Bhutto's government was not long in the making. His reliance on the army to attain political office following the results of the 1970 elections, and the separation of the eastern wing into the independent state of Bangladesh had already raised questions in some quarters. Once in office, the retrogressive policies adopted by Bhutto that belied the progressive rhetoric of his party, consolidated disillusionment. In turn, this led to the formation of various special interest organizations. Reflecting the enabling atmosphere of change,
trade unions and student fronts mushroomed, amongst which the women's wing of the National Students Organization in the Punjab was very active. The United Front for Women's Rights (UFWR) was revived with the aim of securing the incorporation of women's reserved seats on the basis of female suffrage in the constitution. The UFWR ended without achieving its objectives in 1973. The Women's Front was formed in 1974-1975 by left-wing students of the University of Punjab and adopted the slogan 'women and politics are one'. Comprising women of different class backgrounds, the Women's Front spread to other universities but could not be sustained after the initiators graduated in 1977. Other women's groups of this period also indicated a shift in the perspective of women's organisations. Aurat, formed by progressive university teachers, students and other working women in Islamabad (1976-77), focused on raising awareness amongst low-income women on matters relating to legal rights, health etc. Formed as a collective in 1975-76, Shirkat Gah - Women's Resource Centre stated its objectives as 'consciousness raising and research' on women with the aim of enhancing and programming development for women. It was to later catalyse the formation of Women's Action Forum (WAF) in 1981 - the main political lobby for Pakistani women for many years.

This period of activism culminated in the anti-Bhutto Pakistan National Alliance (PNA) movement of 1977. Sparked off by widespread allegations of rigging in the 1977 national elections, the movement was spearheaded by the joint opposition coalition but its demands were articulated by the Jamaat-i-Islami. Consequently, the PNA movement also marks the start of the preeminence of religion in the political discourse.

1977 - 1988: A Period of Reversals

In July 1977, General Zia-ul-Haq's coup d'etat that brought in the longest and harshest martial law period heralded a period of reversal for women. Zia's military dictatorship justified its continued retention of power through a much-publicized 'Islamisation' campaign. In this era the ruling authorities actively moved to curtail women's participation in all spheres of life with measures rescinding women's rights and by reducing their public visibility. The reactivated Council of Islamic
Ideology (a constitutionally created body) produced some of the most retrogressive opinions on women’s rights (see Zia, this volume).

Until Bhutto was hanged by the military government in what some term a judicial murder, public attention remained fixed on his trial. After Bhutto’s arrest on the charge of murder, the movement against martial law was led by the Bhutto women: Nusrat Bhutto who had taken over party leadership and Benazir Bhutto, their daughter. 1977-79 was an intense - and disturbing - period of political activism of women party members who were not only arrested, but for the first time female political workers were tried by military courts and tortured. The activism was short-lived. The shock of Bhutto being hanged on April 4 1979 seemingly paralysed everyone into complete immobility until the promulgation of the Provisional Constitutional Order jolted people back into action.

In the meantime, retrogressive laws such as the Hudood Ordinances (1979) and the Law of Evidence (1984) were promulgated, many others proposed. Innumerable directives were passed restricting various aspects of women’s lives and participation. Paradoxically, by sharply focusing attention on gender issues and discrimination, the reversal of women’s rights galvanized a wide spectrum of women and women’s groups to form a women’s rights lobby: Khawateen Mahaz-e-Amal or Women’s Action Forum (WAF) its better known English name. In the following decade WAF remained the most active women’s rights lobby and pressure group. The same period saw the establishment of many more activist-oriented women’s groups and marked a high point of collaboration between different women’s organisations and individual activists in a joint struggle. At the same time that WAF was being formed, political activists were putting together an alliance for the restoration of democracy, the Movement for the Restoration of Democracy (MRD).

Interestingly enough, despite negative legislation and directives undermining women’s status, Zia’s government established the Women’s Division - the groundwork for which had been laid by the previous government - to look after women’s affairs. Equally surprisingly, in 1983, the government established a Commission on the
Status of Women consisting of thirteen women and three men, that submitted a damning report on the state of affairs in 1985. When martial law was technically lifted in 1985, the Eighth Amendment to the Constitution was passed validating and indemnifying all ordinances passed by the martial law regime, and leaving undiminished the problems women faced in many areas of law.

1988-1998: With Zia-ul-Haq’s death in August 1988, the return to democracy eased the situation for women and for activism as a whole. On the other hand, after ten years of non-stop activism, the pace of the women’s movement slowed perceptibly. Some women simply no longer felt the urgency of the moment and withdrew to return to pick up their lives. Within the movement, the political differences amongst women activists, hitherto submerged in the face of the common enemy of martial law, started to surface leading to divisions on which positions to take in the changed circumstances. A small number of activists decided to join (or reactivate themselves in) political parties. Those who chose to continue their activism within the framework of the women’s movement and the general human rights agenda, had to go beyond their experience under martial law to start learning the ropes of non-confrontational advocacy strategies (see Zia, this volume). During Benazir Bhutto’s first tenure in office (1988-90), the Women’s Division was given the status of a full ministry. The Ministry’s research wing set up 5 committees related to women’s rights. In 1990 at the second SAARC Ministerial Meeting on Women in Development, Nusrat Bhutto proposed an eleven-point strategy for facilitating the formulation of a joint, comprehensive and direct approach to integrate women into the development process, including a clause for maximizing the number of female ministers. The PPP also tabled the idea of an Islamic Women’s Parliamentary Group (achieved in Benazir’s second tenure). But the concrete measures during this period were far less significant than the creation of a general environment supportive of women’s participation and a greater openness vis a vis interaction with independent women’s advocacy groups and individuals.

The Muslim League-led Islami Jamhoori Ittehad (IJI) government which came into power through the 1990 elections after Benazir’s government was dismissed by the President tended to ignore women, for example
leaving them out of economic reforms altogether. In Benazir’s second term (1993-1996) following the presidential dismissal of the III government, the United Nations’ Fourth World Conference on Women in Beijing 1995 was an important catalyst for women’s issues. Internationally, the decade preceding Beijing had seen NGOs being recognised as actors in the social/political scenario. For women activists, the parallel NGO Forum in Nairobi in 1985 was a particularly important event, even though it went virtually unnoticed in Pakistan. By the time of the United Nations Conference on Environment and Development (UNCED) prepcoms, Pakistani NGOs started to become visible in policy dialogues. In the lead up to the Fourth World Conference on Women in Beijing (September 1995), they had been accepted by the government of Pakistan as stakeholders to be included in the process.

For the first time, the government through the Ministry of Women Development (MoWD) initiated a collaborative effort with NGOs. Immediately before the September 1995 Beijing conference, and following pressure from women’s rights activists and human rights groups, the Government signed the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It ratified the Convention in March 1996. Amongst other things, this obliges Pakistan to ensure women exercise their right to vote, hold public office, be a part of the decision-making process and the implementation of policies. The Convention also binds governments to ensure women’s enhanced participation in non-governmental organizations and associations, concerned with the political and public life of the country.\(^7\)

The Benazir government moved towards implementing the Beijing Platform for Action by establishing core groups comprising NGOs and government officials at the federal and provincial levels to facilitate progress and by developing a 20-year National Plan of Action for Women (NPA) in keeping with the Beijing Platform of Action, this too with the active participation of women activists. Benazir’s government was dismissed before the NPA was finalised and formally announced by Prime Minister Nawaz Sharif on 14 August 1998 (see Annex 1 for extracts of the NPA’s Chapter on Women in Power and Decision Making).
Obstacles and Stepping Stones in the Political Process

From the beginning, women's political activism has had to contend with serious obstacles. Combined with patriarchal structures of power that deprive women's access to resources, the institution of purdah has always been a major barrier to women's political activism. Despite having had the right to vote and to contest elections for fifty years, women's narrow and uncertain economic, social and therefore political power base has meant that women's political representation and participation has had to rely to a great extent on the sitting government's attitude and on special provisions to incorporate women in the political process. In Pakistan's chequered political history, however, each successive government has not been progressively more supportive of women with the result that women's political participation has increased or decreased in fits and starts.

In Europe, the United States and Australasia the struggle for women's right to vote was a hotly contested and key issue in the political mobilisation of women (see Evans 77, Rendhal 81). Not so in Pakistan. As in many ex-colonial states, women's activism on women's rights went hand in hand with their engagement in the nationalist struggle for independence. In 1918, when women in England were still struggling to have their right to vote accepted by male politicians, Indian women won the support of both the All India Muslim League and the Indian National Congress for female franchise. Political backing ensured that women got the right to vote on the same basis as men between 1921 and 1928.

Independence brought in the principle of universal franchise for women as well as men, but citizens had to wait until 1970 in order to exercise this right at the national level. Nor has the right to vote ensured that women in fact are able to vote. In 1997, for instance, there are six million less women registered to vote than men. According to the Election Commission there are 55,026,324 registered Muslim voters, 55.5 percent male and 44.5 percent female. Further, women face greater problems in exercising their right to vote. In some areas of NWFP, cultural and purdah norms obstruct women's right to vote. In the Federally Administered Tribal Areas (FATA) of the north bordering
Afghanistan, where universal franchise was only introduced in 1997 by the unelected caretaker government, women's right to vote met stiff opposition even fifty years after independence.

Prior to the 1997 elections, traditional tribal councils (jirgas) vociferously denounced the move and aggressively sought to deny franchise to the female electorate, using mosque loudspeakers to propagate that voting by women was un-Islamic and threatening to raze to the ground any homes in which men allowed the women to go to the polling station. Ultimately, and partially due to the intervention of NGOs, 348,475 women voters were registered. Despite this, not a single female vote was cast in the Bajaur, Mohmand, Khyber, Orakzai and North Waziristan agencies. In Jamrud Agency, only 37 out of 6,600 registered women voters cast their vote. Significantly, government officials did nothing to punish those illegally obstructing women from exercising their right to vote. Nor did the government pay heed to the subsequent calls by some political parties and others urging the Election Commission to declare results null and void in areas where women had been denied franchise.

This problem is not confined to the northern areas and for instance, the Assistant Commissioner of Thatta in Sindh, province, Syed Waryal Shah, expressed his fear that as many as 50,000 women enrolled in the district could lose their right to vote because of the reluctance of their male family members to enter their names on the voters’ list. (Dawn 15.3.96) In at least one village of south Punjab, women were for the first time granted permission to vote by their men in 1998.9

Since the eighties, other factors have further curtailed women's votes. While the 1973 Constitution had provided for the voting age to be lowered to 18, in the 1985 elections General Zia kept the minimum voting age at 21 years.10 Then in 1988, voters were obliged to produce their national identity cards (ID cards) to cast a vote, effectively disenfranchising many voters, but more so women since far fewer women possess ID cards than men. Additional problems came to light in the course of election monitoring carried out by NGOs. The manner in which voters lists are collected (from anyone in the household at the time of interview) and the lack of interest shown by both political parties and
families in the effective updating of the lists based on information collected for the 1977 elections contribute to an under-registration of women. Registered women may still not be able to cast their vote due to discrepancies between the names entered in electoral lists and those on ID cards - which fall under the jurisdiction of two unrelated departments. Further, women voters may be listed by their maiden names while ID cards have been issued to them as ‘wives of’ (or vice versa). Similar discrepancies occur after divorce or re-marriage. Family and residential information in the case of women whose marital status has changed is therefore also not compatible. Finally, allowing women to have ID cards without their photographs, has made ballot fraud easier in the case of female votes and every election sees candidates and parties protesting against voting frauds particularly (though not only) in female polling stations. Women who arrive to cast their vote may find that their vote has already been cast by someone else.11

At the other end of the electoral spectrum, women’s participation in the electoral process and representation in parliament gives no cause for celebration either. Having started off with two women in the Constituent Assembly in 1947, today Pakistan has seven in the National Assembly (less than 3 percent of the total) - a net increase of less than one woman per decade of independent self-rule. Admittedly this is not an entirely fair assessment. In between, thanks to now lapsed constitutional provisions, women’s reserved seats bolstered the numbers, peaking in 1988 when four women winning in open contest were joined by twenty on reserved seats. That Pakistan has the distinction of being the first Muslim majority country to elect a woman head of government in 1988, and the fact that the current representatives have all won their seats in open contest with men - the highest number ever to do so - is little consolation for the vast under-representation of women in the affairs of the state. Clearly the measures introduced by various governments to ensure the presence of some women in the political structures have failed both to mainstream women in the political process and provide a springboard for women’s political leadership (for a summary of the specific provisions and the number of women in assemblies see Chart of Constitutional Provisions and Women Representatives in Shaheed et. al. 98).
Women were first recognised as a special interest group worthy of representation in legislative bodies when the 1935 Government of India Act fixed a quota for women's seats. (Other groups ensured representation were the separate religious communities, landlords, Anglo-Indians and labour). Muslim women's seats were to be filled by separate electorates, and in Punjab and Bengal they were to be elected by women voters only. Thanks to this special provision or, in current parlance, affirmative action, in the 1936 and 1937 elections, eighty women members were elected (some through joint electorates) to the Provincial and Central Parliaments of India. After independence, the two women members of the Constituent Assembly tabled a bill (Charter of Women's Rights) that demanded equality of status and a 5 percent quota of reserved seats for women in 1948. The number of reserved seats finally approved in 1954 approximated 3 percent. Subsequently, the 1956 Constitution stipulated a double franchise for women with women's reserved seats based on territorial representation. National elections were never held under this provision that would have obliged women seeking political office to canvas votes from a particular constituency - ensuring a power base and public interaction which could have served as a springboard for women's political empowerment. Instead, the disruption of the democratic political process in 1958 impeded the emergence of any political leadership - male or female - until 1968. Until the seventies, female political leadership within political parties was limited to those who had joined politics before independence.

Ayub's 1962 Constitution reserved six seats for women (out of 156) in the National Assembly divided equally between East and West Pakistan. These seats were to be filled by an electoral college comprising the deputies of the provincial assemblies (later amended to members of Parliament). The indirect mode of elections reduced the women on these seats to mere tokens, bereft of real political power. The subsequent 1973 Constitution increased the number of reserved seats in the national assembly to 10 (representing 5 percent) and provided a 5 percent quota in the provincial assemblies but upheld the principle of indirect elections for women's reserved seats. This modality suits male dominated political parties since it provides them with an opportunity for increasing their
share of the total seats in the assemblies without obliging them to commit themselves to women's issues. If, despite party constraints, some women on reserved seats have taken the initiative to support or table issues, they have not been able to count on the support of their own parties for these issues (Mumtaz, this volume).

In many ways the 1970 elections, when at least one woman was selected as a candidate on a general seat, mark the start of the contemporary era of women's political participation. In the event, Kaniz Fatima, a trade union leader affiliated with the National Awami Party (Bhashani Group) who was selected as a candidate did not contest since NAP withdrew from the elections due to the cyclone in East Pakistan (now Bangladesh). The first woman to contest a general seat on the basis of adult franchise was Nusrat Rana, sister of the labour leader Mukhtar Rana. She stood as an independent candidate in the 1972 Faisalabad by-election, but did not win. The very paucity of women's participation confirmed the need for affirmative action. As early as 1976 when the Women's Rights Committee submitted its report, women voiced their dissatisfaction with the quota reserved for women and pointed out the problems endemic to the procedure of filling the reserved seats on the basis of electoral colleges consisting largely of men. In her Note of Dissent, Nasima Sultana Akmut proposed several alternatives precisely because, in her opinion, indirect elections made women representatives primarily accountable to male legislators rather than to women. Amongst other suggestions Akmut recommended that it be made obligatory for political parties to have party lists that "contain women candidates of not less than a prescribed ratio - not less than 20%, preferably 25%.” Her dissenting note later formed the basis of the recommendations of the 1986 Commission on the Status of Women Report on women's political participation.

Despite the much wider political mobilization that had taken place, few women had attained leadership levels by the 1977 general elections. Begum Nasim Wali Khan (associated with the - by then banned - NAP) was the first woman to successfully contest a general seat. She never took the oath of office, however, because as part of the PNA her party boycotted the assemblies brought in by the controversial 1977 polls that led to martial law under Zia-ul-Haq.
In 1981, General Zia replaced the elected assemblies with a nominated Federal Advisory Council - the Majlis-i-Shoora - intended to give the regime a semblance of legitimacy by inducting members of the dominant socio-economic strata into the ambit of state patronage. This Majlis included handpicked women but in July 1983 Zia appointed the Ansari Commission to present an ‘Islamic’ political framework. The Ansari Commission Report recommended a strict limit to women’s participation. It recommended separate electorates for women and men, debarring women and non-Muslims from the office of the head of state, and an age limit of 50 and above for women candidates who, furthermore, should first obtain written permission from their husbands to stand. Thankfully, the Ansari Commission recommendations were never acted upon. For whatever reason, whether because Zia wanted to be seen as incorporating women’s concerns or wanted to project himself as a ‘modern Islamist,’ or whether it was because women activists had made sufficient noises to draw international attention by this time, or a combination of these factors, Zia did include women in his Majlis, introduced Special Interest seats for women in the Local Bodies and doubled the quota of reserved seats for women (to 20 seats) in 1984. Equally surprisingly, even under Zia, both local and national elections saw more women participate than ever before. It must be said, however, that this participation was in spite of, rather than thanks to the government’s attitude.

The non-party based elections of 1985 was boycotted by all major political parties but saw 13 women contest general seats though only one from Jhang, (Syeda Abida Hussain) was successful. In the by-elections of May that year, another woman, Nasim A. Majid from Bahawalnagar, won a seat in the National Assembly. She had earlier served as a member of the Majlis-e-Shoora and lost in the February 1985 general elections. In the Provincial Assemblies two women (Farhat Rafiq and Sajjida Nayyar Abidi - Punjab) were successful.

In the eighties, the MRD movement of 1983 managed widespread mobilisation of rural Sindh and a conscientization of men as well as women. Subsequently, women’s politicisation in that province has stemmed from the emergence of Sindhi nationalist parties and in urban areas, especially Karachi and Hyderabad, through the emergence of the
ethnically defined Mohajir Quami Movement (MQM - recently re-named the Muttehida Qaumi Movement or United National Movement). Like their predecessors, these groups have not shown any especial ability to cultivate women’s leadership potential either. At the same time, attesting to continued political resistance to women’s public visibility in 1986 - the year that Benazir Bhutto returned to Pakistan as co-chairperson of the PPP - the Frontier Assembly adopted a resolution demanding that women be put in purdah.

Despite martial law some advances were made by women, as indicated in the 1988 general elections when at least a few women candidates were fielded on general seats by the ANP, PPP and Tehrik-e-Istaqlal. To the surprise of many non-Pakistanis and in spite of all the structural barriers to women’s participation in politics, these elections brought 35 year-old Benazir Bhutto to power who took oath on December 2, 1988 as the youngest and the first female Prime Minister in the Muslim world. The constitutional provision reserving seats for women lapsed after the 1988 elections. The low number of women successfully contesting general seats in 1988 confirmed the need for continued affirmative action and in November 1989 Benazir’s Cabinet initiated steps to extend the constitutional provisions for women’s reserved seats in the assemblies. On 30 November, a bill was moved in the Upper House by Senators Mohammed Ali Hoti, Dr. Noor Jahan Panezai and Syed Fasih Iqbal but in August 1990 the Bhutto government was dismissed before the bill could be acted upon.

In the intense political tussle for power and contrary to expectations that major political parties would select more women candidates in the 1990 elections, the PPP with its two women co-chairpersons issued no party tickets to any other woman, though the PPP-led coalition (Pakistan Democratic Alliance - PDA) fielded a nominal number including Shahnaz Javed from Chichawatni (who lost). Another PDA candidate, Mehnaz Rafi, unsuccessfully contested a provincial seat from Lahore. Opposing the PDA was the Islami Jamhoori Ittehad. Its only female candidate was Abida Hussain (who lost). The excuse used by parties to not field women candidates is a self-fulfilling prophecy. They argue that women are weak candidates and in a tough fight it is preferable to field a male, yet women can never hope to become strong candidates if they are
not given an opportunity to test the waters. When the IJI government of Mian Nawaz Sharif assumed power in 1990, women’s presence in the National Assembly had been reduced to 2 out of 217 seats. The IJI government did introduce the Twelfth Amendment to the Constitution in 1991 but took no action to revive women’s seats.

The 1993 general elections, (in which 13 women contested general seats for the National Assembly) saw the Muslim League - inclusive of all the various factions - selecting women candidates after almost a 50-year gap. The MQM included women candidates for national and provincial assembly seats though the MQM subsequently boycotted the NA polls. The PPP and PML(N) together, put up seven women for the National Assembly. Among these the electoral victory of the PPP’s Shahnaz Javed is interesting since she has no political heritage and has developed her stature as a politician on the basis of her own social and political work in her constituency. The MQM fielded two candidates and the remaining four women stood as independents, predominantly in the Punjab. The Jamaat-i-Islami led Pakistan Islamic Front (PIF) not surprisingly, did not give any woman a ticket. Other than Benazir and Nusrat Bhutto, only two women were returned to the National Assembly. Three women won seats at the provincial level: one each in NWFP, Punjab and Sindh. Additionally two women were elected from the Punjab Christian minority seats. This was the third consecutive win for both. However, one was de-seated just few months before the dissolution of the assembly as a result of a contested vote count. Although for the first time four women contested general seats to the Baluchistan Assembly, not a single one was returned.

With Ms. Bhutto’s return to office in late 1993, one of the first bills to be drafted was on reviving women’s reserved seats to the assemblies with an additional provision of 9 reserved seats for women in the Upper House, the Senate. Unlike the original 1973 constitutional provision, the bill did not prescribe any specified period for the reservation clause to remain operative. The bill could not be tabled due to a lack of consensus on both the number of seats and the modality. The PPP was proposing 25 seats for women in the National Assembly to be elected in accordance with the previous system. The opposition PML(N) put forward two counter alternative proposals: one, increasing the number of
women’s seats to 40 in the NA, to be filled through direct election by the female electorate; alternatively the filling of such reserved seats through a system of proportional representation based on the total number of votes secured by each party in the 1993 elections. Another suggestion derived from proposals made by activist groups and taken up by the PML(N)’s Mushahid Hussain was that all political parties should give a 10% quota of tickets to women candidates. In the 1993-96 Parliament, the PML(N) opposition reversed its initial approach and announced that it would not go for a separate amendment regarding women’s seats but would push for a package deal on a constitution amendment addressing a broader range of issues. In fact it appears that the PML(N)’s actual objection was to the mode of induction of women in the legislative bodies. The Bill was subsequently defeated.

In the February 1997 elections 55 women contested the polls for the National Assembly and 21 for the four provincial assemblies. But in many instances, women candidates were in fact only covering candidates for senior politicians and few in reality saw any chances of victory. Moreover, when seen in the context of the total number of seats contested by the main parties, the paltry allocation of party tickets to women candidates reflects the lack of women’s effective participation in party decision-making. According to the Commission of Inquiry for Women Report (1997), women hold only three out of 21 decision making posts in the Pakistan’s People’s Party (PPP), while in Nawaz Sharif’s Pakistan Muslim League (PML-N) they hold five out of 47 posts.

Thus, the PPP and its coalition partner PML (Junejo) awarded National Assembly tickets to 9 women out a total of 161 seats contested. The 177 PML(N) candidates included only six women even though applications had come from senior women activists. Of the smaller parties, the splinter PPP (Shaheed Bhutto) group fielded seven women while Imran Khan’s Pakistan Tehreek-e-Insaf (PTI) initially allocated women members some party tickets but later withdrew them from the contest. There were also 13 independent women candidates in the running. While the election results produced the highest numbers of directly elected women members of the National Assembly in Pakistan’s fifty-year history, the reality is that the total of six women MNAs (three each from
the PPP and PML(N)) who took oath of office actually constitute less
than 3 percent of the total National Assembly strength of 207 directly
elected, general seat (Muslim) members. (Thanks to a by-election in
1998, there are now 7 women members). In the provincial assemblies the
situation is even worse, with only one directly elected woman MPA out
of a total of 460 provincial assemblies seats. (There is also one woman
MPA in the Punjab Assembly, Begum Raj Hameed Gill elected on a
minority seat). None of the 13 independent female candidates were able
to win a seat.

After returning to power in 1997, Nawaz Sharif used his unprecedented
majority in parliament to make major policy changes and repeal those
provisions that enabled the President to dissolve the Assemblies but
ignored his party’s earlier promise of restoring women’s seats in the
assemblies. Instead, a Constitutional Amendment Bill introduced by the
tiny opposition to restore women’s seats was rejected by a thumping
majority (10-70) on 6 May 1997. In the light of the remarks passed by
members of the Treasury, the Government’s claim that it wanted to
introduce a broad constitutional reform package including women’s
seats holds no water. During the debate, one MNA (Ibrahim Paracha)
said “if you give special seats to women, then tomorrow the members of
the ‘third sex’ will also demand special seats”. Another (Chaudhry
Asad-ur-Rahman) argued that elected members represented both men
and women in their constituencies, so there was no need for special seats
for women. “Children are also discriminated against and exploited in our
society, so tomorrow you would demand separate seats for children in
the House,” he said to a round of applause.

Given prevailing attitudes of male politicians who dominate political
party structures, it is hardly surprising that women’s political leadership
has rarely risen from within the ranks of party workers. Moreover, the
existing structures of power mean that women seldom have large
financial resources at their disposal, while Pakistan’s particular brand of
politics is heavily dependent on self-financing. The suggestion that the
party support candidates of calibre is viewed as virtual heresy. When
exceptional women do break through barriers to achieve leadership
levels or/and when exceptional women have inherited political power, it
has provoked considerable comments on surrogates and suitability that
conveniently disregard that this is equally true of most male politicians. Another factor that undermines the rise of women leaders is the lack of effective mass female mobilization outside the periods of elections or specific movements. Coupled with the paucity of lobbies advocating women’s rights and participation, this undercuts the ability of the few national level women politicians and representatives to effectively broaden the avenues for women’s general political participation.

Ideally, political parties should have assumed the initiative and responsibility for interacting with their female constituencies. Unfortunately this has not been the case and there are too few women politicians integrated into the main party structures to make a difference. In any case, most political parties are run autocratically without bothering, for instance, with internal elections. Parties do not impart any political education to their members and there is little reason to hope that things will change. As for reserved seats it seems clear that a major fault is the de-linking of these seats from a general constituency which, after all, is the basis of political power. The Commission of Inquiry for Women (COI) highlighted the need for women’s reserved seats to be directly elected and recommended a joint electorate for this (see Annex 2). Reflecting a growing consensus amongst activists on this front, the COI recommends that 33 percent of seats should be reserved for women in each of the elected bodies (i.e. local councils, National and Provincial Assemblies and the Senate) and that local councils be strengthened and recognised as the third tier of government. This last indicates a growing focus on local government as perhaps a more effective way of mainstreaming women in politics that has been inspired by the recent experience of Panchayati Raj in India where one third of all seats are only open to directly elected women candidates.

For this third tier to be effective, however, would require a major restructuring since past experience has not been encouraging. Approximately 10 percent of the Local Councils comprise Special Interest seats for women indirectly elected by the (mostly) male councillors. Women elected on these special seats are accountable to the councillors who vote for them; most are merely names on paper without actual powers or potential; a majority belong to the area’s dominant political party and follow the party mandate rather than focus on
women's issues. According to the latest information available (1993) there were 8,295 female members (10.4%) of a total of 79,155 councillors. In Baluchistan and NWFP many women elected on these reserved seats are unaware of having been elected because they are 'excused' from going to the Local Bodies offices.

A few exceptional women have successfully contested general local body seats, notably Syeda Abida Hussain who was later elected as Chairman District Council from Jhang. But Abida Hussain started her career in national politics and returned to it in 1985. Other women who progressed from local bodies to the provincial assembly were Begum Farhat Rafique (winning a seat from a Lahore constituency in the 1985 polls), and Begum Sajjida Nayyer Abidi who won a provincial seat from Sialkot District after having served on the Sialkot District Council. These women are the exceptions however, and generally the local bodies have not been an effective training ground for provincial or national level politics. Ms. Fazila Aliani is a case in point. She entered the political process through a reserved seat in the Baluchistan Assembly in 1970, went on to become a member of the Quetta municipality through reserved seats and was later nominated to the National Assembly again on reserved seats. But her movement between these various seats has notably not helped her join mainstream politics as indicated by the nominal votes she polled when contesting a general seat in 1993.

Local Bodies are a provincial matter, and excepting Punjab, no other province has held Local Body elections since 1987. In Punjab elections have been held twice, in 1991 (when subsequently the local bodies were dissolved in 1993) and in 1998 amidst much political wrangling and confusion.15 Currently, despite many government promises to strengthen women's representation, women's seats have only been revived as before. To mainstream women's political participation therefore requires strategies other than merely reserving seats at different levels.

Another measure used by political parties to include women in politics are the women's wings of political parties. This concept that, like that of reserved seats, pre-dates independence when the Muslim League formed a separate Women's Committee and later a female students organization to mobilise and make visible women's support for the Pakistan
Movement. These special party structures did not, however, provide a forum for women to specifically discuss, promote or mobilise on and around gender specific issues. In other words, while norms of gender segregation and female seclusion were seen as obstacles to making visible female support for the party, the obstacles were circumvented rather than addressed. In the seventies the PPP expanded the notion to that of a Women’s Wing - intended to permanently activate women from the grassroots to the leadership levels. This structure was adopted by numerous other political parties: both older parties such as the Muslim League as well as relatively newer ones like the Sindh Awami Tehrik and the Mohajir Qaumi Movement. The women’s wings of political parties have been a double-edged sword: if they helped women to enter politics, they have also contributed to a dual marginalization. Not only were female politicians within the party restricted to these wings, gender issues were also relegated to these wings which for the most part did not focus on women’s issues. Parties that do not have women’s wings (e.g. the ANP and Tehrik-e-Istaqlal) have been quicker to field women candidates from general seats. The experiences of the women’s wings of two of the relatively newer political parties - the Sindh Awami Tehrik and MQM confirm the poor performance of women’s wings in this respect. The strong active women’s wings of both have contributed to the political agendas of their respective parties. However, despite the different operational style of the two parties mirrored in their women’s wings, neither has produced women leaders whose political stature is recognised at the national or even provincial level.

When the MQM swept the 1987 Local Bodies elections in Karachi and Hyderabad, its success was attributed in equal measure to their women’s wing and to male mobilization. Reportedly, issues are debated and anti-women laws are opposed in the MQM women’s wing (established from the inception of the MQM in 1986) but given tight control over interaction and information, this is difficult to confirm. Certainly, the women’s wing has no independent programmes and functions in a subsidiary role to the central party. In contrast, the operational style of the Sindhiwai Tehrik (of the Awami Tehrik) is fairly autonomous and it has consciously sought and strengthened ties with other women’s groups. While the Sindhiwai Tehrik has successfully mobilized women
who have hitherto remained in seclusion, in the final analysis Sindhiani Tehrik’s allegiance is to the Awami Tehrik and its leader, Rasool Bux Palejo. It is indicative that despite its strong women’s wing, the MQM failed to field even a single female candidate in the 1990 elections.

In the political process therefore, women’s wings have been virtually reduced to mobilizational tools used for canvassing votes in elections. Political, economic or social issues are rarely discussed in these wings and members are singularly lacking in political knowledge as well as skills. In every political party, women are grossly under represented at the leadership level. The traditional routes to leadership impede rather than enhance the entry of women, while so far, women’s wings have not become a launching pad for women who want to later enter mainstream politics. The political agendas of parties have either not or rarely been influenced by the activities undertaken by their women’s wings that lack authority and clout within the party structure. When women’s wings have mobilized on women specific issues, it has usually been the outcome of interaction with independent women’s advocacy groups.

Nor have the reserved seats for women through indirect elections provided an effective training ground though this was definitely one of the original intentions. The major drawback of previous provisions has been the isolation from any sort of popular constituency of the women who come through the reserved seats. Their inclusion in parliament, provincial assemblies, and local bodies is useful only to the extent that it provides an opportunity for women to gain an understanding of parliamentary and administrative procedures. Women who have gained an understanding can constitute a valuable resource pool for women outside parliament. Yet, in terms of leadership training, without being obliged to seek votes through interaction with a constituency, women on these seats can never hope to gain the experience needed to enter the main political arena, nor can they achieve the political standing that would give them independent political weightage. A final drawback of indirectly elected reserved seats is that they reinforce the impression of women being incapable of holding their own in a non-protected political arena. It encourages political parties not to field women in elections thereby depriving politicians of the opportunity to develop stronger
leadership qualities and presence. While reserved seats are still needed, a new mechanism needs to be devised.

Political Discourses and Women’s Advocacy Groups

The presence or absence of independent women’s advocacy groups whose principle commitment is to women and not a political party have significantly helped to shape the interlocking space of the political process and women’s issues. The need for women politicians to link up with a lobby outside parliament was recognized by the first female legislators and from the beginning at least some women’s NGOs and activists have viewed the status of women as intrinsically linked to their greater political participation. From Begum Shahnawaz, who prepared the charter of women’s rights in 1954 to Women’s Action Forum’s Charter of Demands (revised in 1997) and, most recently lobbying by advocacy groups - the struggle to sustain women’s political participation while improving their status has been a continuous one.

Against a background of women’s general marginalization, in the past it was mainly exceptional women like Begum Shahnawaz who were active on the political front while lobbying for women’s rights outside the party agenda. Unfortunately, effective continuous linkages between women politicians and women active in other fields (e.g. development, the law or even social welfare) were subverted early on by the decade of martial law starting in 1958. This suspended political processes and created a break in the continuity of female leadership and acumen in the political sphere. Later, during the seventies, newly active women in the political arena operated strictly within the confines of their own parties or political groups with little inter-communication and support. During this period women’s issues were, more often than not, subsumed in general political agendas and it is only in the eighties, that WAF emerged as a body that could play a link role and influence the political agenda (at least in theory) of political parties. Just as the revival of democratic processes sustained a steady growth of women’s visibility and the number of women contesting seats, so too has the activism of autonomous women’s groups - supported by human rights groups - influenced the manifestos of political parties and government policy documents if not always their implementation.
The process kicked off by WAF which dominated the women's rights scene for a decade (1981-89) has been carried forward since then by many diverse groups. Of importance is that WAF activists were not seeking political careers or office and viewed their role essentially as a lobby-cum-pressure group. Indeed WAF had singularly few politicians amongst its activists though otherwise the professional range was fairly impressive covering virtually every profession (e.g. lawyers, teachers, social and economic scientists, journalists, business women, social workers, artists, trade unionists and middle-level development workers). Unable to launch a mass movement or mobilize women nationwide, WAF was pivotal to putting women on the national agenda and ensuring that the government and political parties (progressive as well as conservative) addressed the issues.

Much of what little previous political experience did exist within WAF was grounded in politics outside the electoral process. Consequently, entering the mainstream political arena was for most activists a learning process. Holding press conferences and issuing press releases for example came long after - not before - arranging large gatherings, demonstrations and pickets. Encouraged by the few women politicians affiliated with it, WAF formulated a brief political agenda for including women in the manifestos of political parties soon after coming into existence in September 1981. The agenda was floated to political parties signatory to the Movement for the Restoration of Democracy (MRD) between 1983 and 1986 and parts of this were incorporated into the manifestos of the Qaumi Mahaz-e-Azadi and Tehrik-e-Istaqlal (both having limited popular support). Yet no attempt was made by either side to strengthen ties. In WAF's case the arms-length stance was partially due to an intense conviction that a women's group had to be completely autonomous to avoid being swamped by any given political party, none of which had till then displayed any convincing evidence of a commitment to women's rights.

Under martial law, interaction between the government and the women's lobby was characterized by open confrontation and hostility so that women activists learnt to be a pressure group far more effectively than how to lobby a government. Until 1988 lobbying was primarily geared towards mobilizing public support and influencing organizations of civil
society such as trade unions, concerned citizens groups and political parties. This lobbying had some degree of success: some trade unions started to include the families of male workers in their activities and women's specific concerns in their agendas; WAF's sub-committee War Against Rape, evolved into a full-fledged organization that, surprisingly, has as at least as many men as women activists; a sharper focus on women's rights was adopted by older and newer organisations alike and issues such as early marriages and polygyny, the right of consent in marriage for women and greater education, more reserved seats for women in medical colleges and other institutions were taken up by many groups.

Being a lobby under martial law was also not easy. A number of activists categorically refused to lobby with an 'undemocratic, unelected' government that had 'no legitimacy to rule'. Others within WAF, convinced that irrespective of procedure and legitimacy, once enacted, laws were far more difficult to amend or rescind (as exemplified by the Hudood Ordinances), did try to lobby with the Majlis-e-Shoora in 1983, particularly with its female members on the proposed Law of Evidence. They found the distrust reciprocated. Most of the Majlis women members viewed WAF as radical women who defied martial law regulations to demonstrate and, therefore, a group to be avoided. For their part, WAF members viewed the Majlis women as being either naive or opportunistic enough to join hands with a dictatorship.

There was an additional problem. If leadership within WAF consciously sought to exploit the narrow gap between what were deemed 'strictly women's issues' and what was considered unquestionably 'political' so as to avoid the martial law strictrures, it took several years of activism before the general membership accepted the intrinsic relationship between the general political process and women's rights (in 1984-85). This induced a general reluctance to build more concrete working links with political party activists.

With the revival of democracy and elections in 1988, WAF brought out a Charter of Demands presenting a more comprehensive women's political perspective. This was circulated to political parties, but little effort was made to have the demands incorporated in party manifestos.
Other associated groups tried to encourage women voters to use their right and to look at the party's agenda on women before casting their ballot through pamphlets. If before 1988, political parties only addressed women voters in the broadest terms, the 1988 political manifestos display an unprecedented accommodation of women's rights as expressed by women activists outside the framework of political parties. Subsequently between 1988-90, WAF started to send material on issues to the legislators, following this up with the Islamabad WAF chapter actively lobbying members of parliament to improve the rights and status of women. One of the obstacles facing women activists is an insufficient knowledge and understanding of how legislation is actually passed, the stages it goes through, the channels through and timing at which lobbying or mobilizing public opinion can make a difference. While activists learnt the ropes, the learning sometimes came too late. Lobbying with political parties was more fruitful and led to parts of the activists' agenda on women being adopted in 1990 by, for instance, the PPP and the Tehrik-e-Istaqlal (see Zia, this volume).

By 1993, women's advocacy groups and general human rights groups (which have steadily increased in numbers) had enough self-confidence to maintain their independence while establishing contacts and links with others. They also learnt to lobby with both the bureaucracy and with political parties. Meanwhile, thanks in no small part to the changed international scene, advocacy groups and NGOs have gained a respectability and acceptance they did not previously enjoy. Women activists learnt to make good use of the dual (or multiple) hats they wear as professional consultants and activists. All of this contributed to the changed circumstances in the 1993 elections which saw greater maturity in lobbying strategies by different women's organizations.

WAF brought out its revised Charter of Demands which it sent to each political party, others e.g., the Women's Legal Aid Cell of AGHS, printed posters and flyers on women's rights and voting. Some joined hands with the Human Rights Commission of Pakistan (HRCP) to monitor elections and Aurat Foundation initiated dialogues with different levels of women from all major political parties in an effort to evolve some minimal level of consensus on women's issues. The Charter of Demands was discussed for inclusion in the party manifestos. Aurat also
produced motivational songs and posters and pamphlets encouraging women to use their vote judiciously.

The inclusion of systematic lobbying with political parties across the spectrum is a new and important trend and the 1993 elections mark a qualitative shift in the efforts of all major political parties to woo the female voter. Women were addressed separately as a potential vote bank not only on gender specific issues but also on general issues. All three leading parties, the PPP, PML(N) and PIF (Pakistan Islamic Front) placed women more prominently on their election agendas. The PPP’s manifesto had a 23-point section addressed to women which amongst other things promised: economic empowerment for women; a review of all discriminatory laws and ordinances ‘under guidance from the Quran’ to eliminate exploitation, discrimination and oppression; to suitably amend the Hudood Ordinances; to make available credit to women farmers and rural entrepreneurs; the promulgation of laws stipulating minimum wages, working hours, health and maternity benefits; the recognition of family planning as a basic human right; to make family laws more equitable for women and ensure their equitable application; to install women-headed qazi (religious) courts.

Both the main contenders - the PPP and the PML(N) - promised to sign CEDAW (a promise then kept by the PPP government). Both manifestos promised women’s economic empowerment and extending coverage regarding minimum wages, working hours, health and maternity benefits, etc. More social welfare oriented in nature, the PML(N)’s programme ignored the controversial Hudood Ordinances but did promise to ensure the ‘protection’ of women, for the first time addressing the issue of violence against women. Even the Jamaat-i-Islami which traditionally ignores women voters felt the need to address them, spending thousands of rupees on newspaper advertisements to highlight the Jamaat’s agenda for women. The Jamaat-led Pakistan Islamic Front promised jobs to women in the fields of health and education, the establishment of mobile family courts and separate women’s universities. The election campaigns also showed a new focus on women. For the PPP, large rallies of women are usual, but for the first time, the PML(N) and PIF also consciously organized special women’s rallies and active campaigning by female relatives of major
candidates. For the Jamaat-i-Islami, with its traditional posture that women should be secluded in their homes, the active public canvassing - albeit suitably veiled - by the wife and daughter of its leader, Amir Qazi Hussain, was an unprecedented break with tradition.

In the 1997 elections, major political parties acknowledged the need to bolster women’s participation in the political process, but compared to 1993 pledges were notably vague across the political spectrum manifestos. The PPP was the only mainstream political party to devote an entire section to women’s issues titled Women’s Rights and Development Agenda 1997-2002, which contained 11 major subtitles, such as Violence, Water, Contribution from the Government of Pakistan to Organization of Women Parliamentarians from Muslim Countries, and Integration. The manifesto contained a detailed description of women’s political rights guaranteeing equal political participation to women and promised to “restore the reserved seats for women in the NA, PAs, Senate and the local bodies”. Significantly, the manifesto avoided discussing the modalities or the number of seats to be reserved. In contrast with its earlier manifesto, in 1997 the PML(N) avoided a straight commitment on women’s seats, stating instead in a section on political reforms “that in order to make the national and provincial assemblies more representative of the different sections of society, steps will be considered to increase the number of seats in parliament and the provincial assemblies to give due representation on the principle of proportionate representation to women, minorities and outstanding professional experts.” Nevertheless, the manifesto did promise working women’s hostels, the setting up of government-funded women’s cooperatives in the cottage industries sector, priority in greater allocation of resources for mother and child health care, harsher punishment for those responsible for violence against women, and the strengthening of inheritance laws.

Contesting elections for the first time, Imran Khan’s newly-formed Pakistan Tehreek-e-Insaf (PTI) included women and related issues under the heading ‘Social Reform’. It strongly advocated the ‘uplift’ of women’s status and that women be brought into the mainstream of socio-economic progress by upholding and protecting the rights of women as equal citizens. It’s manifesto gave more space to women’s
issues as compared to the PML(N) and pledged to (a) “amend the Political Parties Act (1962) to ensure significant female representation on all committees including the central executive committee”, (b) “amend electoral rules to ensure that only political parties which allocate a minimum of 10% general seats tickets to women candidates would be allowed to participate in the elections.” It also promised the “establishing of the Pakistan Commission on Women as a permanent autonomous statutory body comprising government representatives, NGOs, human rights organizations and experts in different fields.” However, the manifesto pointedly made no specific commitment regarding women’s seats in the Federal Parliament and the provincial assemblies. The manifesto also included a number of other regarding measures to improve women’s status. That the issue of women’s political participation has become a national political issue that must be addressed by any party seeking office is visible in the rightist Jamaat-i-Islami’s appeal to women “to take active part in state affairs and make efforts to seek effective representation in the assemblies”. It pointed out that Pakistani women would have to “fight for themselves in order to achieve their ‘usurped’ rights.” The JI, however, made no pledges on its own behalf to increase women’s political participation and representation.

The insufficient measures adopted by parties and government to encourage women’s political participation in mainstream politics confirm the need for consistent advocacy at the policy level to press for official as well as legislative provisions that enhance and facilitate women’s active involvement in political life. This is far easier said than done. The obstacles confronting women are diverse, operate at multiple levels simultaneously and reinforce each other. Some are so deeply ingrained in the social fabric that they elude short term objectives-specific interventions. The norms of purdah are a case in point. Clearly the slow process of changing societal norms and attitudes, increasing the visibility, status and autonomy of women in all spheres and improving the access of women to resources and facilities are long term objectives that must be the ultimate aim of all interventions. Before either political parties or the government adopt appropriate measures to encourage women’s political participation, they need to feel a substantial and vocal
support for the issue. This depends on making heard women's voices in the political arena through active women's lobbies that create a groundswell of opinion and operate outside the framework of political parties. Today, the traditional means of interaction amongst women and of information gathering by women are insufficient to address the needs defined by the rapidly changing parameters of, and forces affecting their society. At the intersection between community and national concerns women risk being completely excluded from all decision-making processes.

That the onus for creating an impetus for change is likely to remain in the hands of women activists not seeking political office is illustrated by the inability of the political parties to formulate appropriate and innovative measures for mainstreaming women in the political process. This task has fallen to advocacy groups outside the parliamentary process who have taken it upon themselves to act as a think tank. The growing consensus for directly elected, constituency-based 33% representation of women at all levels, and a joint electorate for these seats is reflected in the recommendations of the COI. Further discussions concern the need to provide immediate relief within the existing assemblies versus the need for sound provisions guaranteeing the long-term strengthening of women's political participation and representation. The former issue is regarded as politically sensitive in that it would affect current power ratios in the existing assemblies. Some activists believe that in the long term it may be better to forego the immediate restoration of the women's reserved seats if this entails a revival of the old, ineffective indirect modality.

As a result of their opposition to the modalities provided in the 1973 Constitution, much of the serious research and analysis around possible modalities for strengthening women's political representation and participation has been led by women's rights and other advocacy groups rather than women politicians or the political parties themselves.

Precisely how the one-third representation is to be structured is also under discussion. For example, would the quota be adding seats to the existing strength of the relevant legislative body or would these reserved seats be taken out of the existing number of general seats. In the former
instance, the number of women’s seats in the National Assembly seats would be 69 (33% of 207 general seats) in addition to the existing 217 seats (which include 10 seats reserved for minorities) raising the NA strength to 286 Members. In the latter, 69 seats would amount to only 24% of the total NA strength. Other issues concern the time frame for women’s reserved seats and how to define constituencies for women’s seats. Alternative proposals are looking at a system of proportional representation, Others, such as Dr. Faqir Hussein, regard a multi-member constituency as the most suitable system for enhancing female representation in the legislature (Shaheed et. al. 98:85). The possibility of enhancing female representation by making it legally mandatory for political parties to allot a minimum 33% of tickets to women members is another proposal. Some countries have enacted provisions whereby a specified number of women are nominated for election tickets, such as in Argentina where political parties are required to allocate 40% of tickets for elections to the Chamber of Deputies to women. Also in Nepal, political parties are constitutionally bound to ensure that at least 5% of candidates on their lists are women.

This measure is proposed in view of the poor performance of the existing parties to date regarding women’s participation in the party decision-making process. One proposed solution to women’s political marginalisation is the formation of a women’s political party. It is envisaged that the party will open its membership to both men and women but decision-making will be entirely in the hands of the women. However, other activists are of the view that such a structure would simply imply another form of discrimination. Proponents of the women’s party such as Dr. Farzana Bari writing in a newspaper article comments that “the party will develop and promote its alternative vision of politics based on justice for all, irrespective of their gender, creed or ethnicity. [It will] formulate policies to resolve socio-economic and political problems. The party’s immediate objective would be to set standards in policies and behaviour” (Shaheed et. al. 98:85).

Activists supporting the idea of a women’s political party feel that this will provide women with a effective platform for forcefully airing their demands, primarily because the membership of such a party will evolve
from women's rights activists and NGOs who have first-hand knowledge of the issue of discrimination against women.

To be effective, advocacy efforts will have to overcome a number of current impediments: the absence of any women's political caucuses; and an insufficient level of two-way interaction and discourse between the political leadership and other organizations (women's, human rights, trade union, development NGOs etc.); the low level of ongoing communication and linkages between non-governmental organizations; the inadequate number of development-oriented and women's rights organizations disseminating information through newsletters, publications, and films and maintaining libraries and documentation centres. While women's groups, NGOs and government organizations do cooperate on specific programmes and projects from time to time, there has been little in terms of joint political effort.

There is currently a debate on whether the development oriented NGOs which accept external funding have undermined the political activism of women during the Zia period. WAF, conscious of the dangers of the strings attached to funding has always refused to accept any funding from any government, bilateral or international agency as a matter of principle. On the other hand, this means that WAF has neither full-time workers nor infrastructural facilities to undertake full-time work.

Conclusion

Women's political participation has generally been low and erratic. Frequent disruptions of the democratic process characterizing Pakistan's political history have, in any case, undermined the participation and representation of any political actors, be they male or female. For women, however, the rules of the game as well as the board on which it is played are hostile enough to actively repulse their participation.

As a class, women are excluded from the local structures of tribal and feudal power that have functioned as the springboard for much of our political leadership. Nor do women figure amongst the industrialists or traders who have more recently made an entry into electoral politics. Differentiated access to resources and the varied space available to
women from different classes and regions within the country have modulated the scope for at least public activism, which varies significantly from being negligible in rural Baluchistan to being substantially greater in urban centres of Sindh and Punjab. On the whole, women are obliged to operate within fairly rigid structures of patriarchal control in which self-serving notions of male honor and female shame are used to systematically keep women out of all public spaces, blocking access to basics such as health facilities, education, employment but equally to politics, that most public of engagements. Notions of honour underlie the institution of purdah (gender segregation and women’s seclusion) that is a serious challenge to women’s activism and public appearance of any kind. These notions are justified by reference to culture and religion with the latter being used by those in and out of power to promote, justify and mobilise support for their political agendas. In this context, women who choose to enter politics of any nature become easy targets for sexist smear campaigns. Not surprising then that affirmative action - such as reserved seats for women in the parliamentary process and quotas in government service - have been a standing demand of women in and out of parliament since 1947.

Additionally, long periods of martial law have not only systematically undermined existing institutions and stunted the growth of strong institutions of civil society, they have also specifically meant the exclusion of all women from decision-making positions (since women in the armed forces - until recently - have been limited to the medical corps, irrelevant to the political stance of the armed forces). Socio-cultural and economic barriers that obstruct women’s entry into public activism also work in tandem to prevent women from developing the political skills and experience needed to become more effective, producing a vicious cycle.

This applies equally to activists in women’s organisations whose field of activity, style of operation, priorities and focus (or lack of thereof) on women’s issues and rights have been an important element in women’s political participation. Unfortunately, the paucity of linkages between political actors, women in government and independent advocacy groups has reduced the effectiveness of each type of activism. Until the
The Context of Women’s Activism

seventies, women’s activist groups were less visible. In the first two decades of independence, due to the earlier successful alliance and overlap between those leading the Pakistan Movement and those advocating women’s rights, women’s groups believed that the government would automatically expand women’s rights and open avenues for their participation at all levels: whether social, economic or political. The change came in the seventies with a greater emphasis on political activism in progressive left groups and a sprinkling of new women’s groups. But, until the eighties women’s groups only mobilized around women’s issues sporadically, and with little coordination between themselves or with political parties or politicians. It was not until General Zia ul-Haq’s military regime with its particular brand of Islam (1977-88) started to rescind women’s rights overnight, that women’s groups felt the need to establish an advocacy lobby for women on a sustained basis.

Despite the learning having taken place, there is still a pressing need to better understand parliamentary procedures and lobbying techniques, and for this activity to be supported by prior research and analysis of the issues to provide the informational and conceptual base for policy discussions. In the final analysis, however legal provisions can only open doors and are therefore necessary, but not sufficient, to bring about widespread meaningful participation. For their part, government measures depend on political will and a commitment to improving women’s participation which, as we have seen, varies significantly from one period to the next. Ultimately only a combination of efficient lobbying and effective political leadership can permanently change the parameters of women’s political participation by helping bring about greater autonomy for women in all aspects of their lives.
Annex 1

Extracts from the Chapter Women in Power and Decision Making National Plan of Action for Women

G. Women in Power and Decision Making

The equal participation of women in decision in all spheres, from the personal to the most public, is a pre-requisite for an effective democracy. This necessitates gender equality in the sharing of power at all levels. Within the family, socio-cultural norms, legal inequalities and inequitable access to resources of all kinds, deprive women of decision-making powers. This inequality permeates all structures of social, economic and political activity, seriously impeding women's ability to contribute as full citizens. In the past, women's decision-making powers have largely been understood in terms of increased representation in legislative bodies and government employment. Though necessary, this is insufficient to ensure a proper functioning of democracy and the full participation of women in decision-making.

To move towards gender equality as defined in CEDAW and the Beijing Platform for Action, actions in the next twenty years must focus on: (a) improving women's decision-making within the family and community; (b) creating social awareness of the need for, and a societal commitment for greatly improving women's participation in decision-making at all levels and sharing of household responsibilities. In addition, measures aimed at achieving a 40 percent representation of women in all public sector institutions, and women's full participation in the political process must be adopted.

Successive governments have undertaken a number of initiatives to enhance women's decision-making and participation in government service and the political process. Unfortunately, a number of political upheavals and changes have obstructed the transformation of measures into a comprehensive framework addressing the various levels of power relations involved; and the effectiveness of specific measures has been restricted.
It is clear that women's decision-making powers are severely curtailed, primarily due to their lack of access and control over resources including financial resources. Socio-cultural norms have further undermined their ability to intervene in and decide on matters that affect their everyday lives.

Pakistan is a signatory to the Convention on the Political Rights of Women (1952), with a reservation relating to the armed forces, public order and law enforcement agencies, and jobs hazardous to their health. Women have the right to vote, stand for all elective bodies, and hold all public offices at par with men. Affirmative action has been taken to encourage women's participation in the political process. However, the important Constitutional provision of reserving 20 seats of national the national assembly 5% of the provincial legislative seats for women lapsed in 1988, and efforts to restore these seats have not, so far, proved successful.

The distribution of women in different ministries and levels is uneven with the largest concentration of women in the social sectors. Women's representation in Planning and Development, Finance, Economic Affairs and the key sectoral ministries of Industries, Agriculture and Water and Power is marginal. Even in ministries with a high percentage of female employees, women have seldom held decision-making positions. There is no mechanism for ensuring that even the existing five percent minimum quota for women is filled across and within all occupational groups and grades.

The vast majority of women workers is concentrated in the agricultural and informal sectors. Not legally recognized as workers, they are deprived of the benefits of labour legislation, as well as of any participation in the formal channels of collective bargaining. Although the number of women employed in the formal sector has steadily risen, women's participation in trade unions remains almost nil.

One of the most important positive developments during the past decades has been the emergence of new advocacy groups and a changed perspective in older organizations. The decade has seen a quantitative and qualitative increase in activism focusing on enhancing women's
share in power and decision-making at all levels, including in the family, community and other structures of social organisation. Women’s groups have actively lobbied a variety of social sectors including government departments, political parties, grassroots organizations and other institutions of civil society.

Key Direction - PFA paras 187 and 189

The equitable distribution of power and decision-making at all levels is dependent on Governments and other actors undertaking statistical gender analysis and mainstreaming a gender perspective in policy development and the implementation of programmes. Equality in decision-making is essential to the empowerment of women.

In addressing the inequality between men and women in the sharing of power and decision making at all levels, governments and other sectors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programs so that before decisions are taken, an analysis is made of the effects on women an men, respectively.

CEDAW

Articles 7; 8; 11; and 14-2-a

Goal: To ensure the empowerment and autonomy of women in all spheres of decision making and their full representation at all levels of state and society.
Strategic Objective G.1

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

<table>
<thead>
<tr>
<th>Action # 1</th>
<th><strong>BY WHOM:</strong> MoWD, Ministry of Law, Justice and Human Rights, Parliamentarians NGOs, NCG, PCGs</th>
</tr>
</thead>
</table>
| Review existing laws/policies (including rules notifications and procedures) that directly affect women's decision-making role and recommend measures to remove obstacles in women's access to power and decision-making. | **HOW:**
Constitute an Experts Committee (consisting of representatives of MoWD, MoLJ and HR, parliamentarians, NGOs, and relevant sector experts); coordinated through the National and Provincial Core Groups, directly linked to the proposed permanent Commission on the Status of Women
Experts committee to take all appropriate measures to operationalize recommendations of the Commission of Inquiry on Women and other relevant reports, including modifications in existing rules and legislative measures required to enhance women's decision-making
Operationalize all procedural recommendations |
| **BY WHEN:** | 1998-1999 |
| | 2000 |
| | 2000- |
Strategic Objective G. 2

*Strengthen representation and decision-making of women in the political process.*

<table>
<thead>
<tr>
<th>Action # 1</th>
<th><strong>BY WHOM:</strong> Election Commission with the assistance of the Wards in urban areas and Union Councils in rural areas, MOWD, WDDS, Local Government, NGOs</th>
</tr>
</thead>
</table>
| Ensure that all women are included in accurate electoral rolls. | **HOW:**  
Update, immediately and pro-actively, the electoral rolls  
Ensure that women's names appear accurately in the lists by involving female personnel  
Annually update the electoral rolls  
Establish a system of electoral cards wherein women are identified as 'daughter of', no changes to be instituted subsequent to marriage or divorce  
Undertake special efforts to ensure the full registration of all women voters in the tribal areas  
Make all necessary provisions to ensure the enrolment of women with disabilities in the electoral rolls and their active participation in all elections | **BY WHEN:**  
1998  
1998  
1998  
1998  
1998  
1998 |
<table>
<thead>
<tr>
<th>Action # 2</th>
<th><strong>BYWHOM:</strong> Expert Committee (same as in G.1), past and present Women Representatives of Local Bodies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adopt affirmative action measures to increase women's political representation from the local bodies to the Senate.</td>
<td><strong>HOW:</strong> Reserve 33% local councils seats for women based on a direct constituency and joint electorates of all women and men. Provision to be valid for the next three terms or 2020 whichever is later, with a provision for renewal if necessary at that time. <strong>BY WHEN</strong> 1998</td>
</tr>
<tr>
<td>Prepare a Constitutional Amendment that:</td>
<td>Prepare a Constitutional Amendment that:</td>
</tr>
<tr>
<td>- Reserves 33% of general seats for women in the national and provincial assemblies and the Senate for the next three elections or fifteen years whichever is later, allowing for renewal that time</td>
<td>- Reserves 33% of general seats for women in the national and provincial assemblies and the Senate for the next three elections or fifteen years whichever is later, allowing for renewal that time</td>
</tr>
<tr>
<td>- Provides for these seats to be on a direct constituency basis and through joint electorates of all women and men</td>
<td>- Provides for these seats to be on a direct constituency basis and through joint electorates of all women and men</td>
</tr>
<tr>
<td>- Introduces 25% reserved seats for women in the provincial and national assemblies and the Senate prior to the next elections</td>
<td>- Introduces 25% reserved seats for women in the provincial and national assemblies and the Senate prior to the next elections</td>
</tr>
<tr>
<td>- initiate appropriate steps to amend the 1998 Political Parties Act (1962) and People's Representation Act (1976) to ensure that:</td>
<td>- initiate appropriate steps to amend the 1998 Political Parties Act (1962) and People's Representation Act (1976) to ensure that:</td>
</tr>
<tr>
<td>- no party is allowed to contest 30% or more of the seats in the national assembly and/or Senate (including FATA) or 30% or more of the seats in at the province level, unless it has at least 30% female membership and at least 10% members of its policy-making body are women;</td>
<td>- no party is allowed to contest 30% or more of the seats in the national assembly and/or Senate (including FATA) or 30% or more of the seats in at the province level, unless it has at least 30% female membership and at least 10% members of its policy-making body are women;</td>
</tr>
<tr>
<td>no party is allowed to contest 15-29% of the seats in the national assembly and/or Senate (including FATA) or 15-29% of the seats in a province, unless it has at least 15% female membership and at least 5% of the members of its policy-making body are women</td>
<td>no party is allowed to contest 15-29% of the seats in the national assembly and/or Senate (including FATA) or 15-29% of the seats in a province, unless it has at least 15% female membership and at least 5% of the members of its policy-making body are women</td>
</tr>
<tr>
<td>Action # 3</td>
<td>BY WHOM: MoWD, Organization of Women Parliamentarians from Muslim Countries (OWPMC), NGOs, NCG/PCGS, Trade Unions, and Relevant Experts</td>
</tr>
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</tr>
<tr>
<td>Strengthen and promote effective participation of women in the political processes.</td>
<td><strong>HOW</strong></td>
</tr>
<tr>
<td>Provide training programmes for women who are active in the political process at any level on the political system and women’s issues, in the area of paralegal training, in self-assertiveness, and in skills for managing political campaigns, lobbying etc.</td>
<td><strong>BY WHEN</strong></td>
</tr>
<tr>
<td>Institute political education and training programmes for women at the community level, including women politicians, NGOs, CB0s, development workers, media personnel etc.</td>
<td>1998</td>
</tr>
<tr>
<td>Actively promote effective interaction between different catalysts in the social arena, i.e. women’s advocacy groups, women politicians, women’s development programs, CB0s, NGOs, trade unions, government departments and informal women’s groups through electronic media and informal communication channels.</td>
<td>1998</td>
</tr>
<tr>
<td>Lobby for appropriate changes in the legislation, procedures and monitor progress.</td>
<td>1998</td>
</tr>
<tr>
<td>Review progress and adopt necessary measures in the middle and end of each Five Year Development Plan.</td>
<td>2000</td>
</tr>
</tbody>
</table>

Recommendations on Political Participation of Women

1. The principle of reservation of 33% of seats for women in an enlarged house of each of the elective bodies, from the local bodies up to the Senate, should be accepted.

2. Necessary amendments in the Constitution and other laws should be initiated as speedily as possible to provide for women's reserved seats in all the elective bodies through any modality meeting the criteria of direct elections and joint electorate.

The 33% reserved seats in the Senate should be filled through allocating the following number of seats for female senators:

a. Five additional seats from each province;
b. At least two out of the eight seats of FATA;
c. One out of the three from the federal capital;
d. One or two of the five seats for technocrats.

The five additional seats from each province can be filled through immediate elections; all others should be filled on a priority basis as the seats in those categories fall vacant.

4. Necessary constitutional amendments should be initiated to give local government recognition and protection as a third tier of government.

5. The Election Commission should be authorized to conduct local body elections.

6. Immediate steps should be taken to expedite the above, so that local body elections can be properly conducted.

7. Elections to women's reserved seats in the national and provincial assemblies may also be held along with local bodies elections.
8. Prompt and strong action under the existing penal provisions should be taken against parties, candidates, pseudo-religious and other categories of individuals and bodies acting to restrain women from voting or otherwise creating difficulties in the exercise of their right of franchise.

9. Where the Election Commission finds evidence of large-scale non-participation of women in voting, it should declare the election null and void.

10. Efficient updating of the electoral rolls is a high priority. It should particularly ensure not only that all eligible women are included, but also that the names are exactly the same as on their identity cards.

11. The process of issuance of identity cards should be greatly simplified and made prompt, especially in the rural and remote areas. Photographs of women on identity cards should be made compulsory, as it already is on passports.

12. Cross-party consultation of all parliamentary and elective body groups should be held annually to review the state of women's representation and their political participation. An immediate process for this should be initiated through a dialogue on the modalities for reserved seats.

Endnotes

1 In East Pakistan (now Bangladesh), the political mobilisation pre-dates this period.

2 In 1908 Anjuman-e-Khawateen-e-Islam, was formed in Lahore and was geared towards education, social reforms, and the rights of women within the framework of Islam.

3 Fatwa is a public declaration on a subject by a religious authority, often translated as edict.

4 It set up a hostel for working women in Islamabad (later handed over to the government's Social Welfare Department), and produced the first annotated bibliography on women in Pakistan in 1978.

5 In September 1981 Shirkat Gah called together like-minded women to discuss strategies against the multiple retrogressive directives and proposals floated by General Zia's early years, particularly the implications of the Hudood Ordinances.
6 Unfortunately, the potential of the Women's Division - which in theory had a wide mandate - was seriously curtailed by the lack of administrative structures below the Provincial Secretariat level.

7 However, Pakistan has made a general declaration stating that the accession to the provisions of the UN Convention is subject to the provisions of the Constitution of the Islamic Republic of Pakistan. It also noted a reservation regarding Article 29 on reporting procedures.

8 Since March 1985, Zia introduced a separate electorates system in Pakistan. Religious minorities are therefore registered as voters separately and not included in this figure.

9 Report of the South Punjab Field team of Shirkat Gah's research: *Women and Governance: Re-imagining the State* a regional research project under the aegis of the International Centre for Ethnic Studies, Colombo (In Pakistan the national survey was completed in 1998, research on-going).

10 The original Constitutional provision setting the voting age at 18 was subsequently omitted via the Presidential Order of 2 March 1985 and substituted for 21.

11 Photographs have been made mandatory in 1998.

12 This included a woman minister, two parliamentary secretaries, one Deputy Speaker and a Deputy President of an Upper House.

13 Technically, the first woman to successfully contest a general seat was Begum Hamida, the widow of the former Prime Minister, Mohammad Ali Boga. However, her election in the 1964 assembly was seen as merely a political manoeuvre in which a sitting member was asked to vacate his seat for her to sit in parliament through a by-election. In any case the election did not involve a popular franchise.

14 In March 1985 Zia introduced separate voting and representation of non-Muslims.

15 In the Punjab an Ordinance was introduced in 1995 that provided for 33 percent reserved seats for women but lapsed when it failed to be presented in the provincial assembly. In April 1998 the Federal Government announced that it was doubling the existing 10% provisions for women's seats at the local bodies level, far below a one-third representation of women. Reportedly, earlier Local Bodies draft legislation in Punjab had included a 33% reserved seat provision. Moreover, given the realities of the current legislation affecting local government, women's representation is likely in practice to fall below the 20% margin. While under the 1979 local bodies provincial Ordinances, the structure and process for electing Local Bodies were broadly similar with only minor variations between the four provinces, new legislation has led the provinces to diverge significantly in their local body structure, with implications for women's representation (for details see Shaheed et al. 98:85-87).

16 Political inexperience can be gauged from the fact that having collected tens of thousands of signatures from all over the country in its first campaign, WAF members were at a loss on what to do with these; neither holding a press conference nor issuing a press release (eventually the packet was presented to the President via a woman politician).

17 Recent years have seen the induction of women into the technical (computer based) tasks of some forces, notably the air force, but this too is irrelevant here.
References


Political Participation: Women in National Legislatures in Pakistan

Khawar Mumtaz

Abstract: This paper examines women's role in Pakistan's national legislatures since independence to 1988. Have women, despite their minuscule representation, used the opportunity for inquiry and discussion and given direction to policy-makers and have they raised women's issues? What has been the extent and nature of their participation in debates on national issues and what perspectives have they presented on women's issues? Have women just toed the party line? The paper addresses these and many more questions that have previously remained uninvestigated.

Introduction

Women participate in politics at various levels from mobilization on specific issues to taking part in electoral politics (largely as voters), to sitting in local bodies and provincial and national legislatures. While women have been and continue to be mobilized at critical junctures in Pakistan's political life (beginning with the Pakistan Movement and repeatedly during the various elections) their presence in the decision-making bodies of both political parties and national institutions has been minimal. The socially disadvantaged position of women and the myriad economic, social and legal obstacles to their full participation in the country's political and economic life are well-known, widely recognized and reflected in the provisions for women's reserved seats in Parliament in Pakistan's various constitutions from 1956 to 1973. These provisions,

* I would like to acknowledge those without whom the painstaking work of combing through assembly debates spanning 40 years would have been impossible. These include SG's programme officers Nadia Bokhari, Arifa Nazle and Iman Ahmed as well as a host of interns who were required to work on the research as part of their internship responsibilities. Acknowledgements are also due to Sohail A. Warraich for his deep interest in the study and in helping unearth the scattered (and buried) records of women parliamentarians.
however, were seen as temporary measures until such time that women were brought into the political mainstream. Article 51(4) of The Constitution of 1973, for instance, provided for a “period of 10 years... or the holding of a second general election to the National Assembly, whichever occurs later....” If the political process in the country had proceeded normally women’s reserved seats would have ceased to exist as early as 1983. In the event, the military coup in July 1977 shortly after the general elections earlier in the year, gave women’s seats a new lease of life, and the seats lapsed after the election of 1988 when the highest number of women in Pakistan’s history sat in the National Assembly (20 on reserved seats, 4 on general). The reality of women’s participation was starkly brought to light in the elections of 1990 when only two women were returned from the general seats in the National Assembly (NA) and four in the provincial assemblies. Subsequent general elections in 1993 and 1997 saw four and six women respectively elected to the NA. Progress certainly, but at a snail’s pace and extremely inadequate.

The lapse of the women’s seats triggered a debate on women’s representation in legislatures, albeit confined to women and human rights groups and women members of political parties. The debate that has focused on the pros and cons of reserved seats has also raised the issue of women’s role in legislatures. Many view women members on the reserved seats as having acted as ‘rubber stamps’ or as ‘surrogates’ for defeated male contestants, as not having contributed to meaningful debates, as having failed to protect women’s interests and as simply bolstering the numerical strength of political parties in the assemblies. For instance a woman Member of the National Assembly (MNA) reportedly said that female members of previous assemblies “... were more or less like rubber stamps and had to say yes to everything suggested and approved by the male members of the House,” (Muslim 18.6.85). A political commentator expressed a similar sentiment in 1997, “Needless to say only such women were put up for candidature who would echo what the male members sounded. Consequently, they made little difference to women’s status and conditions,” (Sadeque 97). According to a prominent leader of the Pakistan Peoples Party (PPP), Aitazaz Ahsan, women in the assemblies do not take up women’s issues
nor are they united on these (Shirkat Gah Seminar on Women’s Political Participation 28.4.94). While there may be some element of truth in these opinions, in the absence of documented information and analysis of women’s role in the legislatures these are, at best, subjective assessments. There is an urgent need therefore to review and assess women’s participation in legislatures, especially at this juncture of Pakistan’s political history when there is a raging debate over mechanisms for increasing women’s participation and representation.

The primary source for this review is the official published records of the legislative assembly debates from 1947 to the end of the Junejo-led National Assembly that was dismissed in May 1988. The cut off has been determined by the availability of official records. Secondary sources have been used for putting together the contextual information. The paper’s first part gives a brief overview of Pakistan’s political and legislative history till May 1988, the constitutional provisions for women’s participation and the profile of women who sat in the assemblies (Annex 1 provides a summary of Pakistan’s legislative history). Part two, the substantive section, examines the nature and extent of women’s participation with reference specifically to women-related debates, as also other major national debates. The final and the concluding section presents an analysis of the findings and draws some conclusions from this four-decade long experience of women in primary law making institutions of the country.

The Context - The Legislatures and Women Legislators

In its 50 years of existence, Pakistan has had 12 different national level legislatures (not including the Senate which was introduced as the upper house under the 1973 Constitution that converted Pakistan’s legislature into a bicameral system). This legislative experience includes three Constituent Assemblies and one hand-picked Majlis-e-Shoora. Only twenty three years after the country’s creation, in 1970, were legislatures first elected on the basis of universal adult franchise. For eleven years there were no legislatures at all and for another fourteen these functioned under the wings of military rule. Moreover, beginning in 1954, assemblies were repeatedly dissolved: 1954, 1955, 1969, 1977, 1988, 1990, 1993, 1996. Another hallmark of Pakistan’s legislatures
has been the dearth of discipline among members and their unabashed opportunism. The last decade specially has witnessed the rampant buying and selling of support acknowledged all round as 'horse-trading' and 'lotocracy'. Above all, legislatures in Pakistan have been used for giving legitimacy to decisions made by the executive rather than for giving direction to policy makers or framing new legislation.

Women too have been affected by the prevailing political culture and their roles have to be examined within that framework rather than with reference to some ideal or preferred criteria. Over the decades women’s participation in politics gradually increased. The dramatic change came during the 1970 elections with the widespread institutionalisation of women’s inclusion within political parties through the growth of women’s wings of political parties. The Pakistan Muslim League (PML) had a history of a women’s wing, the PPP continued with this culture, and by the mid-70’s the Jamiat-i-Ulema Pakistan (JUP) and Jamaat-i-Islami (JI) had also created women’s wings. With successive elections these were consolidated and played a significant role in bringing out female voters, particularly in the urban areas. The JI, whose women activists had previously concentrated on educational institutions became increasingly visible in electoral politics.

Despite being tortuous and uneven, the political process has thrown up a core of female political leadership, encouraging the Awami National Party, the PPP and the Tehrik-e-Istaqbal to field a few women candidates on general seats and allowing Benazir Bhutto to come into power twice (she took oath at the age of 35 in 1988 as the youngest and the first female Prime Minister in the Muslim world). Ironically, the lapse of the women’s seats after the 1988 elections and the gradual induction of women in party politics did not translate in their being considered for party tickets.

Between 1947 and 1997, women have been elected to 113 seats in various national legislatures, including the nominated Majlis-e-Shoora. Of these eight were from East Pakistan. Unfortunately, only very limited information on the backgrounds of seven East Pakistan members of the NA between 1962-1969 is available. Therefore, for purposes of analysis women legislators from what is now Pakistan and only one
from East Pakistan (Begum Shaista Ikramullah, biographical information about whom is available) have been considered.

A total of 78 women have been elected to the 106 seats being analysed here. Of these 12 were returned on general seats through direct elections. One of them, Nasim Wali Khan, did not take up her seat. The first two women legislators, i.e., Jehan Ara Shahnawaz and Shaista Ikramullah, were indirectly elected by the provincial legislatures but had been directly elected to those in 1946. Since 1947, 18 women legislators were returned more than once to the assemblies either through direct elections or on reserved seats. Begum Nusrat Bhutto has had the privilege of sitting in five National Assemblies, once on a reserved seat (1977) and four times on general seats. Benazir Bhutto was returned to the NA four times through successful contests on general seats and Syeda Abida Hussain, thrice also on general seats. Among others with three stints are Kulsoom Saifullah of NWFP and Bilquis Shabaz of Baluchistan, but both came on the reserved seats quota.

At least 5 women came with successful local bodies experience: Syeda Abida Hussain (Jhang), Nasim Majid (Bahawalnagar), Bilquis Shabaz (Kharan), Qamrunnisaa Qamar (Karachi) and Jehan Ara Shahnawaz (Lahore). Ten women had experience of sitting in Provincial Assemblies, most from Punjab: Begum Jehan Ara Shahnawaz (six times),\(^6\) Begum Salma Tasadduq Hussain (thrice),\(^7\) Begum Khadija G.A. Khan (twice),\(^8\) Sahibzadi Mehmooda Begum (twice),\(^9\) Rehana Sarwar (twice), Syeda Abida Hussain and Bilquis Habibullah once each. Begum Zari Sarfraz and Dr. Ashraf Abbasi\(^{10}\) were from NWFP and Sindh and Baluchistan, respectively.

Thus, 44.9% of women legislators in the national legislatures had previous political experience either, as stated above, of local bodies and/or provincial elections, or as part of movements: the Pakistan Movement, the Pakistan National Alliance (PNA) movement of 1977, the Movement for the Restoration of Democracy (MRD) of the eighties against General Zia-ul-Haq, or as party activists. The PPP in particular has brought forward a large number of women from its ranks. Another 11.5% women came from political families and while not political activists, they had enjoyed political exposure (this is not to say that the
women with political experience were not from politicized families, most were). Women who belonged to political families and/or had political experience constitute a little over 56% of the women who have sat in National Assemblies at different times.

However, over a quarter of women in legislatures (26.9%) have been unknowns, not seen in public life after a term in the Assembly. With the exception of perhaps Bilquis Nasruminallah (Hazara) who stood for election on a general seat subsequently, the others more or less disappeared. In all probability it is this category of members that has contributed to the popular perception that women legislators are merely chosen to bolster the strength of the majority party and that patronage and political exigency are the only criteria for indirectly electing women on reserved seats. In fact, only three women may be categorised purely as surrogates as they entered the electoral race following the defeat of their respective husbands in general elections. Afsar Raza Qizilbash, successfully returned on the reserved seat in the 1985 Assembly is the only one who entered the Assembly having lost a closely contested seat for the NA from Lahore.

Given the mode of election to reserved seats through which the maximum number of women have sat in assemblies, the majority has either belonged to the leading party of the House or at least enjoyed its support. However, contrary to popular perception the majority of women who sat in the national legislatures came with political experience or exposure and were educated, some were professional women with outstanding track records in their fields, for example, the first woman member of Pakistan Federation of Chambers of Commerce and Industry industrialist Salma Ahmed and architect Yasmin Lari. Others had emerged from very restrictive feudal/tribal backgrounds like Abida Hussain, Nasim Wali Khan, Nasim Majid, to name a few. Among the professionally qualified women have been two Ph.Ds (Attiya Inayatullah and Shaista Ikramullah), six medical doctors, at least five women with postgraduate degrees, two lawyers, a trade union leader (Sabiha Shakeel), and a headmistress of a school. The majority benefitted from the formal education system and only a handful were without formal education.
Besides Benazir Bhutto who became Leader of the House twice and Leader of the Opposition also twice, five of the women legislators became members of cabinets,\textsuperscript{12} Dr. Ashraf Abbasi was elected Deputy Speaker of the NA of 1972, and some became Parliamentary Secretaries.

Significantly, the female composition of the assemblies reveals an urban bias due perhaps to the relative advantage of urban women. Likewise, women who have come on general seats are largely from the well-off sections of society reflective of the prohibitive costs of elections that enables only those who have the financial wherewithal to enter the arena. Eight women have been from well-known feudal families.\textsuperscript{13} Nevertheless, a number of middle class women have found a place in legislatures through the reserved seats mechanism, for instance Rehana Aleem Mashadi (PML), Zareen Majeed (MQM), Qamrunnissa Qamar (JUP), Abida Malik (PPP), Amera Ahsan (JI) among several others.

Women’s Legislative Participation: 1947-1988

Even a cursory reading of legislative debates reveals the surprising frequency with which women members have engaged in the issues under discussion at any given time. In fact, proportionate to their numbers in the legislatures, women’s participation has been overwhelming. Naturally, some matters have evoked greater participation than others. It is important to remember that women’s participation has taken place in the overall context of unstable/uncertain political conditions within which the legislatures have had to function. The most significant being the ever-present threat of dissolution and the executive’s perception of legislatures as instruments of legitimizing its decisions. Women in these Houses have at all times been in the minority. They have not always found the Houses supportive (in fact have often had to face gender-based hostility from some members). Women have belonged largely to the same class as their male colleagues and, like them, have had to work within the prevalent political constraints.

Women have participated in debates on women’s and national issues, in the budget and the Question Hour sessions. It would be misplaced to presume that they only spoke on women’s issues and ignored important
national concerns or to assume that national concerns took precedence over specific concerns of women. One possible generalization is that women legislators while following party discipline as a rule, have not always conformed to the party position on women’s issues. Another, that on women’s issues there has been a broad consensus among women, with only some exceptions (to be discussed later).

Women have also actively served on Select Committees, some having acted as parliamentary secretaries. Ashraf Abbasi became a Deputy Speaker and Begum Jehanara Shahnawaz a member of the Panel of Chairs to run the proceedings of the House. The latter probably holds the record of membership of House committees. She was a member of the Fundamental Rights Committee, the Basic Principles Committee, the Franchise Committee, the Nationality Committee as well as the Zakat Committee (Shahnawaz 71:241).

Women’s Issues in the Assemblies

In the 40 years of the National Assembly debates under review women’s issues have repeatedly come up for discussion:

(a) In the form of full-fledged debates these included: the Recovery of and Issue of Resettlement of Abducted Girls and Orphans (March 1949); Muslim Family Laws Ordinance deliberations spread over several years (July 1962 to July 1966 and then again in September 1972); the Purdah for Muslim Women (August 1972); the Status of Women’s Commission (December 1974 to November 1975); among others;

(b) With reference to various bills under discussion: such as the Law of Evidence (1983), Qisas and Diyat Ordinance (1984), the Constitution of the Islamic Republic of Pakistan (1973), Report of the Basic Principles Committee (1954), The Electoral College Bill, (1964) and others;

(c) During the General Budget debates when the opportunity has been used to raise women-related issues either with reference to a specific budget item or through Adjournment
and Privilege Motions. These have included the demand for Divorce Courts to deal with inheritance issues during discussion on the Finance Bill (1954), demands for more technical training centres for women social workers (1962), greater opportunities and better provision of food and living conditions for women (1964), condemnation of heinous crimes against women (1974), negative projection of women in the media (1976), etc;

(d) During Question Hour sessions through starred (needing prepared response from the Treasury side) and unstarrd (requiring immediate reply from the government) questions. This has been frequently used by women as a successful tool for drawing public attention to issues ranging from the number of women employed in government service (1950), to the number of female doctors sent abroad by the government, and government policy on medical colleges for women given that there were only 72 women doctors in the country at the time (1950). Women maximized their use of the Question Hour session in the Assembly of 1986-88, making a total of 121 interventions as compared with 29 interventions in the combined period of the two PPP assemblies during 1972-1977, and 63 in the two Ayub Khan assemblies over the period 1962-68.

In fact, the issues that find resonance in the Question Hour sessions of all legislatures are those related to female employment and employment opportunities (1950, 1965, 1966, 1972, 1974, 1986), female education at various level (1950, 1966, 1972, 1986) and discrimination against women. In the first national legislature, the government’s policy of excluding women from the Pakistan Administrative Services and the Pakistan Foreign Service was challenged in the Question Hour by Jehanara Shah Nawaz (10 April 1950); Marium Hishamuddin Ahmed, a member from East Pakistan in the National Assembly, raised the question of why only one woman was included in a cultural delegation sent abroad (5 July 1966) and demanded assurance from the government for an equal male - female ratio in future delegations; Nasim Jehan, a member of the ruling PPP, asked a series of pointed questions on
whether there was a woman member among the Board of Trustees of the National Sports Trust (13 December 1973), if the figure of the total labour force included women (18 December 1974), and whether women District Education Officers were considered equal to their male counterparts or subservient to the latter with a lower status (July 1973); Syeda Abida Hussain in Junejo’s Assembly questioned why the Pakistan Women’s Hockey Team was not being allowed to go to Seoul for participation in the international tournament (12 October 1986).

This paper examines in depth the assembly debates on two issues - the Muslim Family Laws Ordinance and women’s reserved seats in parliament - to provide an insight into the nature of discussion, women parliamentarian’s positions on them, and the male legislators’ perspective on the issues. These two issues have been selected because of their importance for women and their recurrence in the legislatures.

The Debate on the Muslim Family Laws Ordinance 1961

Since its passage, the Muslim Family Laws Ordinance 1961 (MFLO) has been a bone of contention between the religious right and women in Pakistan. The MFLO regularised marriage and divorce, introduced talaq-i-tafweez (delegated right of divorce for women), restrained polygamy by requiring prior permission for remarriage, and enabled children to inherit from their grandfathers the share of their predeceased father. The Ordinance has been repeatedly raised in the legislatures starting from 2nd July 1962 in the first session of the legislature after its promulgation. It came up for substantive debate on 2nd July, 20 July, 25 July and 23 November 1963. In March 1964, July 1966 and then in September 1972 additional attempts were made to amend/repeal it.\textsuperscript{14}

The MFLO’s history goes back to 1955 and the then Prime Minister Mohammad Ali Bogra’s second marriage which invited a very strong reaction from women. All Pakistan Women’s Association (APWA) launched a campaign, the United Front for Women’s Rights was formed (Mumtaz and Shaheed 87:56) and the government felt compelled on 4th August 1955 to appoint a seven member Marriage Commission (also referred to as the Family Law Commission by legislators). Headed by Justice Sir Abdur Rashid, the Commission was assigned the task of
removing "the apparent anomalies in the Muslim Family Law as propounded by the jurists," (National Assembly of Pakistan, 2 July 1962:884). The other members were: Dr. Khalifa Abdul Shujaud-Din (who died during the proceedings), Khalifa Abdul Hakim, Maulana Ihteshamul Haq, Mr. Inayat-ur-Rahman, Begum Jehan Ara Shahnawaz, Begum Anwari G. Ahmad and Begum Shamsun Nahar. The report of the Commission was submitted in 1956 and all members except Maulana Ihteshamul Haq were unanimous in their recommendations. The Report however, met with opposition from religious quarters. This period was characterised by very unstable political conditions with fast changing allegiances and frequent toppling of governments that culminated in the coup d'état of 1958 (see Annex 1). The Marriage Commission report was in effect shelved and it was only on the insistence of women that it was revisited and finally implemented in the form of MFLO 1961 by the then President, General Mohammad Ayub Khan. Needless to say, the religious elements protested against the law and Ayub, reluctant to repeal it, stated that it could be discussed in the Assembly which was soon to be set up.

That those opposed to the MFLO took up the first opportunity to bring it to the NA is evident from the fact that on 2nd July 1962, within days of the new legislature's coming into session, Abbas Ali Khan (East Pakistan) moved for leave to introduce The Muslim Family Laws Ordinance (Repeal) Bill.

The introduction of the Bill should be seen in the context of the antagonistic relationship between Ayub Khan and the religious elements. Ayub saw the latter as retrogressive and was far from sympathetic to them. They in turn saw Ayub as a westernised despot who sought to stifle their voice. The attempt to repeal the Ordinance thus was a strategic one for these religious elements, a fact admitted by the proponents of the Bill in the NA. When it was said that since they did not feel strong enough to start an agitation against the Ordinance at the time of its promulgation the "Ulema took a pledge to do so at an opportune moment..." (NA 2 July, 1962:1500). This was that 'moment' for the religious element to launch their opposition to the government.
Abbas Ali Khan’s reason for bringing the Bill to the Assembly was in his words, "the recommendations of the Commission, on the basis of which the MFLO was promulgated, are un-Islamic" (NA 2 July 1962:884). There was considerable debate, which constantly veered away to whether the MFLO provisions were in accordance with the Qur’an and Sunnah rather than the issue of admissibility, i.e., whether leave should be given for it to be introduced. The Law Minister, Muhammad Munir, expressed concern about the timing of the Bill in the "maiden sitting" of the House when the House had not yet settled "down to more constructive business". He did not think it would be “expedient” to submit the Bill as “it is a highly controversial Bill.” Since it was bound to be referred to the Advisory Council of Islamic Ideology (ACII) which had not yet been established, his plea was to withdraw it. Muhammad Munir also wanted the assurance from the mover of the Bill that he would abide by the decision of ACII.

There was prolonged discussion on the technicalities of the Bill’s admissibility in which four men and two women participated and where the thrust of the government’s argument was its referral to the ACII a proposal on which all those who spoke agreed, including the mover. Admissibility was finally decided by division (i.e. counting of Ayes and Nos) that “Mr. Abbas Ali Khan be given leave to introduce a Bill to repeal the Muslim Family Laws Ordinance, 1961,” (NA 2 July, 62:892). The Bill was then referred to a Standing Committee which subsequently came to the conclusion that the MFLO was not in contradiction with Islam and therefore the proposed Bill be rejected. However, Maulana Mufti Mahmood, a member of the Standing Committee, submitted a note of dissent.

One year later, on 2 July 1963, Abbas Ali Khan again moved “that the Bill to repeal the Muslim Family Laws, Ordinance, 1961, as reported by the Standing Committee, be taken into consideration at once” (NA 2 July, 63:1498). Substantive and heated debate on the motion then followed (NA 20 July, 25 July, 23 November 1963).

Abbas Ali Khan’s opening statement set the tone for the 10 members who spoke against the Family Laws Ordinance. He began with an attack on the Marriage Commission members, whom he declared “ignorant of
the principles of the Qur’an and the Hadith and being obsessed with the Western civilization and culture....” (NA 2 July, 63:1498). He blamed “a section of our pro-Western women” for having started the agitation against second marriage and then approaching the President for implementing the Law during martial law. In his view the fact that the majority had voted in favour of introducing the Repeal Bill (NA 2 July, 1962: 1502) including members from the Treasury, demonstrated that the majority was against it. He challenged the government to present “irrefutable arguments” from the Qur’an and Sunnah promising that “we would not have any objection to accepting it,” otherwise “we will not tolerate the existence of this law and we will continue to fight until and unless this law is repealed.”

Others who followed in support of the Bill included Abdur Rashid (East Pakistan), S. Ali Asghar Shah (West Pakistan), Mufti Mahmood (West Pakistan), Akhtaruddin Ahmad (East Pakistan), Moulaa Mohammad Mushahid (East Pakistan), Sardar Bahadur Khan (West Pakistan), Abdul Bari, A.K. Yusuf (East Pakistan) and Farid Ahmad (East Pakistan). Most of the speakers repeated the arguments made by their colleagues to the point that one of the women members, Begum Serajunnessa Choudhury (East Pakistan) was forced to say in despair that “the way in which things are going on here makes me feel that it is useless to sit here. Religious matters are already known to women and these things need no repetition in the House.... The time of the House should not be wasted in fruitless discussion. I am not prepared to sit in the House in these conditions,” (NA 26 November, 1963:138).

Primarily the right of interpretation of the Qur’an and Sunnah by anyone other than the ulema was questioned. Those in favour of the Bill opposed the notion of equal rights for men and women and contested each of the elements of the Ordinance (inheritance, registration, iddat, arbitration, marriage age, permission for second marriage) as being repugnant to Islam. Additionally these members were disparaging to women members of the House. The ultimate argument was that “the law will not eradicate malpractices,” in other words implying that there was no need to have this controversial law on the statute books.
Mufti Mahmood, the principal spokesperson of this point of view, began with the issue of polygamy. From his perspective there was "nothing detestable" in polygamy. It was "not a vice or a social evil" and "to stop it is to interfere in matters of faith". In his opinion monogamy was "merely... empty imitation of Europe [and] has no basis in Islam," (NA 20 July, 1963:1875). Turning around the argument against polygamy (permissible only if equality and justice to all wives can be maintained), Mufti Mahmood argued that monogamy was prescribed only in cases where a man is "incapable... to observe justice and equality among his several wives". Putting the onus on women he went on to say if "...a woman does not like being a second wife she must refuse to marry one who already has a wife". Then on an advisory note he asked the "honourable sisters who are married... [to] convene a conference and appeal to their unmarried sisters... [to not marry a married man]. The blame cannot be laid at the door of men," (NA 20 July, 63:1876). In any case, in his opinion, "...people of the well-to-do families are generally opposed to polygamy and this only shows they want to promote adultery by this means" (NA 20 July, 63:1877).

Adultery as a consequence of monogamy was repeatedly raised. Ominous references were made to the high number of fatherless children and those born out of wedlock in the West as a warning to supporters of the law. That 'girl friends' would take place of wives as a certain consequence of restrictions on polygamy was also pointed out.

Maulana Mufti Mahmood saw the fixing of a minimum age of marriage as violative of the Sharia prescription. According to him under the Shariat the age of maturity was nine years for females and twelve years for males. It was imperative, he said, that a girl be married as soon as she attained puberty for she "will easily fall into sin". Besides it tantamounts to injustice to the father who may be on his death bed and thus unable to marry a daughter who is not yet 16 years old. One must add here that the arguments of most speakers were replete with various emotionally charged hypothetical situations. Mr. Abdur Rashid, objecting to the minimum age of marriage, argued that: "thanks to the hot climate of our country, the popularity of film songs, the system of co-education and various other social evils, girls here attain puberty at the early age of 12 or 13... the parents of a girl... have to wait... in the
meanwhile running the risk of seeing their daughter spoil her character....” (NA 20 July, 1963:1503). Hence in his opinion the Select Committee report should be rejected as also the MFLO.

Similarly, the argument against the registration of marriages, was that of the provision not having a basis in Islam. While not opposing registration of marriages as it would serve as “an aid to memory” he opposed its obligatory nature under the law. Punishment for non-registration was therefore seen as not having an adequate basis. In any case it was argued that this provision would not eradicate malpractices and may even be used against women (Mufti Mahmood, NA 20 July, 1963:1874-75). Given the state of society anyone could acquire a false certificate through bribing the Nikah Registrar and use it as evidence for proving marriage with any ‘unsuspecting’ woman he likes. The need, he argued, was for social reform and not MFLO.

The provision of arbitration through the Chair of the Union Council came under blistering attack by Abdul Bari who saw the law as giving Union Council Chairs the opportunity “to take any beautiful girl they fancy” in their area besides opening the way for adultery. Akhtaruddin Ahmed lamented that “respectable ladies” were being made to go to Union Councils. He declared himself being as English educated, not being a mullah and still opposed to the Ordinance, because he believed that only alims can interpret the Qur’an. In his view the “APWA sisters... these ladies ever so powerful... they prevailed on Ayub Khan,” who gave in to their pressure and ‘forfeited’ the position of the ulema.

That the women who had campaigned for the law, including the ones sitting in the Assembly were not seen as respectable was evident from the comments of a number of those speaking against the law. Akhtaruddin Ahmad called them un-Islamic because they had burnt the effigy of Abbas Ali Khan (26 November 1963:87). Women “...should stay at the place where they belong,”... and, by implication, not protest or sit in assemblies. Maulana Mohammad Mushahid accused the women in favour of the law as members and supporters of Tulu-e-Islam, a Lahore based religious organisation which incidentally had declared the MFLO as not being repugnant to Islam (NA 26 November, 1963:108). Tulu-e-
Islam was singled out by two to three speakers as creating a split among the religious groups.

Abdul Bari underscored the qualities and conduct of women whom Islam had given a high place of glory and virtue as "motivated by the desire to give birth in ever larger numbers... to believers of Allah... Their wombs are the inviolate repositories of the strength of Islam. They bear with a smile all the troubles and in conveniences during pregnancy, comforted by the thought that they are carrying the burden of Islam," (NA 23 November, 1963:114).

The rhetoric of supporting women's rights as conferred by Islam was repeated by the speakers. Most of the protagonists of Abbas Ali Khan's Bill rejected the MFLO and almost all agreed that ulema were the only ones qualified to draft an Islamic legislation. Some, however, like Sardar Bahadur Khan (Leader of Opposition) had the grace to recognize women's oppression and the fact of their being deprived of rights given to them under the Qur'an and Sunnah. The final consensus among them was for forming a Select Committee with ulema on it, to either draft a new Bill or to propose amendments to the MFLO. During the debate two amendments were moved one by Roquayya Anwar and another by Maulana Mohammad Mushahid for setting up Select Committees to study the law and produce an amended draft. Both proposed 15 names each.

Altogether seven people spoke in favour of the law and hence against the Bill. The four women and three men were: Roquayya Anwar (East Pakistan), Mujibunnissa Akram (West Pakistan), Khadija G.A.Khan (West Pakistan), Sirajunnissa Choudhury (East Pakistan) Ghulam Sabir Khan Rana (West Pakistan), Syed Abdus Sultan (East Pakistan), Moulvi Akhtar Ali (West Pakistan), and Shamsunnahar Mahmood (East Pakistan).

Those against the repeal motion and in favour of the MFLO also put forth their arguments largely from within the framework of Islam. The speakers emphasized the spirit of Islamic injunctions and pointed out that interpretations were needed in the context of prevailing social conditions. They of course rejected the ulema's claim of being the only
ones with the authority to interpret the Qur’an and Sunnah. In addition, specific arguments made by the opponents were also answered.

Khadija G.A.Khan was one of the main speakers who took up the objections made by the anti-MFLO legislators point by point. Rejecting Maulana Mufti Mahmood’s arguments as carrying no conviction, she saw the MFLO as the first step towards the recognition of the rights of women. Voicing her suspicion that men were “mentally unprepared to concede rights” she warned that “there will be no real and substantial progress so long as women are not allowed to take part in the development and welfare activities,” though hastening to add, “without of course, neglecting the duties that devolve upon them as good housewives.” She reiterated that at the heart of the issue is “the struggle between men and women of their respective rights and is a serious matter,” (NA 20 July, 1963:1885-1886) and went on to ask, “why the idea that women enjoy rights granted to them under Sharia had never occurred to them before,” (NA 20 July, 1963:1890). Islam exalts women, but when women ask for their rights they are dubbed westernized. Delving into history, Begum G.A.Khan wondered why under British rule when decisions on personal matters were based on practice and convention (rather than Sharia) and were consequently anti-women, in the absence of women having a personality of their own, “the sense of religious duty did not perturb our ulema in the least.”

The issue of inheritance of the son of a predeceased father from the grandfather was linked by Khadija G.A.Khan to the provision in the Qur’an for the treatment of orphans. Given that one sect of Islam recognizes this right and the Qur’an does not forbid it, she saw no reason for depriving orphans of their inheritance. She also referred to the Punjab Assembly Bill of 1953 that gave a deceased father’s son the right to inherit the share of his father from the grandfather’s property. According to her there was agreement in the House over the proposed law and it was not seen as contradicting the provisions of the Qur’an or Sunnah. It was not passed because of procedural lacunae.

On the provision for the registration of marriage she quoted Haroon-ur-Rashid’s fatwa (NA 20 July, 63:1888) and cited the example of other Muslim countries (Malaysia, Turkey, Indonesia, Jordan, Lebanon and
where registration was a requirement. She asked why the marriage contract should be excluded from being registered, when the Qur'an says that all contracts be reduced to writing. She further cited the numerous letters and telegrams that she received in favour of the MFLO as sufficient proof of the law being welcomed by women.

Khadija G.A. Khan also tried to dispel the notion that second marriage had been banned by the law. The reality was that men remarried and then abandoned their first wives and children, therefore the requirement of taking permission. She quoted the hadith of Hazrat Ali and Bibi Fatima where the former asked the Prophet (PBUH) for permission to remarry and was refused it. In her opinion the conditions for remarriage (i.e. equal and just treatment) could not be followed and therefore the restriction was justifiable. She went on to add “husbands just have to think twice now”. Nor was there an obstacle if a man wished to divorce his wife under the MFLO. He just had to inform the Chairman of the Union Council. Time was provided under the Ordinance for patching-up quarrels.

In the end, declaring that the “laws of Islam... [were] twisted into handy tools for serving the selfish ends of men” (20 July, 63:1890), she urged members to adopt the report of the Standing Committee and reject the Bill. Only if considered necessary, did she feel the Bill could be referred to the Advisory Council of Islamic Ideology.

Begum Mujeebunnisa Mohammad Akram while arguing for the MFLO proposed that matrimonial courts be set up and permission be sought from these rather than the Union Council. She emphasized that “one very important factor, that the Family Laws Ordinance has not laid enough stress on, is the right of appeal of the woman against unjust and inhuman treatment to herself and her children. Every woman should have the right of appeal, and the man should be prosecuted if found guilty of unjust and inhuman treatment to herself and her children.... These cases should be tried by the matrimonial courts, and the public and the press must be kept out,” (NA 20 July, 1963:1864). She summed up by emphasizing, “let not one section of the people claim to be the only correct interpreters of the Qur’an and the Hadith,” (NA 20 July, 1963:1865).
From among the men who spoke against the Bill, Syed Abdus Sattar spent considerable time trying to prove that while he supported the MFLO he was not hen-pecked and this was his considered personal position. In his view the two most important issues of the Ordinance were male-female relations and polygamy. Besides quoting from the Qur'an and other sources he pointed out that it was not practical to keep more than one wife due to economic conditions and that, given the fact of a smaller female population relative to males—it was neither logical nor fair to marry more than once (NA 25 July, 1963:1889).

He rejected the notion that immorality was conditional on the number of wives and did not see the law “opening the floodgates of immorality” as portrayed by the opponents of the law. He concluded with the warning that a man’s argument could easily turn into becoming a woman’s argument too. If the man has the right (to polygamy) then the woman may also demand it (NA 25 July, 1963:2093).

The debate concluded with the Leader of the House, Abdus Sobur Khan promising to propose amendments on the basis of the points made during the debate, stating that “this side of the House is no less and no more mussalman than my friends on the other side.”

The opposition went for a vote on the Bill as well as the two amendments (for the formation of Select Committees). All three were defeated (NA 25 July, 1963).

This, of course, was not the end of the MFLO related debate in the legislature. On 20th March 1964, Begum Roquayya Anwar, a non-government member from East Pakistan, moved the House to introduce a Bill to amend the MFLO. A supporter of the Ordinance, she sought to: improve its provisions to extend the principle of inheritance to the children of pre-deceased father to other heirs; replace the Arbitration Council by a properly constituted matrimonial court; make divorce revocable unless three menstrual periods had expired (instead of 90 days under the law); empower the matrimonial court to grant permission, in special circumstances, to relax the minimum age of marriage (NA 20 March, 1964:336). However, the government, including women members, opposed the motion. In the earlier debate the women of the
Treasury Benches had raised doubts about the effectiveness of the Chairmen of Union Council as arbitrators in matrimonial matters and had spoken in favour of special courts. However, since Roquayya Anwar was not a member of the ruling party her motion was not accepted, instead she was invited to the Convention Muslim League’s Committee which had been formed to suggest amendments to the law. Since the said Committee was not a House Committee and she did not belong to CML she refused and her motion was thrown out.

Yet another bill to amend the MFLO was moved on 7 July 1966 by Mujibur Rahman Chowdhury (East Pakistan). The two amendments proposed this time were on the inheritance issue and these too were opposed by the ruling party. The House was, however, informed that the Ordinance was under the consideration of the Council of Islamic Ideology.

21 September 1972 was the next time that the repeal of the MFLO was sought through a resolution moved by Karam Baksh Awan. At the same time, Mian Manzoor-e-Hassan moved a resolution to amend the family laws. Once again the plea was made for setting up a board of ulema to examine the law and bring it into accordance with the Qur’an and Sunnah. Begum Nasim Jehan vehemently opposed the resolutions referring to the women’s movement that went back to 1917 and its struggle for better family laws, and stated that every women’s organization demanded its retention. Dr. Ashraf Abbasi did not think that the MFLO gave enough rights to women. She therefore called for ignoring the two motions and instead asked for the formulation of a Bill that gave women all the rights granted by Islam. In all four men spoke against the resolutions including a maulana and three women (two mentioned above and Shireen Wahab). The resolutions were rejected.

It is obvious from the above that women parliamentarians had the ability to articulate their point of view and were clear on the issue under debate. That there was consensus among them on the issue of family laws, is quite evident in the three assemblies that discussed the law. Roquayya Anwar and Shamshunahar Mahmood, despite their opposition to the ruling party, strongly supported the law. It is also very clear that women parliamentarians felt that there was room for improvement in the law.
Equally interesting is the fact of party loyalty among women. That those belonging to the majority party had not attempted to include Roquayya Anwar in their efforts to work on the amendments is revealed through the proceedings of the legislature. On the other hand, Roquayya too had not considered negotiations with the Treasury Benches before moving her bill. An indication perhaps of the lack of communication with the other side.

Particularly noteworthy in the above debate is the content of the argument against the MFLO. The attitude of the men (not a single woman spoke against the law), their particular interpretation of religion, their dismissiveness of others - even those recognised as ‘alims’ - their sheer intolerance, and biased view of women continues to hound women’s rights protagonists to this day. Women challenging prevailing norms are branded as westernised, an euphemism for immorality.

Women’s Representation

Women’s representation at different strata of governance in Pakistan has been minimal. On the one hand there have been socio-cultural barriers specific to each of the provinces, on the other the reluctance of those in power to take meaningful affirmative action to encourage women and ensure their fullest participation. Historically, political movements have provided women the space to come forward and articulate their demand for greater participation. Women from Punjab, thus have had a longer presence in the political arena, followed by NWFP and Sindh, with Balochistan trailing. Over the years women’s representation through affirmative action i.e. reserved seats, and the modalities of election to these have been the subject of debate and controversy. Women legislators in the first assembly alone were elected through votes of a territorial constituency specifically delimited for women’s reserved seats. Subsequently all the women on reserved seats were elected by provincial or national legislators, thus having less moral power behind them than Begum Jahanara Shahnawaz and Begum Shaista Ikramullah. Women elected on general seats have been few though sometimes in powerful positions like Benazir Bhutto but have failed to bring in the women’s perspective to the debate. That the issue of women’s representation is high on women parliamentarians’ concerns is reflected by the debates on
the subject in successive legislatures. The discussion has usually been within the context of constitutional debates and has encompassed both aspects: women as part of the electorate and as representatives.

The first discussion on women as voters took place on 19th November 1951 when the Constituent Assembly of Pakistan took up the clause by clause consideration of the Constitution (Second Amendment) Bill to amend the Government of India Act, 1935 and the Indian Independence Act 1947. Dr. Ishtiaq Hussain Qureshi (East Bengal) proposed that the wife of a man who becomes entitled to vote in a constituency under the provision of sub-para (5A) also gets entitled to vote. While moving the amendment he addressed the two women members of the Assembly and belaboured the government’s magnanimity towards women, “it should be noticed that whereas the concession of voting is extended to the wife of a male government servant, it is not extended to the male being the husband of an exalted woman public servant...” (Constituent Assembly 14 November, 1951:51). This amendment received a tongue-in-check rejoinder from Begum Jehanara Shahnawaz who expressed gratitude on behalf of women to the government and “men-citizens of Pakistan... for safeguarding our rights” (CA 14 November, 1951:52). She also added that in her opinion “the rule of vice versa be followed so that the husbands are not deprived of such a right”.

On 27th July, 1954 women’s franchise was challenged by M.H. Gazder (Sindh), Deputy President of the House during the consideration of the Report of the Basic Principles Committee. Commenting on the provision of adult franchise he said that perhaps they had “gone rather far” particularly by giving women this right. Citing examples, he pointed out that women got the vote in England in 1923 after having practiced “parliamentary life in a democratic manner... for nearly seven centuries” and women in Switzerland, France and Egypt had not yet got the vote. He appealed that the new Constitution adopt the franchise “to suit our genius”. Begum Jehanara Shahnawaz was prompt in responding to him and asserted that the framers of the Constitution “have been so statesman-like,” and “have given us equality of status, equal opportunities and equal pay for equal work as fundamental justiceable rights and at the same time have given us our representation in the
Legislatures." None of the other members in the House took up the issue raised by Mr. Gazder (CA 27 July, 1954:242).

Women members of the Constituent Assembly probably did not have a grudge against male colleagues on the representation issue as their demands had been adequately fulfilled by the Basic Principles Committee. As Begum Jehanara Shahnawaz recounted in the CA session considering the Report of the Basic Principles Committee, "as the only woman member of the Fundamental Rights Committee I asked for a Charter of Women’s Rights which should include equality of status, equal opportunities and equal pay for equal work and the safeguarding of all our rights and interests given to us under the Islamic Personal Law of the Shariat," and which, according to her, the Fundamental Rights Committee incorporated (CA 21 September, 1954:513). She was also equally pleased with the reservation of 3% seats for women in the provinces and 4.5% seats in the centre. Begum Shahnawaz ended her speech on a resolute note, "some of the women will always be there to safeguard our interests and rights... if we are unable after this to secure all our rights... it will be our fault. It is for us now to organise ourselves and to have a strong women voters league so that women’s interests should not be overlooked." The Report was finally adopted on 21 September 1954. It provided for women’s reserved seats for a period of 10 years. Obviously for women the provision marked a step forward in the movement for their rights.16

Issues related to women’s participation in the electoral process were next brought up for discussion during the debate on the Electoral College Bill, 1964. Roquayya Anwar (East Pakistan) moved two amendments, one in Clause 5 providing for 10,000 seats for the election of female members as Basic Democrats and the other, in Clause 9 for separate polling stations and registration office for women in every electoral unit (NA 10 April, 1964:1702). On the former issue she lamented that the Bill was silent on the question of women’s franchise pointing to the need for affirmative action at that level. Initially, before moving her amendment she had demanded 50% seats for women in the electoral college - commensurate with their share in the population (NA 6 April, 1964). On the second issue her argument was that given the prevailing conditions (of inequality and disadvantage) it was ‘not fair’ to
expect women to go to the same polling centres as men. Her plea was taken up by Mr. Masihur Rehman (East Pakistan) who reiterated the need for separate electoral lists, rolls and polling centres for men and women. The motion, however, was trivialised by the Treasury Benches, taken to absurd conclusions, and topped with the demand that "lady members should have separate seats in this Assembly," (A.K. Md. Yusuf. NA 10 April, 1964:1704). So much so that the only other woman who spoke in support of Roquayya Anwar's suggestion was moved to state, "we should not get into these frivolous things... You should be sympathetic towards women.... Why should our brothers after all be so indifferent and unsympathetic towards women?" (NA 10 April, 1964:1705).

The Law Minister, incidentally did not oppose the proposition, but on voting it was 'negatived'. Surprisingly the other women members did not speak up in support probably because they belonged to the government benches and opposition proposed motions were per force not to be supported.

Roquayya Anwar continued with her persistent demand for more reasonable representation in the Provincial and National Assemblies during the National and Provincial Assemblies (Elections) Bill August 1964. She argued for the reservation of one seat from each subdivision in each of the two Provincial assemblies (i.e. East and West Pakistan) and one from each district in the National Assembly suggesting the amendment to the Constitution towards this end. Her recommendation was part of a number of others including the reduction of election expenses, withdrawal of restrictions on the press, and debarring of Governors and Ministers from election campaigns (NA 3 August, 1964:148). Her suggestions, however, were not taken seriously.

In the next Assembly during the Budget Discussion in June of 1966 Begum Dolly Azad (East Pakistan) once again raised the unfair treatment of women who were half the country's population. Along with other demands for separate medical colleges for women, maternity centres in every thana (police station), and reservation for women in Superior Services, was the demand for more seats for women in National and Provincial Assemblies. There was no immediate positive
response. However in December 1967, when the Constitution (Eighth Amendment) Bill 1967 was under consideration, the Law Minister, S.M.Zafar announced that the reserved seats of women were being increased (Clause 6) from 5 to 8 in each of the Provincial Assemblies and from 6 to 8 in the National Assembly (NA 15 December, 1967:688). Provinces were to be divided into four zones for the purpose of electing each of the women members to the NA. Apparently, the recommendations of the Working Committee of the Pakistan Muslim League had not included the increase of women’s seats and it was the initiative of government party members in the NA which led to the proposal (Rafique Saigol, NA 15 December, 1967:693). The clause triggered a heated debate with women asking for reserved seats in the Union and District Councils (Begum Mujeebunnisa Mohammad Akram, NA 15 December, 1967:688). Women forming 50% of the population was the argument repeatedly used by women to plead their case. Mujeebunnisa M. Akram, Begum Khadija G.A.Khan and Begum Mariam Hashimuddin Ahmed also spoke in support of greater representation for women. Men who spoke up in support of women’s position were Rana Ghulam Sabir Khan and Mian Muhammad Rafique Saigol. The former agreed with women legislators that the increase of seats in the NA and PAs “is still far from meeting all the ends of justice because their population percentage entitles them to a still larger representation in these Houses,” (NA 15 December, 1967:689). Rafique Saigol spoke to defend his female colleagues who had been subjected to attacks by some of the male members and appreciated their contribution to the deliberations of the House.

On the other side of the discourse, Muhammad Qasim Malik, Major Zulfiqar Ali Khan Qizilbash and Makhdumzada Syed Hamid Raza Gilani were particularly vitriolic on women demanding seats commensurate to their share in the overall population. According to Muhammad Qasim Malik women already had “100 percent share to participate or to get represented or to get returned to legislatures,” and he reminded the House that in the previous Assembly, “there were two ladies, one from East Pakistan and one from West Pakistan, who were returned from general seats”. 19 The only problem in his view was that “the general voters do not vote for them because women do not work for
the people of the rural areas where the deprived lived. ...unfortunately our ladies do not take that much of interests [sic]..." (NA 15 December, 1967:691). His basic argument was when women were capable they managed to get to the parliament, became ambassadors and even Accountant Generals (as was the case in East Pakistan at that time) and if they did not get elected it was their own fault.

Major Qizilbash took on a patronising note saying, "...in fact we have given them every right and it is they who demonstrate that they are weaker than men and so they need our protection.... However, we have gladly conceded that request and their demand," (NA 15 December, 1967:692). Makhdomzada Gilani, obviously very agitated and using what he termed "all" [his] "mental and moral courage," said, "...what has a woman to do in politics? Women [sic] is essentially and basically a mother and her proper sphere of activity her home and her family. Her duty is to bring up the coming generation while it is for the man to rule and to conquer." He could not understand why there were congratulations being shared on the proposed amendment. "Is it because man has yielded his place to woman? Is it because he has hanged his guides and apostles?" He warned that "wherever women were entrusted with the responsibility of wielding the sceptre, the people had to meet a terrible fate." Fortunately, his impassioned plea to exclude women from "this dust and dirt" was not taken up by other members and clause 6 was voted in (NA of Pakistan 67:693-694).

Women’s representation again became the focus of attention during the framing of the 1973 Constitution. Similar arguments as in the past were repeated though there were a larger number of men supporting women’s representation in the assemblies through reserved seats. The debate was at two levels, the first centred around whether women should be represented at all and the second around Begum Nasim Jehan’s proposed amendment that women’s representation be through female suffrage for reserved seats for a period of ten years. On the issue of representation there was no disagreement among members belonging to the ruling party. They generally agreed on 10 reserved seats for women for a period of 10 years. While Ali Hassan Mangi felt that women’s seats should be increased to 20, Khurshid Hassan Mir (both from the ruling
PPP) questioned whether women should contest on general seats when there was the provision of reserved seats (NA 15 March, 1973).

Maulana Ghulam Ghaus and Mohammad Hanif Khan from the Opposition Benches did not see any need for women's representation at all. According to the latter there was no instance in the history of Islam where a woman was a member of parliament or a head of state, therefore no such provision should be made. The former was against reserved seats. Initially he said they should contest elections and come through that process but on second thoughts he decided that, too, was inappropriate as women would need to make speeches to men if they participated in elections.

Nasim Jehan's amendment to clause (4) for the inclusion of female suffrage for reserved seats was hotly opposed by her party colleagues. She had made a strong plea for the amendment as she believed indirect elections made women legislators beholden to men and subject to political pressure. Malik Mohammad Akhtar opposed the amendment as it would create 'hassles' for women and Abdul Hafeez Pirzada because he felt the mode of female sufferage would fail to give representation to women living in backward villages besides creating a wide gulf between the male and female population. The women, even from PPP, did not speak up in support of Begum Nasim Jehan and she withdrew her statement in protest (NA 15 March, 1972).

During further discussion Begum Nasim Jehan strongly protested an amendment proposing that Muslim men alone could become the head of state. She cited various examples of successful women and informed the House that no Muslim country had this provision in its constitution. Begum Ashraf Abbasi joined her in opposing the amendment. She argued that if the constitution guaranteed equal rights for women the amendment would in any case become ultra vires (NA 16 March, 1973).

Ashraf Abbasi suggested through a proposed amendment a few weeks later (NA 8 April, 1973) that of 14 members to be elected to the Senate by the Provincial Assemblies, at least two ought to be women as she felt that unless there was a binding clause in the Constitution women would not find themselves in the Upper House. She was supported on this by at
least two women legislators. But this too was not approved by the House.

In the Majlis-e-Shoora the discussion on women's representation took place on 28 July 1983 during the consideration of the Committee Report on the Nature and Form of Government (Rights of Muslim Women). Once more the issue was of increasing women's representation relative to their share in the country's population and on the basis of female suffrage. Nusrat Maqbool Elahi's argument was that Islam gives the right to women to express their opinion publicly (if they so desire), to earn and control their income, to work for the nation and society, in high office and in politics, hence they should be better represented in legislatures also.

In the same session the question of woman as the head of state was also debated with a number of women favouring the notion on the basis of merit. Pir Ahmed Shah Khagga, however, thought this idea inappropriate, because according to him, if a woman were to become pregnant while in office she would not be available for 40 days. Needless to say, women's point of view was totally disregarded.

The NA of Pakistan that came into being after the partyless elections of 1985 discussed the women's reserved seats issue in October 1985. An amendment to Article 51 of the Constitution was proposed to allow women to contest through indirect elections. Women in the House were divided on this. Syeda Abida Hussain, a member of the small opposition, did not think it appropriate to further expand women's representation through reserved seats. Her position was that women's seats had already doubled and there were more women participating in elections. More reserved seats would indicate that women were incapable of fighting on general seats. On the other hand, Rehana Mushadi and Dr. Attiya Inayatullah felt that a more realistic view needed to be taken for women would not be able to mobilise votes in general elections. In the end the reserved seats remained as they were (20 seats).

The above debate once again highlights women's capacity to put forward arguments and present their case. However, it also underscores
women's inability to move their agenda when male colleagues were not so inclined.

Differing Perspectives

While women in the various national level assemblies have had a wide range of common concerns and often demonstrated a shared perspective on women's rights and issues, sharply divergent views on the latter became discernable in the eighties. In the debates prior to the creation of the Majlis-e-Shoora the instances of women challenging each other on women's issues were rare. A marked increase in the incidence of these was seen in the Majlis and the National Assembly of 1985-88 where there were more women in the assemblies (20 reserved seats), with a greater diversity of backgrounds and hence conflicting view points too.

The eighties also saw the emergence of two vocally enunciated points of view regarding women's rights: one for greater emancipation of women, equal rights and equal opportunities; the other for women's rights as defined by religion and emphasizing women's segregation as the key to women's development. Women's Action Forum was the platform for the former school of thought and Nisar Fatima and the Jamaat-i-Islami women's wing the representative of the latter. The media highlighted this conflict in views and a debate of sorts was underway between the two groups. This found expression in the Assembly also.

The Draft Law of Evidence Bill, 1983, (Majlis-e-Shoora. 28 February, 1983) was the first instance in which these opposing points of view found expression. This Bill had met with strong protest from women for its discriminatory clause 17 whereby a woman's evidence was reduced to half that of a man's. Verse 282 (Surah-al-Baqra) of the Qur'an was included in the Bill to justify the provision. A controversy ensued, extensively covered by the media, around the proposed legislation in the country. Inside the Majlis, where women activists lobbied intensively, as the clause by clause reading of the Bill progressed the discussion was heated with eleven out of the twenty women legislators participating in it. They protested against the application of the Qur'anic verse meant for a specific situation to all kinds of situations. They also emphatically argued that Islam did not reject women's evidence. Two women,
however, did not agree with their colleagues. One was Begum Mahmooda Sultana and the other, Begum Maulvi Faizan. The latter was of the opinion that Islam gives full rights to women but also wants to protect them from dangers that can accompany giving evidence. She saw the Bill as being in conformity with "God’s orders" (Majlis-e-Shoora, 28 February 1983). Begum Mahmooda Sultana thought that women were being unreasonable in not accepting the proposed Bill. According to her women “always clamour for greater presence,” if God has prescribed that another woman be present at the time of giving evidence “why this uproar?”

Another instance of differences among women was on the issue of reserved seats in the Assembly of 1985. During the discussion on the Constitution (8th Amendment) Bill 1985 on the proposed amendment for women’s reserved seats (Article 51), Syeda Abida Hussain strongly opposed the proposal (discussed above) as it would indicate women’s lack of ability to fight from general seats. As the only directly elected member of the Assembly, her position was resented by other women members who viewed her opinion as being unrealistic and unsympathetic to women’s circumstances (NA 9 October, 1985).

An interesting example of how perspectives had shifted over a period of time was the issue of the separate university for women. Begum Zari Sarfraz was first who raised the issue in the National Assembly in 1966 (NA 7 July, 1966:1987). She had argued for separate universities exclusively for women in both wings of the country to be run by them. Her suggestion came in the context of the debate on women’s education and the quality and content of the curricula and the insensitivity of male administered institutions towards the needs of girl students. Twenty years later, in 1986, the demand was voiced by Nisar Fatima Zehra, a Jamaat-i-Islami supported member, (NA 13 November, 1986). Her demand hinged on the premise that co-educational institutions inhibited women’s entry into institutions of higher learning and that in an Islamic state segregation should be ensured. There was a difference of opinion among the women members on the issue reflecting the debate outside the assemblies on women’s university among women’s rights activists and the religious groups. Women activists saw the proposal as an attempt to segregate women and marginalise them from mainstream institutions.²¹
Women legislators opposing Nisar Fatima, did not see the need for opening a separate university which they feared would curtail women's entry into existing universities. Another fear was that such a university would not be able to maintain high standards and quality particularly in science and technology education, further marginalizing women desiring to pursue studies in these fields. Instead, they advocated the upgrading of existing women's degree colleges.

Yet another dividing line among women MNAs was the issue of women's participation in sports. Nisar Fatima along with male colleagues belonging to religious political parties vehemently opposed the selection of women athletes for participation in the Seoul Asian Games as being against Islam (NA 23 November, 1986). It was reported in the House by the concerned Minister that four women had been selected. Rashida Khubro representing the other point of view questioned why only four women were being sent to the games. Earlier, Syeda Abida Hussain had asked in the Question and Answer session (NA 12 October, 1986) why the women's hockey team was not being allowed to go to Seoul. This was yet another instance of a contemporary public debate being reflected in the assembly. The government's restrictions on women's participation in sports was being strongly challenged by women's rights activists in the country while women belonging to the Jamaat-i-Islami were strongly in favour of restrictions and defended the government's policy as being in consonance with Islam.

But perhaps the most vitriolic and aggressive was Nisar Fatima's Privilege Motion of 4 June 1986. She alleged that in a WAF seminar in Islamabad on 17 May, Asma Jilani [Jahangir] used derogatory remarks against the Holy Prophet and had thus "shamed the nation". Nisar Fatima used the opportunity to attack WAF for having taken to the streets against Islamic injunctions, and for demonstrating, protesting and speaking against the ulema (religious leaders). She admonished the government for its 'soft' attitude towards the organisation and demanded that WAF be banned and no such force be allowed to emerge in the future. "If a non-Muslim had acted in such a manner our laws would have immediately come into motion. Can we as Muslims permit such activities?" she asked in anger. She called for legal action against Asma
Jilani. While the motion was ruled out of order by the Speaker, in an extraordinary move he directed the Interior Minister to register a case against her. This incident raised a number of questions about parliamentary procedures: how, for instance, was this a case of a member's breach of privilege? if it was a matter of public concern why wasn't it raised through an adjournment motion allowing proper debate on it? why was the issue raised after a lapse of so many days? especially when there had been no public comment or reaction against the said speech? Somewhat unfortunately, and perhaps for the first time, the NA had been used by a woman legislator against another woman as part of the vilification campaign by religious zealots.

Conclusion

There is unequivocal evidence of women's full participation in all of Pakistan's legislatures. They have taken up a broad spectrum of issues ranging from those of national security, economic parity (between East and West Pakistan), fundamental rights, functioning of political parties, the electoral system, environment, to specific concerns of women. Women legislators have demonstrated their awareness of matters under discussion and their preparedness for debates. The quality of interventions has been comparable and in some instances higher than that of their male colleagues. Legislators who entered the assemblies with a background in politics and experience in movements (political or social), not surprisingly, displayed greater understanding and made a richer contribution to the debates than the uninitiated. Surrogates appear to have been few. At the same time it cannot be denied that women elected indirectly to reserved seats were in a sense beholden to their male colleagues, a point admitted by a number of them during the course of the debates, and felt constrained as a result.

Clearly, women legislators did bring a women's perspective to the issues under discussion and maintained a broad consensus on basic rights of education, employment, and political participation. Their dissatisfaction with the women's lot in the country is equally clear. There is, however, a distinction discernable between the perspectives of directly elected women legislators and those sitting in assemblies on reserved seats. The latter have expressed greater concern regarding women's issues and
have raised many more questions on these compared with the directly
elected women who focused more on the general issues of their
constituencies. This is not to say however, that matters of general
political, economic or other concerns were not raised by reserved seats
representatives nor that directly elected legislators were silent on
women’s issues. The divergence of views among women regarding
women’s issues did not emerge until the eighties. This reflects the
coming to the fore of women belonging to a different social strata:
lower-middle, and middle class women often first generation educated,
new entrants into universities and professional institutions, veiled and
supported by religious political parties, as opposed to second and third
generation educated women from elite institutions with greater national
and international exposure and professional experience. The differing
perspectives on women’s rights and concerns between the two groups
found an echo in the assemblies.

It is also seen that in the 40 years of legislative participation under
review, a little over a quarter of all women who sat in assemblies were
not heard of in the political arena before or after serving their terms.
These women may be categorised as the ones used for inflating the
numbers of political parties in legislature, or those who were
beneficiaries of patronage of political leadership for personal reasons.
These women were also the least vocal of all women legislators. This
finding strongly indicates that it is critical to establish eligibility criteria
for women candidates for reserved seats.

A dilemma for women members of assemblies underscored by the
debates is one between a commitment to women’s issues and party
discipline. There is obvious tension, as evident during the debate on
women’s representation, Commission for the Status of Women, and
several others, between what women perceive as their demands and
where party discipline constrains them. The debates further reveal that
while women’s arguments have been substantive and well presented,
positive measures have been the result of executive decisions and not
necessarily due to their persuasiveness in the assemblies. This is actually
true for all legislative debates. The government in power tends to bring
its decisions for legitimisation and very seldom gives in to the
Opposition’s point of view. In fact the practice of promulgating
Presidential Ordinances by-passed the legislatures on critical and controversial issues reflecting the attitude and thinking of the executive regarding legislatures.

The debates indicate that the pressure that women exerted on the executive from outside the assemblies has often perhaps had a greater effect on decisions. The linkage with a movement certainly seems to have had an impact on the decisions of those in power. The assemblies, however, have been important platforms for voicing women’s perspectives and airing their positions. Even if male legislators have been dismissive and non-serious (which happened repeatedly), the fact of their being confronted with a different point of view cannot be undervalued. That women legislators, especially in the earlier assemblies, have been pioneers in communicating women’s concerns needs to be acknowledged. There is evidence that the women managed to be more successful than their numbers in assemblies warrant. If the impact (which in any case is not quantifiable) of their participation seems limited, the blame may be placed at the door of the male legislators, whose attitude has often veered from lacking in seriousness to being patronising. Suggestions that went beyond what they, the male legislators, had decided (even in the case of leadership with progressive leanings towards women’s issues) were not usually welcome. Members of assemblies, it appears, were not always comfortable in the presence of women and thus did not create an enabling environment for women parliamentarians. Part of the problem has been the unwillingness of political leadership to give women the space for participation in decision-making within political parties. Until such time as women political activists are viewed as mobilisers of the female electorate and not as part of the decision-making structure of political parties the contribution of women parliamentarians will remain restricted.

To sum up, women parliamentarians have demonstrated their capacity to participate ably and fully in the assemblies. Indeed their presence is crucial from the women’s point of view. It is critical that the modalities of their representation be agreed upon and adopted to ensure the entry of women with a track record of involvement in politics as well as an understanding of women’s issues. It is equally imperative for male politicians and political parties to reflect on their attitudes and give women their due place in the political system and structures.
Legislative History

The Early Years: 1947 - 1958

The country’s first legislature, the Constituent Assembly of Pakistan was inherited from the All India Constituent Assembly indirectly elected by legislatures of Indian provinces. These legislatures had been elected through general elections in 1946 under the Government of India Act, 1935. The elections of 1946 had enfranchised 660,000 women. The Constituent Assembly of Pakistan comprised of members of the All India Constituent Assembly from the provinces which formed Pakistan. The Indian Independence Act, 1947 (Clause 8, Section 2) stipulated that until such time as the CA of Pakistan had adopted a Constitution the country would be ruled in accordance with the Govt. of India Act, 1935 and that the CA would also function as the Federal Legislature. (Islam, 90:110)

The Assembly which first met on 10 August 1947 initially had 69 members increasing to 79 after more seats were created for the princely states of Bahawalpur, Khairpur, Baluchistan States Union and NWFP States, on their accession to Pakistan, (Kizilbash & Mumtaz 76:7). It had two women members, Jehan Ara Shah Nawaz from Punjab and Shaista Ikramullah from East Bengal. Of the total membership, 44 were from East Bengal and 22, 5 and 3 from Punjab, Sindh and NWFP respectively. Baluchistan, Baluchistan states, Bahawalpur, Khairpur and NWFP States had one representative each. In all there were 35 members from what is now Pakistan (Islam 90:117). The Muslim League (ML) and Congress were the two leading political parties in the Assembly with the ML in the majority with 59 seats and the two women members belonged to the ML.

The Assembly struggled with the constitution making exercise taking nineteen months to pass the Objectives Resolution (March 1949) as the first step towards framing the Constitution under the provisions of the resolution it set up the Basic Principles Committee (BPC) assigning it the task of constitution making. The BPC’s Report to the CA in
September 1950, evoked sharp reactions from both the Bengali and Punjabi members of the Assembly. Before the differences could be resolved the Assembly’s passage of three bills-curbing the powers of the Governor-General on the one hand and enhancing those of the legislature on the other and repealing the law suppressing political opposition-led to the dissolution of the CA by Governor General Ghulam Mohammad on October 24, 1954. Unfortunately, the task of making the constitution was left unfulfilled. According to historian K.K. Aziz the CA met only for an average of 16 days a year between 1947-54 to frame the constitution (Noman 88:10).

The next Constituent Assembly consisted of 80 members equally divided between the eastern and western wings. 72 of the members were elected indirectly in June 1955 by provincial legislatures and electoral colleges from Karachi and Baluchistan (Kizilbash & Mumtaz 76:8) and the rest nominated by the rulers of the princely states. The party configuration in the Assembly was markedly changed with the Muslim League reduced to 26 members and the United Front (16) and the Awami League (13) emerging as the other two dominant parties. The strength of the Congress came down to 4. There were no women in this Assembly. The majority of the House was new with only 14 members of the previous legislature re-elected. The Assembly held its first session in July 1955 and by early 1956 had drawn up the Constitution of Pakistan. It provided for a National Assembly of 310 members (including 10 women) divided equally between its two federating units i.e. East Pakistan and West Pakistan. Prior to this the Assembly in September 1955 had merged the provinces of the western unit into One Unit, to be called West Pakistan.

The first Constitution of Pakistan was promulgated on March 23, 1956. The existing Constituent Assembly was transformed into the National Assembly until general elections could be held (set for February 1959). Nine political groups were represented in the Assembly including the Muslim League, the United Front and the Republican Party (formed overnight on the instructions of President Iskandar Mirza) with none having a clear majority. The Congress was eliminated by this time. The life of this Assembly was marked by its extremely brief sessions (Kizilbash and Mumtaz 76:9) and the high and bitter level of political
intrigue and tussle. There was frequent changing of alliances and falling of governments - four in its short life. Finally, martial law was imposed by the President, General Iskandar Mirza on 7 October 1958 with General Ayub Khan as the Martial Law Administrator (MLA). By 27th October Iskandar Mirza had been ousted and Ayub took over as the President and MLA. The Constitution was abrogated, assemblies dissolved, and political parties banned. The next four years were spent under martial law without a constitution or a legislature.


After four long years of virtual silence a new Constitution was introduced in June 1962. This provided for a Presidential form of government and a National Assembly of 156 (including 6 women) divided equally between East and West Pakistan. The National Assembly was to be elected by an electoral college of 80,000 Basic Democrats themselves elected through adult franchise. With older political parties and leadership barred from political activity, those elected were largely new entrants to politics and belonged to land owning, lawyer and business communities. (Their combined strength 136 out of 156). 76 of the members belonged to the newly created party, (Sept. 1962) of President General Ayub Khan. The women members allegiance, of West Pakistan members at least, was also with this party.

The combined opposition (60 members) belonged to new groupings (Pakistan Peoples group, Progressive group and Pakistan Independent group) established under the renewed but restricted political space (Kizilbash and Mumtaz 76:10).

Elections to Ayub Khan’s next National Assembly were held in 1966 and were strongly influenced by the earlier held presidential election of 1965 when Mohtarma Fatima Jinnah as the candidate of the Combined Opposition Parties had challenged Ayub Khan. However, the Pakistan Muslim League was still returned with 124 seats in the House of 156, COP had 15 seats and independents 17. The dominant group was of businessmen followed by landlords and lawyers. The same women who had sat in the previous House continued in this one; from East Pakistan,
however, two new members (Dolly Azad; Razia Faiz) replaced the old ones (Sirajunnisa Chaudhry; Roquuuya Anwar).

Politically, the period of this Assembly was marked by dissatisfaction. The 1965 war with India had left a negative feeling towards the government in its wake, the Tashkent Declaration was seen as a sell-out to India, the much publicized economic development had widened the gap between the rich and the poor and the alleged widespread rigging in the presidential elections had left the political elements and the public disillusioned with the system. In East Pakistan the demand for autonomy accelerated with Mujib’s six-points and in West Pakistan Zulfiqar Ali Bhutto, a minister in the cabinet, parted ways with Ayub Khan and formed his own political party (the Pakistan People’s Party). There was great unrest across the country, leading to the proroguing of the National Assembly in February 1969. Ayub’s government was replaced by the Commander-in-Chief of the Army General Mohammad Yahya Khan and a second martial law imposed in the country on 25 March 1969.

Coming into power Yahya Khan pledged general elections on the basis of ‘one-man, one-vote,’ annulled the One Unit scheme (April 1970), and lifted the restrictions on political parties and their activities. Elections were held in December 1970 for the National and Provincial Assemblies under procedures set by the Legal Framework Order (LFO) issued by the President and Chief Martial Law Administrator, General A. M Yahya Khan, on March 30, 1970. According to the LFO the NA was to be comprised of 313 members including 13 seats for women.

In the elections Awami League emerged as the majority party with 151 (out of 162 seats) seats all from East Pakistan and PPP as the second biggest winning 81 (out of 138 seats) seats from West Pakistan.

Under the LFO, the National Assembly once elected was to frame a new constitution within a period of 120 days from “the date of its first meeting,” (Islam 90:159). The LFO also set out the principles within which the constitution was to be framed after which the National Assembly was to become the national legislature. Before the Assembly was even convened General Yahya’s military action in East Pakistan over the issue of transfer of power to the majority party plunged the
country into a bloody civil war (The role of the army and the PPP in the events leading to the army action fall beyond the focus of this paper).

By December 1971 India had intervened followed by Pakistan’s defeat and East Pakistan’s secession. General Yahya was ousted after the debacle and Z.A. Bhutto made the President on 21 December 1971.

Beginning Afresh: 1972-77

The first directly elected National Assembly of Pakistan met on April 14, 1972. Its members were those elected in the 1970 elections from the western wing of the country. Pakistan Peoples Party was the leading party with National Awami Party (6), Jamiat-i-Ulema Pakistan(7) and Jamat-e-Islami (4) in the opposition. Six women were subsequently elected to the Assembly on reserved seats, four of these were activists of Pakistan People’s Party.

The NA completed its primary task of drafting the constitution within the prescribed time of 120 days on 10 April 1973. Under the new constitution a Parliament was provided for with a Senate of 63 members and a NA of 200 members. The NA continued with the same composition while elections were held for the Senate with the National and Provincial Assemblies acting as the electoral college. The Pakistan People’s Party dominated both houses.

In the wake of the traumatic events of 1971 the Constitution represented a major consensus-building exercise. It provided for a representative federal structure, equal rights to men and women, equal opportunities for all and prohibition of discrimination on the basis of sex, class or creed.

Zulfiqar Ali Bhutto, despite having emerged as the leader of the downtrodden and oppressed in the 1970 elections, steering the constitution-making process, and having successfully negotiated the return of the 90,000 prisoners of war from India, did not succeed in laying the foundations of democratic practice. He ruthlessly crushed labour unrest in Karachi and Multan (1972-73), dismissed the elected government in Baluchistan and used the military to quell the consequent revolt (1973), created his own special Federal Security Force (FSF)
using it largely to intimidate and coerce political opponents and bent backwards to appease the vocal religious elements clamouring for greater space in the political system.

Bhutto’s policies resulted in distancing him from the masses. When he called for elections in 1977 he could not have been more isolated. The opposition, from the Islamic obscurantists, to the entire spectrum of centrist, liberal, and left-of-centre parties combined to form the nine-party Pakistan National Alliance (PNA). The Elections were held in March 1977 with allegations of widespread rigging and the opposition refusing to accept the results. The House that met in April 1977 had the opposition seats empty. The first woman to be successfully returned on a general seat (Nasim Wali Khan of NWFP who stood on the PNA ticket) did not take the oath. The 10 women’s reserved seats however, were filled with largely PPP activists or supporters.

The PNA launched its urban-based movement demanding a return to a pure Islamic order. All those alienated in the preceding five years joined in. From March to July the country was faced with yet another political crisis with the opposition parties seeking military intervention to bring it to a close. Finally, on 5 July 1977, just when an agreement was arrived at between the government and the opposition parties, Bhutto was arrested, the assemblies were dismissed and martial law imposed once again, this time by General Zia-ul-Haq, who took over as President and Chief Martial Law Administrator (CMLA).

Martial Rule Phase II: 1977-1988

General Zia-ul-Haq, having seized power in 1977 and having overthrown an elected civilian government, promised fresh elections within the constitutional stipulation of 90 days. The elections, however, were postponed first to March 1978 “to complete the process of accountability” and then again indefinitely to introduce “an Islamic system” in the country. At the same time members of one faction of the Muslim League (Pagaro group) and Jamat-e-Islami were inducted in the cabinet. What followed may be termed the darkest period in the country’s history. An elected prime minister was sent to the gallows (1979), the country was pushed towards theocracy, army’s control was
tightened, draconian laws were introduced, parallel courts were set up, political activity curbed, women discriminated against, public lashings frequently used and the Constitution subverted through orders and ordinances (e.g. the Provincial Constitutional Order 1980 that effected the most far-reaching blow to the judiciary by providing for the removal of judges by the executive, annuling the right to habeas corpus, terminating judicial scrutiny of politically important executive action).

Committed to his 'mission' and with no "intention of leaving power" until the 'mission' was complete, Zia announced the formation of an Advisory Council, the Majlis-e-Shoora on 24 December 1981. Altogether 287 persons were appointed to the Majlis including ulema, politicians 100 from PPP, 40 from Muslim League factions and 4 or 5 each from other political parties (Syed 84:173), workers, farmers, minorities and 20 women. The latter came from a mixed background of professionals, political activists (mostly PML), and others with largely rightist thinking.

The military government held non-party local-bodies elections in 1979, followed by a next round in 1983 and a referendum to confirm Zia's continuation in power based on whether the people supported measures undertaken by the regime to Islamise Pakistan (with an abysmal turnout estimated at 10%). This was followed by non-party elections to the National and Provincial Assemblies in February 1985. With political parties banned and processions and demonstrations disallowed the election campaign centered around individuals, castes and biradaris. Political, social and economic issues were conspicuous by their absence. Not surprisingly the locally powerful were returned. The National Assembly of 1985 had 157 landlords and tribal leaders, 54 businessmen, 18 urban professionals and 6 religious leaders. Twenty women sat in the Assembly on reserved seats, one on the seats for minorities and two were elected directly (one of these in a by-election). The turnout was surprisingly high (52%) reflecting perhaps the desire of the public to start some process towards representative government. However, Zia was very clear that this change to a civilian face was just that and no more. He stated that, "the present democratic system that began this year is not a rival to its predecessor [martial law] but a continuation of it" (Mumtaz and Shaheed 87:118).
In December 1985 the martial law was officially lifted and political parties revived. Rather ingeniously the majority of the NA members declared themselves the Official Parliamentary Group and after the lifting of martial law this group named itself the Pakistan Muslim League (Pagaro group) strongly reminiscent of the process of creating in-house political parties during Ayub Khan’s regime. Mohammad Khan Junejo, the hand-picked prime-minister became the leader of the House as head of the party. There was a small opposition in the Assembly, including a few women. Abida Hussain, was perhaps the most vocal member of this group.

In October, 1985 the parliament passed the Eighth Constitutional Amendment Bill indemnifying and validating all ordinances and laws promulgated by the military regime and shifting the centre of power to the President from the Prime Minister. The President now could dissolve the National Assembly without the consent of the Prime Minister under Article 58-2(b) of the Constitution, a provision used liberally by General Zia and successive Presidents to overturn popularly elected governments.

The legislature however, did not survive its full constitutional term. The Prime Minister, notwithstanding the fact that he was a protégé of General Zia-ul-Haq developed serious differences with the latter. According to some analysts Junejo’s decision to investigate the disastrous blast in the Ojhri camp, a military ammunition dump in the heart of Rawalpindi city, in April 1988 was the last straw that led to the dissolution of the National and Provincial Assemblies on 29 May 1988. The stated reasons, however, were to put the country “back on the track of Islamisation”, “revitalize the ailing economy” and “to remove a corrupt government,” (Hussain 88). Elections were promised in ninety days and an ordinance promulgated declaring the Islamic Sharia as the supreme law of the country. The Junejo dismissal was followed by “one unconstitutional act” after another from appointing a caretaker cabinet without a caretaker prime minister, to fixing the election date beyond the mandatory 90 days for November 1988 (Hussain 88:61).
1988 - Onwards

The post Junejo period is outside the scope of this paper. Suffice here therefore to briefly summarize the events since May 1988. The most unexpected and dramatic was the death of General Zia-ul-Haq and his senior military colleagues in an air crash on August 17, 1988. The transfer of power that followed was smooth with the Chairman Senate, Mohammad Ishaq Khan, taking over as President and elections held to the National and Provincial assemblies in November 1988. Four women were elected on the general seats and 20 came on reserved seats. The female membership was more or less evenly divided between PPP and PML with one member each from JI and MQM.

The elections however, did not herald a strengthening of the democratic process. The assemblies were repeatedly dismissed in 1990, 1993 and 1996 by the extraordinary discretionary power vested to the President under Article 58-2(b) of the Constitution. The only saving grace was the holding of elections within the stipulated period. The PPP led by Benazir Bhutto was returned twice in 1988 and 1993 and Nawaz Sharif also twice, in 1990 and 1997, as the leader of Pakistan Muslim League and its allies.

The decade is important for the rise of the Mohajir Qaumi Movement (MQM) as a new urban educated lower middle-class force in Pakistan’s feudal dominated politics. Concentrated in the urban centers of Karachi and Hyderabad, the MQM displayed its immense capacity of mobilization of women. In its tightly knit organizational structure women’s units reportedly have a critical role to play. One of the party’s leading woman political activist and office-bearer, Nasreen Jalil, has been in the Senate since 1993.

The other significant marker of the decade is the growth of women’s wings of political parties. PML, PPP, JUP, JI had women’s wings but by the election of 1993 not only were these consolidated but other political parties had created active wings which played a significant role in bringing out female voters, particularly in the urban areas. Jamaat-i-Islami, whose women activists had concentrated on educational institutions in the past became increasingly visible in electoral politics.
It may also be pointed out that despite being tortuous and uneven the political process has thrown up a core of female political leadership, encouraging the ANP, PPP and Tehrik-e-Istaqlal to field a few women candidates on general seats. To the surprise of many non-Pakistanis and in spite of all the structural barriers to women's participation in politics, Benazir Bhutto has twice come into power. She took oath at 35 years of age in 1988 as the youngest and the first female Prime Minister in the Muslim world. The elections bringing Benazir Bhutto to power, however, were the last ones with the provision of reserved seats for women.

Ironically, the lapse of the women's seats after the elections of 1988 and the induction of women in party politics did not translate in their being considered for party tickets. Given the low level of women who contested general seats in 1988 it was clear that women's presence in the assemblies would require affirmative action. In November 1989 the Cabinet sought consensus for the extension of the provisions in the Constitution regarding reserved seats for women in the national and provincial assemblies. A bill on women's reserved seats was moved in the Upper House by Senators Mohammed Ali Hoti, Dr. Noor Jahan Panezai and Syed Fasih Iqbal in November 1989. Before the bill could be acted upon the Bhutto government was dismissed in August 1990. The new IJI government under Mian Nawaz Sharif failed to take action in this regard.

In 1990, the major political parties did not issue tickets to women except PPP which issued tickets only to its two women co-chairpersons. The PPP-led coalition (Pakistan Democratic Alliance - PDA), however, fielded one NA candidate (Shahnaz Javed from Chichawatni, who lost) and one at the provincial level (Mehnaz Rafi, who contested unsuccessfully a provincial seat form Lahore). The Muslim League-led Islami Jamhoori Ittehad's (IJI) only female candidate for a NA seat, Abida Hussain lost. MQM, despite its strong women's wing failed to field even a single female candidate. The two Bhuttos were thus the sole female legislators in the 1990 National Assembly. The reticence of parties to field women candidates is reportedly due to their perception that women are weak candidates and in a tough fight it is preferable to field a male. In many ways this is a self fulfilling prophecy for women
can never hope to become strong candidates if they are never given an opportunity to test the waters.

The 1993 general elections experienced a slight shift with 13 women out of 1500 contestants on general seats for the NA. The PPP and PML(N) together, put up seven women; the MQM fielded two candidates (it later boycotted the national assembly elections) and the remaining 4 women stood as independents, predominantly in the Punjab. Altogether four women were successful, including Benazir Bhutto. Three women were returned on general seats at the provincial level (though many more stood) - one each in NWFP, Punjab and Sindh. Additionally a woman won one of the Christian minority seats from the Punjab. Not a single woman was returned to the Baluchistan Assembly, although for the first time 4 women contested general seats.

In 1997, the number of women contestants remained low pointing yet again to the need for affirmative action on the issue of women’s representation in assemblies. A total of 55 women contested the elections: 34 for 28 NA seats the rest for PAs. In Sindh only 28 women were in the field out of the total of 1674 contestants, in Karachi 9, the largest province Punjab had 5 women in the fray as compared to NWFP which saw 7 female contestants. Baluchistan had one women contesting on a provincial seat (Rahman 97). While disproportionately low in comparison to men, this is still an improvement on the past elections. More political parties gave tickets to women: PPP 8 for the NA, PML(N) and PPP (SB) 5 and 7 tickets respectively and 13 women ran independently including the star of Pushto films, Mussarat Shaheen who challenged JUI’s Maulana Fazlur Rehman in D.I.Khan.

The 1990-1997 may therefore be termed barren years from the point of representational politics for women. The only positive initiative was the enfranchisement of women in the Federally Administered Tribal Areas (FATA) in 1997. A measure that was strongly resisted by the males of the area.
Annex 2

Women's Representation: Constitutional Provisions

The two women legislators in Pakistan's first national legislature came under provisions that were a part of the transfer of power arrangements in 1947. They championed the cause of women's representation and proposed at least a 5 percent quota for women's reserved seats through their Charter of Women's Rights Bill. However, only a 3 percent quota was ultimately approved by the CA in 1954, paving the way for women's participation in legislatures through reserved seats in the constitution of 1956.

The 1956 Constitution under Article 44(2)(I) provided for the reservation of 10 seats for a period of 10 years for women equally divided between East and West Pakistan. Women's territorial constituencies were delimited for this purpose giving women a double franchise to elect their representatives. Under Article 72(2) of the Constitution, five seats were reserved for women in each of the two provincial assemblies to be elected in the same manner as for National Assembly. Unfortunately no elections were held under this Constitution.

General Ayub Khan's Constitution of 1962 reserved six seats for women in the National Assembly (out of 156) and 5/155 in each Provincial Assembly, but changed the mode of election to an indirect one by stipulating that the deputies of the national and provincial assemblies should elect the women representatives. The National Assembly of 1962 thus elected 6 women on reserved seats before its first meeting representing three zones in each province defined by the Election Commission. At the provincial level each province was divided into five zones with each zone represented by one woman.

The principle of indirect elections for women's reserved seats introduced by Ayub has been upheld in each subsequent constitution. The procedure however has strengthened the hold of male politicians in the male dominated political parties providing them with the means of increasing the party's share in assemblies without necessarily obliging them to make commitments on women's issues.
1970 Legal Framework Order, reserved 13 seats in the National Assembly for women (7 East Pakistan, 3 Punjab, 1 Sindh, 1 Baluchistan and 1 NWFP/Tribal Areas under the general elections held in 1970 and for the Provincial Assemblies East Pakistan 10, Punjab 6, Sindh 2, Baluchistan 1, NWFP 2. The provision was for six reserved women’s seats for West Pakistan and seven from East Pakistan to be elected by NA members. The Assembly was convened in 1972 after East Pakistan ceased to exist and elected seven women seats to fill the women’s seats.

The 1973 Constitution increased women’s reserved seats to 5 percent in the National and Provincial Assemblies but maintained the principle of indirect elections. The Constitution, under Article 51(4) stipulated that the provision of reserved seats was for 10 years or 2 general elections whichever was later. Under Article 106, women’s representation in the provincial assemblies was Punjab (12); Sindh (6); NWFP (5) and Baluchistan (2).

The first elections under the 1973 Constitution were held in 1977 marking the first instance of a woman winning from the general seat. However, the assemblies were dissolved within months of the elections with the imposition of martial law in July 1977.

In 1981, General Zia-ul-Haq introduced a new legislative form installing a nominated Federal Advisory Council - the Majlis-e-Shoora. Presented as “a symbol of ‘Islamic democracy’”, the Shoora had no effective powers over the executive. Its main purpose was to give the regime a semblance of legitimacy by largely inducting members of the dominant socio-economic strata into the ambit of state patronage. Whatever the general political purpose, from the perspective of women’s political participation it is significant that despite the numerous other negative legal, administrative and public and cultural measures initiated at the time, General Zia did appoint twenty women as members in the Majlis.

The Majlis-e-Shoora was replaced in 1985 by a National Assembly elected through non-party elections held under Martial Law Ordinance 1984. Women’s reserved quota doubled (to 10%) for the National Assembly under this (20/237). For the provincial assemblies quotas set by the 1973 Constitution were maintained. In the National Assembly of
1985, besides the indirectly elected women members, two women were elected from general seats one directly, one later in by-elections. In addition a woman was elected on the minorities seat. A total of thirteen women contested for the National Assembly from general seats in these elections. In the Punjab Assembly also two women were returned on general seats.

The 1988 elections were held with provisions for women’s seats remaining the same as in 1985. Four women were returned to the NA in addition to the 20 on reserved seats. From 1990 to the elections of 1996 the special provision is no more and as stated in earlier sections women’s presence in the national legislature is only of token proportion.

Endnotes

1 This was done through the Eighth Amendment in November 9, 1985 when the provision of the 1973 Constitution: “holding of a second general election to the NA” was changed to “holding of a third general....”

2 Ironically, the election highlighted the fissures in the political fabric and was followed by the break-up of the country with East Pakistan seceding as Bangladesh.

3 Derives from lota a local water container which because of its rounded bottom is inclined to shift position or topple over. Lotacracy implies opportunistic change of allegiances often accompanied with monetary incentives.

4 Given the low level of women who contested general seats in 1988 it was clear that women’s presence in the assemblies would require affirmative action. In November 1989 the Cabinet sought consensus for the extension of the provisions in the Constitution regarding reserved seats for women in the national and provincial assemblies. A bill on women’s reserved seats was moved in the Upper House by Senators Mohammed Ali Hoti, Dr. Noor Jahan Panezai and Syed Fasih Iqbal in November 1989. Before the bill could be acted upon the Bhutto government was dismissed in August 1990. The new IJI government under Mian Nawaz Sharif failed to take action in this regard.

5 Mariam Hashimuddin entered the NA Assembly of 1962-65 mid-way into its term filling Shamssunahar Mahmud’s seat vacated due to her death. Wife of a Muslim League politician Mariam had a Masters in Education. She also represented East Pakistan in the NA of 1966-69. Reportedly she has withdrawn from public life ever since. Roquayya Anwar was a widow at the time of election. She later remarried the editor of Pakistan Times. Hamida Mohammad Ali Bogra the first wife of Mohammad Ali Bogra was returned through a bye-election on his seat when he died.

6 Elected five times from the 1937 Punjab Assembly to the 1962 West Pakistan Assembly, Jehan Ara Shahnawaz represented the Muhammadan Women Urban seat in the PA’s in the period 1937-1946 and the Non-refugee Women’s seat in

7 First elected to the (1946-47) Punjab Assembly from Inner Lahore (Mohammedan Women’s Urban), she continued to represent the constituency in the PAs of 1947-49 and 1952-55. She was the first woman Parliamentary Secretary (to Minister of Education) in 1952-55.

8 For the 1952 Punjab Assembly Khadija G.A. Khan stood from the Lahore city reserved seat (refugees) (Shahmawaz. ibid p. 271) and was Deputy Minister in the 1956-58 Provincial Assembly (Social Welfare and Local Govt.). She was elected again from women’s reserved seat (Multan) in the West Pakistan Assembly (1962-65).

9 In the 1962 elections women’s reserved seats were constituted on divisional basis. Sahibzadi Mahmooda Begum represented Sargodha and Rawalpindi Divisions for the 1962-65 and 1966-69 Assemblies respectively.

10 Dr. Abbasi was elected from Bahawalpur, Khairpur and Quetta Divisions in the 1962-65 Assembly.

11 Durre Shahwar Mazari, whose husband Ashiq Mazari lost from Rajanpur, Raifa Tariq, whose husband lost the NA seat from Lahore and Ishrat Ashraf of Rahim Yar Khan whose businessman husband lost the Provincial Assembly election.

12 Shahnaz Wazir Ali, Afzal Raza Qizilbash, Dr. Attiya Inayatullah, Nusrat Bhutto, Abida Hussain, Tehmina Daultana.

13 Nusrat and Benazir Bhutto, Rashida Khuho, Abida Hussain, Tehmina Daultana, Durre Shahwar Mazari, Zari Sarfraz, Nasim Wali Khan.

14 The issue of women’s right of divorce had been raised in the national legislature earlier also. On 18 March 1950, during the General Budget - General Discussion Begum Jehan Ara Shahnawaz pointed out the need to update the *Khula Bill* according to Muslim Law. Again on 30 March 1954, during discussion of the Finance Bill, she put forward the demand for Divorce Law and the provision for Divorce Courts.

15 New sub-para 5C in clause 8 of the Bill. The condition for the entitlement were a) that she is not already enrolled in another constituency and b) her marriage to such person has not been dissolved. (C A. 19 November, 1951:51).

16 On 24th October, 1954, however, the C.A. was dissolved on the order of the Governor General and a state of emergency declared.

17 Earlier on 10 June 1964 Begum Zari Sarfraz had moved a substituting sentence for clause 9 on the modalities for electing PA & NA women members i.e. that they would be elected before the first sitting of the Assemblies and would represent each zone formed under Article 162 (Clause 2). p.592. This was adopted without much discussion.

18 Kamar Jehan Sekandra Begum was popularly known as Dolly Azad, the name used in the official records of the National Assembly.

19 Official records nowhere mention this. The Assembly proceedings, however, indicate that there were indeed 8 women in the National Assembly (1962-65) rather than only the 6 on reserved seats.
20 The clause read “in all matters pertaining to financial and future obligations providing these are reduced to writing the evidence of two men or one man and two women will be required, so that if one should forget, the other may remind her”.

21 After more than a decade, in 1998, has a Vice Chancellor been appointed for the Women’s university. For discussion on the issue see, Mumtaz & Shaheed, ibid, pp. 86-90.

22 For discussion on this see, WLULM Dossier 3. p.19.

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**Governments Documents**


Some Experiences of the Women's Movement: Strategies for Success

Shahla Zia

Abstract: Wide-ranging strategies have been adopted by the women's movement in Pakistan starting from the earliest days in the nationalist struggle in the sub-continent to the present. This paper focuses on the last two decades, a period that started with the movement being galvanized thanks to the negative policies of General Zia-ul-Haq's regime. It presents a critical analysis of the various strategies adopted by the movement, looking at the specific achievements of particular campaigns but also at how these related to the broader movement for the restoration of democracy and how, in the post-dictatorship scenario, the movement had to rethink its strategies. Drawing on the lessons learnt from the past, the paper concludes with an analysis of what needs to be done in the future from the perspective of the role the women's movement does, and should have, in a democratic set up.

Introduction

The women's movement in Pakistan is subject to a number of misconceptions. There are misconceptions about who it is composed of, whose problems it addresses, what, if anything, it has achieved and what direction it is taking. The popular image - much encouraged by its opponents - is that of a militant group of elitist, 'westernised' women, who take to the streets on the slightest pretext and are totally out of touch with the realities of everyday life. The fact that the majority of the women who come out publicly in protest belong to upper and middle class families appears to many as conclusive proof that they represent a particular class interest, devoid of concern for the majority of the women.

This often obscures the fact that the public protest is merely the tip of the iceberg and that the women seen protesting are only a small segment of the groups and individuals actually involved in the women's
movement. It also obscures some other very relevant facts: that most of the issues raised in their protests are indigenous and more directly affect and concern the average, lower-income women of Pakistan; that most of those protesting are working women who put in extra time, over and above their professional commitments and domestic responsibilities, to take up these issues; that many of them are also involved with less-advantaged women in other areas of their work and, therefore, reflect the concerns of broader segments of society; and most importantly, that women from the lower-income brackets cannot afford to be out on the streets whether because of constraints on their time or mobility, limitations placed on them by their families or their own fear of public exposure or other possible repercussions of confrontation. It becomes incumbent therefore, upon those from the middle class, to take on the responsibility of playing the more public role of raising issues and registering protest (the consequences of which they are better equipped to face) as well as of lobbying with policy-makers and legislators to whom they can gain access.

Combined with the fact that the women's movement has had no spectacular successes or achievements to capitalise on, this image has raised doubts both about the validity of its claim to represent the women of Pakistan as well as its effectiveness in doing so. Some of its severest critics and doubters have been from within the movement itself for a number of reasons. Firstly, the women who have been a part of the movement over a period of time, have tended to get discouraged due to the constant onslaught of laws, policies and official statements at the highest level. Combined with this have been the varied attacks and criticisms they have faced from many quarters. And, finally, the standards and ideals they have set themselves do not allow for any compromise and are not likely to be realised in the near future. Tired of fighting what often appears to be a losing battle, they forget many of their successes and remember only their defeats which rankle more and remain on the ever-lengthening list of issues to be tackled.

The critics of the women's movement abound. Apart from the obscurantist lobby that is perhaps its major ideological opponent, there are many others, some of whom claim to be its loudest supporters: politicians who rarely want to get entangled in sensitive and
controversial issues like women's rights and only raise them and encourage public demonstrations on them when it serves their own political purposes - usually when they are in the opposition; bureaucrats who claim that they are unable to say or do anything because they are government servants, but are always ready to tell women and anyone else who is willing to listen why these 'militant' tactics antagonise men; liberals who claim to be totally supportive of the women's movement and can always offer some 'constructive' criticism, provided that they do not have to bestir themselves; women themselves who, by criticising the ideology, the tactics or the organisational ability of the movement, justify their own lack of active involvement or contribution; women scholars, many of whom live outside the country away from the conflicts and tumults which confront the movement, who criticise its 'conceptual' framework, without any real perception of the situation on the ground. Perhaps what all these 'supportive' critics have in common is that they manage to absolve themselves of the guilt of their own inaction by placing the blame for all the failures on the women's movement.

It therefore becomes important to document the successes of the movement, not only to silence the critics, but also to encourage those who have expended time and effort and are nearing burnout, as also to elicit the support and understanding of those who may join us tomorrow. While the successes that we discuss may not be spectacular, their cumulative effect is quite substantial. It is also a sobering thought to imagine what might have been in the absence of these achievements. It is also important for the women's movement to review its own actions and to identify which of its strategies have been most effective in the past and under what circumstances. In doing so, it must also analyse its failures and identify the factors responsible for them. This becomes critical for the women's movement as it continues its battles, clarifies its future directions and devises its strategies.

Background of the Women's Movement

The women's movement in Pakistan did not emerge suddenly out of nowhere in reaction to General Zia-ul Haq's 'Islamisation' measures, nor is it based merely on events that transpired after the creation of Pakistan (Mumtaz & Shaheed 87). Nevertheless, while rooted in the
history of the social and political struggles of the subcontinent long before the idea of Pakistan had ever been conceived, the women’s movement as it currently exists can trace its immediate history to the events of this period. The circumstances under which it found its impetus and direction differed vastly from the earlier phases of social and political struggles. Until the advent of General Zia-ul-Haq, no government had officially been in opposition to women’s rights and their demands were considered within the ‘legitimate’ framework of political agendas. With General Zia-ul-Haq assuming power through martial law and entering into an alliance with the most reactionary forces in the country to legitimise his control, women suddenly became the main target of oppression. Overnight, women who had considered themselves in the forefront of the movement for reform and progressive thinking, found they were now a part of a ‘subversive’ movement, one which even yesterday’s allies and supporters were embarrassed to be associated with.

Following his coup d’etat, Zia-ul-Haq’s televised speech proclaimed ‘Nizam-e-Mustafa’ (system prescribed by the Prophet Mohammad). Shortly afterwards, Zia announced his intention of ‘Islamising’ the Penal Code of Pakistan and co-opted members of the right wing Jamaat-i-Islami (JI) into his cabinet. The results were only to be expected, considering that even under normal circumstances the JI had a very conservative and denigrating view of women’s status under Islam. The effects began to be felt almost immediately.

Women were targetted at various stages. A social climate was deliberately created whereby the public was insidiously encouraged to believe that they had the right to intervene where the code of ‘Islamic morality’ was being violated by women. This led to a number of isolated, unsavoury incidents which had the effect of making women feel insecure in public. Soon after, the debate on women’s status in an ‘Islamic society’ was re-opened through the airing of offensively reactionary programmes on television and the circulation of an official questionnaire seeking opinions on the role and status of women. Simultaneously, even their basic rights e.g. to work, to drive and to vote, which had always been assured, began to be questioned in different fora. A number of extremely detrimental directives and policy decisions
followed, including directives on an Islamic dress-code for women on television and in government departments, universities and colleges; the approval of a separate women’s university and the banning of women in spectator sports. In addition, highly discriminatory laws were introduced amongst them, the infamous 1979 Hudood Ordinances and the 1984 Qanun-e-Shahadat (Law of Evidence), which became law during this period, and the Shariat Bill and the Qisas and Diyat Ordinance which, while being passed much later, had their genesis in the Zia years. The period saw the equal citizenship rights of minorities being downgraded through the creation of separate electorates for non-Muslims that took away their right to vote for general candidates who were Muslim.

The early years of General Zia’s Islamisation caught women by surprise. Women had not felt any urgent need to mobilise since the years preceding the Family Laws Ordinance 1961. Even then, the government had not been opposing their demands and the worst consequence of inactivity would have been a continued status quo. Moreover, since there had not been any serious indications that Pakistan was likely to be hit by a revival of the most retrogressive interpretation of Islam, there had been no time to mobilise and prepare. Left adrift, unable to believe what was happening to them, still not quite believing that this could happen in a progressive, forward-looking country like Pakistan, women had to literally start mobilising their resources from scratch.

The Constitution stood abrogated and fundamental rights suspended. Pakistan’s previous experience of martial law had never been in this lethal combination of a military regime with a retrogressive brand of Islam. Examples of what could happen to women under orthodox and militant Islamic regimes (Saudi Arabia and, more recently, Iran) were not exactly reassuring. Activists who had previously been most vocal in their support of women’s rights, were either lying low for fear of political victimisation or silenced because of their uneasy collaboration with the new regime. For the liberals and intellectuals, seemingly more critical issues were at stake and, as always, women’s rights issues were relegated to the back burner as being less important. As such, the early Islamisation measures like the Hudood Ordinances (1979) and the policies of chaddar and chardivari went by almost without any public
reaction by women, and certainly none by other intellectuals or progressive parties.

As the implications of these measures began to be felt and private misgivings and fears were shared and crystallised in larger groups, women started to mobilise. With the first strong, public reaction by women in the Fehmida and Allah Bux case\textsuperscript{1} under the Hudood Ordinances, the Women’s Action Forum came into being, establishing a platform for individual women and organisations to express their views and to develop some common strategies. The Fehmida and Allah Bux case was followed by the Safia Bibi case,\textsuperscript{2} and WAF’s momentum started being built up on these cases and other retrogressive measures. WAF was not the only women’s body to react but, as a platform bringing together the voices of all progressive women and organisations, it became the most visible, vocal and active forum for women’s rights.

Support from women lawyers bodies was immediately forthcoming and other women’s organisations, notably APWA,\textsuperscript{3} gave it a legitimacy and outreach which, otherwise, just a handful of active women may not have attained within such a short time. Activism, particularly on cases under the Hudood Ordinances, encouraged the media to start noticing WAF, viewed as one of the few bodies articulating public opposition to the martial law regime. The continuous postponement of elections - on one pretext or another-led other political and politicised groups and individuals to also pay attention to activities that indicated the rapid development of a small but active women’s movement, though no overt support materialised until later. By the time the government started gearing up to introduce further measures curtailing women’s rights, the women’s movement was in a greater state of preparedness.

The first test came when the government proposed the new Qanun-e-Shahadat (Law of Evidence). It had earlier proposed the highly discriminatory law of Qisas and Diyat (retribution and bloodmoney) (see Qadir Shah, this volume), which had received a negative reaction from women, including a protest and position paper prepared by APWA. Delaying further action on this, the government moved in to establish the principle of women’s status being half that of men through the Evidence Act. These measures were followed by the Shariat Bill and the Ninth
Amendment (to the Constitution) Bill. The strategies devised by women to meet these challenges, and the results of these efforts are examined here.

The Qanun-e-Shahadat, 1984 (The Evidence Act)

Passed with a number of modifications in October 1984, the Qanun-e-Shahadat was first proposed by the Council of Islamic Ideology (CII) (see Qadir Shah, this volume) in April 1982 to replace the Evidence Act of 1872 and bring it into 'conformity with Islam'. Apart from its other implications, the Qanun-e-Shahadat directly affects women by critically diminishing the value of their evidence in particular circumstances. The earlier versions of the bill had even more drastic and far-reaching implications for women.

The women's movement first researched the issues involved and the possible consequences of the Bill and set out to both convey its rejection to the government and to raise awareness amongst other women and concerned groups. Possibly lulled into a false sense of security by the lack of reaction to earlier measures, the authors and supporters of the Bill, seemed unprepared for the reaction it would evoke. For women activists, this was their first real attempt to thwart the intentions of the obscurantist lobby and, as it also amounted to the first real opposition to an act of the martial law regime, it was a do-or-die situation for women. Feelings ran high, and with all the fervour and enthusiasm of undertaking a major battle, the women tried out a whole range of approaches and tactics. Among other things, the Punjab Women Lawyers Association in Lahore gave a call to all other organisations to join it in a press conference and to carry a petition to the Supreme Court putting forth arguments against the proposed law on religious grounds.

WAF and other women's organisations responded to the call enthusiastically, and what ensued was a milestone in the history of the women's movement. On February 12, 1983, about 300 women gathered on a street in Lahore to march down the road and present a memorandum to the Chief Justice. Rattled by this unexpected challenge to its authority, the government brutally attacked and teargassed the procession of women (a number of whom were picked up and put in the
lock-up) with far reaching effects. Apart from evoking a strong response from a number of groups and individuals who had so far remained silent against the excesses of the martial law regime, it focussed attention both nationally and internationally on the issues being raised. Police action did not deter women who continued their campaign, employing a number of strategies.

To raise awareness, groups and individual women organised a number of special lectures, discussions and jalsas. Lawyers were invited to explain the implications for women, religious scholars to explain why it was un-Islamic and theatrical performances held to convey the absurdities contained in the law. The print media was used to project views and opinions, while posters and cassettes were also produced and disseminated to further spread the message. To exert pressure, activists held pickets, protest meetings, demonstrations and press conferences to publicize their rejection of and protest against the proposed measure. They also undertook signature campaigns, sent telegrams and letters, passed resolutions and planned to carry a petition to the Supreme Court against the law. Soon after the February 1983 demonstration, activists met both with female and some male members of the Majlis-e-Shoora (Zia’s hand picked nominated parliament) and representatives of political parties and minority religious groups. Women also convinced the sole female member of the Council of Islamic Ideology to write a paper on the issue.

The proposed enactment underwent four drafts before it was finally made law in October, 1984. While the women’s movement failed to prevent the law from being passed, it did succeed in getting the original version of the draft substantially modified. And even after the Qanun-e-Shahadat was passed it was rarely implemented, both because of the ridiculousness of its implications as also because of the fear of further reaction. It was not until the passing of the Shariat Act in 1991 that the provisions contained in it regarding women began to be implemented in certain quarters.

The campaign against the Bill had a number of other unexpected consequences, which were to affect both the character and image of the women’s movement. The public confrontation between the women and
the police propelled women’s issues into the limelight, ensuring that their struggle and concerns could never again be shrugged aside with impunity. It drew international attention to the women’s rights situation in Pakistan – as had the Safia Bibi case - and embarrassed the government. There were other implications for the women’s movement. The campaign, especially the demonstration, gave the movement a ‘militant’ image which scared off sympathisers within the fold of the establishment. While this created immense difficulties for women at the time, the more positive aspect is that it later forced the women’s movement into evolving a clearer position on issues which allowed for no compromise on principles. Yet, the fear of public notoriety, physical insecurity, job insecurity and family/social pressures helped to keep away many other women who were participating or keen to participate in the movement. Certainly this was to ensure that, at least for public demonstrations, the majority of activists would be women with the means to withstand the pressures. On the other hand, for those who participated in the fateful demonstration, it was a liberating experience. Having faced the ‘enemy’ once, they were not likely to be cowed down in future.

In terms of future alliances, the women’s movement made visible gains. By proving their courage and determination to take on the martial law government, activists gained the respect and attention of many who had not taken it too seriously before that. Having exposed the hypocrisy and the vulnerability of the regime, it encouraged others to take on the government on other issues. In the process, it also laid the foundation for the movement’s future alliances and support with the media, the lawyers, and other forward-looking groups and individuals.

The process of struggling against the Evidence Act threw up other vital issues integral to the character of the movement. One of these, for example, was the difference of opinion within WAF on the question of lobbying with members of the Majlis-e-Shoora, the legitimacy of which they did not recognise. Another was whether they should be invoking religious arguments and inviting religious scholars on these issues. Serious rifts on these issues emerged, which are still not totally resolved. At that stage, advised by many that religious arguments were the only way to counteract laws passed in the name of Islam, and finding no other
adequate forum to address apart from the Majlis, pragmatic decisions prevailed.

The Post-Zia Period

Non-party elections to the national and provincial assemblies were held in February 1985 and in December that year martial law was lifted after Muhammad Khan Junejo, the new Prime Minister, agreed to bring in the 8th Amendment to the Constitution whereby drastic constitutional amendments brought in by Zia were endorsed and laws promulgated by him could not be challenged in any court. There was, however, a revival of political activities and greater freedom for the press. The Shariat Bill, which attempted to make ‘Sharia’ or the ‘particular way of life enjoined upon Muslims’ the supreme law of the land, was moved in the Senate as a Private Member’s Bill and countered with the government’s Ninth Amendment Bill. Women rejected both as any codification of Islamic laws and precepts would be interpreted by those elements who visualised a very limited and constrained role for women in an Islamic society. They continued to rally against them and neither had been passed when the Junejo government was dismissed in 1988.

Benazir’s Bhutto’s short term (1988-90) began as an exhilarating experience for the country, particularly for women who expected the new government to take steps to over-turn at least the discriminatory laws introduced under the military regime. The very fact of her coming into power, indicating support and acceptance from men as well as women, provided more social space for women. Unfortunately, while Benazir’s regime made women more visible on media, reversed the ban on women’s participation in spectator sports, laid down a minimum employment quota for women in government departments and set up committees to review the laws, no actual move was made to repeal the laws introduced by Zia.

Women’s groups consolidated their work on longer-term development issues, but the high profile activist role of the movement during the Zia period diminished. Partly this was due to hopes that the crucial legal issues it had raised would be taken up by the new government once it
had settled in. With the dismissal of the government twenty months after assuming power, all hope for reprieve in the immediate future died.

The interim government of Ghulam Mustapha Jatoi (August - October 1990) saw in the Qisas and Diyat Ordinance. Subsequently, the Islami Jamhoori Ittehad (Islamic Democratic Coalition) government of Muhammad Nawaz Sharif of the Pakistan Muslim League that included the Jamaat-i-Islami and other religious groups, brought in the Shariat Act in 1991. Despite possessing a clear majority in the house and having declared in parliament that he was not a fundamentalist, Nawaz Sharif played to the tune of the religious parties on issues relating to women and minority in order to mobilise support on other issues but especially to stay on in power. Promises to restore the lapsed provision of reserved seats for women were not kept; the government reintroduced restrictions for women on media and tried to introduce a discriminatory national identity card policy which was shelved after public protest. Drastic amendments were introduced to the penal code in the clauses relating to the Ideology of Pakistan and blasphemy: the former led to a range of women’s rights being challenged in courts; the latter to victimisation, particularly of minorities. Fortunately, attempts to introduce an Anti-Obscenity Bill were abandoned after dissent was voiced within the ruling party.

For the first time, women made a concerted effort to collectively formulate recommendations for women’s development in the Eighth Five-Year Plan (the official national development policy document). Women’s NGOs, groups and experts submitted a number of papers which were accepted by the official working group on women’s development. While these were barely incorporated - largely because the government fell before the Plan was finalised - the exercise was an important first step towards collectively working on issues other than laws. Women more actively extended their linkages in urban and rural areas, and increased their involvement in areas other than women’s issues. Meanwhile, advocacy continued, with particular focus on the Shariat Bill.
The Shariat Act, 1991

Conservative religious parties had demanded that Sharia be declared supreme law as early as 1977 during the PNA movement against the Bhutto government. Acceded to in principle by Zia-ul-Haq, a concrete formulation did not emerge until 1985, and the Shariat Act was only passed in 1991 under Nawaz Sharif’s first tenure, after almost seven years of deliberations on various drafts of bills and ordinances under many governments (Annex 1 summarises the process). The Shariat Act omits the most damaging clauses of the original draft, whereby legislative and judicial power was effectively being passed into the hands of the ulema (religious scholars). While it does not directly address women’s rights, except in terms of giving protection to their constitutional rights, it poses a real threat to women by directing the courts to observe Sharia as the supreme law in the decision of cases. Based on the religious orthodoxy’s views on women’s rights and the prevailing social attitudes in the country, women’s apprehensions on the Shariat Act have already been borne out by certain decisions and directives emerging after the passage of the Act.

When the Shariat Bill was initially introduced, the women’s movement had the experience of campaigning against the Qanun-e-Shahadat and appeared to have impeded any further progress on the Qisas and Diyat Ordinance. Participation in the movement’s activities had increased to include a number of women’s organisations and individual women who had remained dormant during the earlier period. Links with the media were stronger; indeed, a number of media persons progressed from being strong sympathisers to active adherents of the movement. More systematic support was forthcoming from lawyers’ bodies and even professional organisations like the Pakistan Medical Association (PMA) started to provide active support. Political parties, intellectuals and other liberal elements opposed to the government were more vocal in their support. Links had been established with the minorities and minority sects who were also threatened by the legislation.

The emergence of human rights bodies and development-oriented NGOs during this period gave the women’s movement the ideological support and administrative help that it previously lacked. The lifting of martial
law reduced the threat to activists and allowed a freer press to articulate opposing views. With a more conducive climate, relatively more experience under its belt, an increased number of options and somewhat greater clarity in vision, the women’s movement set out to prevent the passage of the bill. Yet, the movement also had to cope with some negative factors.

In seven years the campaign was able to spread awareness about the Bill’s implications more widely and to rally forces (possibly accounting for the fact that most governments preferred to let it remain buried in select committees), but it was challenged by the need to sustain the momentum over such a long period. Moreover, fierce opposition and fervour was difficult to maintain in the absence of an obvious enemy in the shape of a reactionary martial law regime. The disappointing performance of Benazir’s first tenure in office - despite a political party manifesto promising to reverse discriminatory laws against women - left women activists dispirited. Despite such adversities, the movement succeeded in maintaining some level of pressure, adapting to rapid political developments by innovating strategies as it went along.

Throughout the seven years, seminars, conferences, panel-discussions were held by different women’s organisations, human rights groups, newspapers, trade union federations etc. to publicise the issues and implications reached at least some grass-roots organisations. Materials were prepared and disseminated on each successive draft and articles were published in newspapers and magazines etc.. The consequences of the Bill for women, minorities and human rights were discussed and arguments against the Bill were presented from both the religious and legal-constitutional view. Demonstrations, rallies, press conferences and signature campaigns were undertaken by and with the support of different organisations. Joint Action Committees on the Shariat Bill were established in major cities bringing together different groups to act jointly. Extensive lobbying was carried out. Political parties were asked for their position on the Shariat Bill; letters were written to MNAs (members of the national assembly) asking them to vote against the bill; in the later stages, printed materials opposing the bill produced by WAF and HRCP were put into the boxes of MNAs at the parliament building. Intensive personal lobbying was done by WAF members with MNAs
from the treasury and opposition, both in their homes as well as in the corridors and cafeteria of Parliament House. Women also made their physical presence felt by sitting through the entire final reading of the bill and its passage.

The passage of the bill could not be prevented. Nevertheless the women's movement generated sufficient pressure and enough support amongst the public, the political parties and the Treasury Benches to drastically alter the character of the bill. Unfortunately, the issue has now re-emerged in a far more dangerous form in the shape of the 15th Amendment to the Constitution (see below).

During the campaign against the Shariat Bill, some major developments took place within the movement itself. Retaining its focus on women's rights, the movement moved towards aligning itself with other oppressed groups like the minorities and labour, and brought itself within the overall ambit of the human rights agenda. In doing so, it moved outside the narrower sphere of women's rights to address the broader issues of authoritarianism, democracy and democratic institutions, peace, militarisation etc. Though its feminist and class perspectives were still vague at many levels, various women's organisations started working more closely with grassroot organisations, resulting in a more genuine understanding of issues and perspectives.

The passage of the Shariat Act re-opened the debate on whether the movement should take on a clear secular stance, an issue that remains unresolved even today. WAF declared itself secular at its 10th year Convention in 1991, holding that even under the most progressive interpretations of Islam, the danger of reverting to reactionary Islam would be ever present. A number of women's rights and human rights NGOs also adopted the same position or incorporated it into their work. But others avoided entering into the debate or were reluctant to take a clear position on it because of the unfortunate and incorrect translation of the word 'secular' into 'la-dinayat' in Urdu (literally meaning 'without religion', the term is understood to mean the elimination of religion).
Campaign to put women on political agendas

The three-months of an interim government preceding the 1993 elections provided women's organisations an opportunity to table their issues within the political campaign. Over the years women's rights groups had interacted with political parties lobbying with them on specific issues, but in 1993 a focussed campaign was launched to mobilise women and to pressurise political parties to reflect various women's concerns in their manifestos. Manifesto suggestions on 13 areas of concern to women were prepared and sent to thirty political parties, and followed up with dialogues with main political parties. Steering committees were set up in the federal and provincial capitals comprising representatives of diverse groups (women's NGOs, women's rights and human rights groups, trade unions, media activists, outreach organisations etc.) to help develop the agenda and strategies. Pamphlets, posters and cassettes highlighting the importance of women's vote and other issues, were distributed to organisations, political parties, election candidates, women's groups etc., and put on display in public places. Dialogues were held with women from political parties and face-to-face public meetings arranged with election candidates to question them on their party manifestos and positions on women's issues. Community level meetings were held with women highlighting the importance of their vote, issues of concern and the need for raising these issues with candidates. The media campaign included articles and coverage in the print media, programmes on television, and songs and messages on radio.

The campaign led to a number of suggestions being incorporated into the manifestos of main political parties, increased interaction with women in political parties, a relatively better understanding of how the political system and political parties function, and a enhanced recognition of the political role played by women's groups. It also brought home the realisation that a substantial proportion of the population had very little real knowledge about the political system in the country or about the key political issues.

Benazir Bhutto's second term in government (1993-1996) saw some positive and constructive developments in the context of women
including a Commission of Inquiry for Women - headed by a judge of the Supreme Court - to examine laws discriminatory to women and to make concrete recommendations, and the involvement of women's NGOs, groups and experts in the Beijing process. (see Shaheed & Warriach, this volume).

During this period, women's organisations entered into a more active and open collaboration with the Ministry of Women Development and became more involved and effective at the regional and international levels. Using the space created for their participation in policy debate, activists started dialoguing with government on other issues of concern. Some organisations entered into a cross-party dialogue with major political parties on women's political representation through the restoration of reserved seats. In this same period, the Supreme Court started entertaining public interest cases on issues of human rights, rendering some landmark judgments in the process. On the other hand, the government made a concerted effort to bring NGOs more directly into its control through the introduction of an NGO bill which, fortunately, had not been passed when the government was dismissed in 1996.

The Deja Vu of Recent Years

The interim government period that followed was fraught with tension, suspicion and hostility. Several crucial political issues were raised before the Supreme Court, and political uncertainty prevailed. In an atmosphere restraining specific campaign activities and marked by serious doubts about whether elections would even be held, the space for women's activism was relatively limited. Nevertheless, women continued to lobby for their rights with political parties and also maintained a high level of involvement with other important political issues.

The second term of the Nawaz Sharif government (1997 - present) brought in through a massive majority, was widely expected to bring about a certain measure of political and economic stability in the country. Almost immediately, however, it managed to precipitate a number of critical political and economic crises in the country, resulting in increased sectarian violence, political insecurity, and a confrontation
of the government with several key institutions in the country as well as economic sanctions from outside. The general political atmosphere perceptibly changed with conservative trends and patterns becoming more apparent. Fueling the fear was the choice of a president with an obscurantist religious background and renewed attempts to introduce a ‘purdah’ policy in the Punjab (which was eventually not followed through). Where women were concerned, progress seemed to come to a virtual halt.

The new government has its own priorities and it is quite apparent that women’s rights are an area that the government would rather ignore: The Beijing follow-up process, no longer a governmental priority, has been impeded considerably. The National Plan of Action for Women (NPA) was completed and formally launched by the Prime Minister on August 14th 1998, but it remains to be seen how effectively it will be incorporated into the Ninth Five-Year Plan. The Commission of Inquiry Report, released in August 1997, was largely ignored because (a) its recommendations are not in consonance with the mindset of the government and, (b) because it was the previous government’s initiative. The first CEDAW report is still due despite the extension obtained by the government. Verbal commitments to reserve and increase seats for women in the legislative assemblies have not produced any concrete measures even though the government has the necessary majority to do so. The privatisation policy of government saw the First Women’s Bank being put up for bids without any safeguards towards maintaining its character.

The most recent - and most frightening - development has been the introduction by the government of the 15th Constitutional Amendment Bill in the National Assembly which was passed by the National Assembly on October 9th 1998. Projected as the ‘Sharia Bill’, this bill not only seeks to concentrate absolute power in the hands of the federal government, it destroys the concepts of a federation, parliamentary democracy and supremacy of the judiciary and also has very frightening implications for women and minorities. The barely disguised call for violence against those opposing the move, and the horrific statements that followed from the leadership of retrogressive political-religious groups, has given human rights groups a feeling of déjà vu. Memories of
the Zia period, now dangerously disguised under a veneer of democratic government, have surfaced painfully.

Women’s organisations have had to be extremely vigilant about new developments, often having to put aside other on-going work to respond to women’s rights and other political issues that seem to be arising on a regular basis. Constructive dialogue with the political leadership, particularly at the federal level, has diminished to mere rhetoric. During this period, the issue of a woman’s right to marry by her own choice was re-opened through the Saima Waheed case, which received massive media attention and became a rallying point for women’s rights groups. While the split decision in the case went in favour of an adult woman’s right to marry without her guardian’s permission, it brought up several issues relating to women’s fundamental rights in a legal system which allows women’s fundamental rights as equal citizens to be constantly challenged on the basis of retrogressive religious interpretations.

Paradoxically, because it is no longer possible for any government or political parties to ignore women’s issues, interaction at other levels has proceeded and even improved. Thus, for example, the Ministry of Women Development has continued to seek help from women’s organisations and experts on the CEDAW report, the preparation of the NPA and follow up on the Inquiry Commission report; provincial governments and legislators have interacted well and been far more responsive to the demands of women’s groups; interaction with leadership of other political parties continued to be positive; and cross-party interaction with women from political parties has increased considerably.

Women’s rights organisations have been playing a far more politically active role during this period. They have responded to all moves by the government to curtail women’s rights and political space. During this period they have also undertaken a number of exciting new endeavours through different strategies. These have included challenging the privatisation of the First Women’s Bank in the High Court, more focussed cross-party interaction with women in political parties and undertaking a campaign for the reservation of seats for women in the legislatures in accordance with certain basic principles.
The right to marriage by choice: the Saima Waheed case

In Pakistan, women's rights have always been subject to debate and, despite judgments that appeared to have resolved the issues finally, have sometimes been re-opened by superior courts. Socio-cultural norms and particular interpretations of Islamic law have been cited even in the past to deny women their fundamental rights. However, the introduction of Article 2(B) in the Constitution and the Shariat Act 1991, (see Ahmad this volume) have given added impetus to those wanting to reopen apparently settled issues on religious grounds. One such issue has been that of an adult woman's right to marry by her own choice without the permission of her wali (guardian). Over the years, a number of cases on the matter had been heard by the superior judiciary and, by and large, returned judgments supporting an adult woman's right to choose her husband. But in 1996, the case of Saima Waheed suddenly became a subject of major controversy in the country.

Saima, a well-educated adult Muslim woman whose father had strong links with a militant religious group, had married against the wishes of her family. Upon learning of her marriage, the family reacted very strongly and tried to break up the marriage by denying its validity. Saima escaped to an independent women's shelter, Dastak and sought legal help from a renowned woman lawyer and activist Asma Jahangir (also associated with Dastak). Saima's father filed a habeas corpus petition against the lawyer in the Lahore High Court, seeking recovery of his daughter. This was the beginning of a legal and human nightmare.

A number of different cases and petitions were filed by all concerned. The case was heard before a single judge, a division bench and finally before a full bench of three judges of the Lahore High Court. Saima was transferred from Dastak to another shelter by request of her father and then, by her own request, moved back to Dastak. One judge allowed Saima's parents to freely visit her. Another, at Saima's request, made it subject to her willingness. Saima's father variously alleged she had been abducted by Asma's daughter, brainwashed by Asma, and that Asma was asking him for a bribe to release his daughter. Attempts were made to kidnap Saima and she claimed that she feared for her life, refusing to even meet her father without protection. The situation, which brought
forth tactics of intimidation and violence by retrogressive religious forces, became extremely threatening not only for Saima, but also for her counsel.

Basically, the case re-opened women’s fundamental rights of choice, movement and liberty. WAF passed strong resolutions on the issue, women’s and human rights organisations arranged seminars and wrote articles about it, many supportive media activists actively followed up on the case and its various dimensions, a number of women from different organisations came onto the Dastak committee for solidarity and support, and many activists crowded the courts on hearings despite the presence of threatening groups.

A number of Islamic scholars gave their views and a number of authorities were cited. By a split majority decision, the case was decided in favour of Saima. But the fear that the issue could be raised time and again remained, as also the fear that other similar issues relating to women’s rights could also be re-opened. While exemplifying the insecurity and uncertainty that women face in the country, as well as of the inadequacy of key institutions in upholding their fundamental rights, the case also brought home the real threat to all activists who stood up for women’s rights.

WAF: Challenging Privatisation of the First Women’s Bank

In 1997, the government moved to privatisate all public sector banks, including the First Women Bank (FWB). The FWB was set up in 1989 in Benazir’s first tenure as an institution that combined the characteristics of a commercial bank and a development institution to encourage women’s economic activities. The only bank of its kind in the world, the FWB is run exclusively by women professionals (though it has male subordinate staff) and gives credit to women, or institutions/enterprises where at least fifty percent of the ownership is with women, or where all the employees are women. Additionally it runs a micro-credit programme granting small loans to women without collateral.

Women activists were approached when it became clear that the privatisation of the FWB would mean the end of the women’s bank in
terms of both its employment and loans policies. Bidders were largely interested in the FWB's 35 branches and were intending to immediately change the name of the bank. Women's organisations and individuals met representatives of the Privatisation Commission on September 4, 1997 to try and persuade the Commission to either not privatise the bank or to at least maintain its current mandate. As the date of the bidding approached, and signature campaigns, letters of appeal and behind the scene lobbying with the government produced no result, WAF decided to approach the courts in a public interest litigation case.

The bidding was to take place on Monday 3rd, November. On Friday, October 31st, WAF was given leave to appeal by the Lahore High Court which simultaneously ordered that the date of the bidding be postponed to the following Monday. The WAF petition argued that, unlike all other public sector banks, the FWB was an affirmative action measure under Article 34 of the Constitution which could not be undone until such time that the need for such a measure ceased to exist, in this case the economic development of women. The case was argued by a well-known woman activist supported by several young male lawyers. The government maintained that the FWB was merely another commercial bank, challenging WAF to provide documentary evidence that the FWB was an affirmative action measure for women. This was noon on Friday, the bidding for the FWB was to be held in Islamabad that Monday. Over the weekend, the intensive networking and linkages created by the women's movement in the previous years paid off. Public libraries, documentation centres of women's organisations and members of the media were pressed into action. Formal and informal linkages were activated in several cities to obtain the information and backup plans were made - in case of an adverse decision - for demonstrators to picket the venue of the bidding.

To the shock of the government's Privatisation Commission, at nine o'clock Monday morning the women's movement succeeded in placing on record the minutes of the original Cabinet decision concerning the FWB, the Prime Minister's letter to the FWB President on loan and employment policies for the bank, the records of the National Assembly where the FWB was first announced in addition to some 80 pages of other supporting evidence. Enough evidence for the Lahore High Court
to pass an interim order that allowed the bidding to take place but made it obligatory for the original mandate of the bank to be maintained and for the court’s decision to be read out at the time of the bidding (being broadcast live on national television).

This major victory for women was confirmed in October 1998 when the court gave its final ruling. The judgement does not bar the government from selling the bank but makes it incumbent on any buyer to adhere to the full mandate of the FWB as described by WAF in its petition, thereby making it unlikely that anyone will buy the bank.5

Campaign for reserved seats for women in legislative bodies

Constitutional provisions for the reservation of seats for women in the legislative assemblies expired after the 1988 elections (see Shaheed & Warraich this volume). As a result, women’s representation dropped drastically, currently less than 3% women in the National Assembly and far less than 1% in the total number of members in the four Provincial Assemblies. Debates on women’s rights issues virtually ended with the exit of women on reserved seats and it became apparent that not only were reserved seats necessary to ensure women’s political representation, the modality for doing so also had to be one which helped to mainstream women in the political system.

WAF had earlier demanded an increase in the number of seats in the assemblies, reservation of seats in the Senate, and a double vote to women for voting in the women on reserved seats. However, as the debate progressed, a number of concerned women’s rights and human rights organisations felt the need to review the entire issue and to examine the various modalities before making recommendations. In 1997, with a new government in power, representatives of concerned civil society organisations met to discuss the issue thoroughly. After deliberation, consensus was reached on the need to have 33% seats reserved for women at all levels, the existing indirect modality seats to be introduced in the Senate, upper house, through and for reserved seats to the National and Provincial assemblies to filled through direct constituency-based elections by a joint electorate of all men and women in the concerned constituency.
Several possible modalities in accordance with these principles were suggested. Thereafter, a campaign was undertaken towards pressurising political parties and legislators to support the demand. Towards this: a declaration of support was prepared and a signature campaign undertaken to get endorsements for the demand; lobbying was done with cabinet ministers, legislators, politicians, members of the Constitutional Reform committee, media, public opinion leaders etc. at both federal and provincial levels. Meetings and dialogues were held with several women politicians, office-bearers and activists across political parties; several public functions were held across the country, including but at the district-level, and inviting representatives of political; press conferences and public demonstrations were held; information packages were prepared and sent to concerned decision-makers; articles and press releases were brought out in print media.

The declaration was endorsed by representatives from 19 political parties, including national and provincial legislators, some ministers and two Speakers who approved it in principle; about 1500 civil society organisations including NGOs, women’s rights and human rights groups, community-based organisations, major trade unions and media organisations; a number of professionals and professional organisations; cross-party support from a number of women from political parties; and thousands of concerned citizens. Resolutions for the restoration of an increased number of seats were passed unanimously in two Provincial Assemblies, one also recommending extending the provision to the Senate.

This has been by far the widest support that any issue relating to women has ever received, indicating the linkages the movement has managed to build with civil society groups and individuals across the country, as well as the in-roads it has made with political parties, legislators and women in political parties, particularly in the smaller provinces. It is also indicative of a relatively greater awareness on the subject generally and a growing concern among civil society organisations about the implications of having virtually no female representation.

There is still a long battle ahead, however. There has been no official move so far towards adopting the demand. The government has side-
stepped the issue by saying it would include it in the entire constitutional package it is supposed to be preparing, which is unlikely ever to get consensus even though it has rapidly put together and passed two other constitutional amendments (13th and 14th) and is forcefully pushing to have the 15th Constitutional Amendment passed as well. For its part, the government has suggested yet another even more indirect modality of filling in the seats through the vote of women councillors (overwhelmingly elected indirectly to their positions by male councillors) and, despite discussions, supported by the Ministry of Women Development. Basically, the campaign on women’s political representation brings home the message that women’s rights are not a priority with the present government, nor is it interested in bringing in a system which does not bolster up its own political strength. It also clearly exposes the reality that decision-making at the top remains firmly in the hands of just a very select few, entirely unresponsive to public demand.

The paradoxes and contradictions remain. Visible official trends have been frightening, both in terms of democratisation and human rights. The active sanctioning or tacit approval of militant and retrogressive religious groups by all political governments for reasons of their own political expediency, as well as their failure to provide viable alternatives for a poor and frustrated public, has resulted in their proliferation and strengthening. The Taliban anti-women policies next door and the strong linkages between Pakistani and Afghani groups and institutions, have created a threatening environment, with spectres of a similar situation looming over those who believe in the principles of equality, justice, fundamental rights and tolerance. The more secular-minded parties have not yet played their due role, due to both fragmentation within and alliances with conservative groups and parties. The infiltration and orientation of people in key institutions that occurred during the Zia era, is beginning to show distressing results.

Discriminatory and oppressive laws remain on the books and continue to be used against women and minorities. Even today, the vast majority of women in jails and shelters are there because of the Hudood Ordinances. The blasphemy law, as amended in 1986, has been used to victimise opponents, particularly minorities. The current government has clearly
indicated its intention of trying to set in place an authoritarian form of
government with total control, and in accordance with their own
interpretation of Islamic doctrine. On the other hand, civil society has
grown considerably during this period. The women’s movement has
extended its outreach, established stronger and wider linkages within
civil society as well as within political circles. But the continued
onslaught of laws, policies and directives detrimental to women’s rights
has given the movement no respite. While trying to work towards longer-
term goals and play a pro-active role towards bringing about positive
change, it has been obliged to continue to play a reactive role.

Successes and Failures

To assess the successes and failures of the women’s movement, we first
have to define success. Ordinarily success means the attainment or
achievement of an objective. But in relation to a movement, success is
usually relative to the circumstances. Under difficult circumstances,
where the odds are overwhelming and the resources limited, even the
partial attainment of an objective can qualify as a major success.
Moreover, the very nature of a movement implies that it is an on-going
process of continuous metamorphosis, in which the issues as well as its
own visions and aspirations will continue to develop and change.
Consequently, success is not easy to measure in specific terms. While
charters of demands always exist, these are usually temporary agendas
for a particular period of time. In evaluating the achievements of a
movement, the unanticipated positive results of its successes, its failures
and sometimes of the process itself need to be taken into account.

In terms of measurable successes - none of which the women’s
movement claims as a result of its sole contribution but in which it has
played a critical role - can be included: preventing the passage of the
Constitutional Ninth Amendment Bill which would have given the
Federal Shariat Court jurisdiction over personal laws (so far denied by
the Constitution); the dismissal and reversal of the judgement in the
Fehmida/Allah Bux and Safia Bibi cases, where strong public reaction
was a key factor; the quiet demise of the Anti-Obscenity Bill within the
confines of the ruling party’s internal debates; the reversing of the
National Identity Card policy, which first sought to create distinctions
between men and women and then between Muslims and non-Muslims; and the official withdrawal of support in a blasphemy case against Akhtar Hameed Khan, a renowned social reformer and worker.

Political parties can only be effectively mobilised if a number of them are willing to agitate on the issue or if they have sufficient representation within the house to make a significant difference. The Ninth Amendment Bill and the Shariat Bill could not be passed when a number of political parties opposed to the government took a united stand against it. However, the pressure was not maintained and in the new kaleidoscopic restructuring of political alliances, many of the supporters shifted ground, thus allowing for the Shariat Bill to become law.

Achievements include the very significant modifications brought about in the Evidence Act, the Qisas and Diyat Ordinance and the Shariat Act which, had they been passed in their original forms, would not only have demolished the remnants of women's rights in the country but would also have heralded the advent of theocracy. Perhaps some credit can be claimed for the fact that many of the most retrogressive recommendations of the Ansari Commission, the Council of Islamic Ideology and the religious parties limiting women's political and personal rights as citizens have not so far been seriously considered by any government for implementation.

An unquestionable achievement of the women's movement has been successfully bringing women's issues onto the national agenda and winning for these issues a legitimacy and recognition previously never accorded them. For example, subjects of women's development, status etc. have been included in courses at the Civil Services Academy, the Administrative Staff College, the National Institute of Public Administration, and the Police Academy. The Women's Division has been upgraded to a ministry. Print media gives women a high profile and electronic media, though officially controlled, has sometimes found means of moving away from traditional programmes and giving time to more critical issues. Even at the legislative level, women's concern can no longer be totally ignored. At the final reading of the Shariat Bill, the presence of women and their active lobbying forced every party and individual, however reactionary, to give assurances that women's rights
would not be affected. While this may have amounted to mere lip service, the fact remains that each one felt compelled to make a public statement on the issue.

Recognition is also visible at the policy-making level. The ratification of CEDAW was a direct result of the pressure mounted by women. The National Report for the Beijing conference was largely due to input by women's groups. And the National Plan of Action for Women, a blueprint for women's development, is a major contribution of the movement. The Commission of Inquiry was set up thanks to women's endeavours and the resultant report was based on active contribution made by them. In a country wracked by obscurantist influence and rhetoric, the very fact of these documents is a major achievement.

The women's movement has raised awareness of women's concerns at other levels, new women's organisations have been established and the existing ones have been (re)activated into addressing women's rights. These organisations have moved in to fill in gaps in information, services and developmental work, provide resources and administrative/co-ordinational backup, and have helped to establish a support network of organisations with similar or common objectives. At the same time the movement has established links with rural and community based organisations. In the long run, awareness raising, sensitisation and mass mobilisation with and through these groups and organisations will be the means of providing women some measure of security against discriminatory measures at the hands of authoritarian regimes or reactionary forces.

By demonstrating courage under the most adverse circumstances and refusing to accept oppression and injustice, the women's movement set a precedent for other groups, parties and movements to follow. Taking a stand on the Qanun-e-Shahadat in the harshest of the martial law days, it paved the way for others to express their opposition. Today, it continues to play a crucial role in taking strong positions on critical issues like the 15th Constitutional Amendment Bill. By agitating on issues of social injustice and playing a pivotal role in human rights bodies and organisations, the movement has forged links with other oppressed and disadvantaged groups to provide mutual strength and support against
antidemocratic and antidemocratic forces. By taking an ethical stand on issues of democracy regardless of the political parties involved, it has demonstrated that principles can take precedence over self-interest.

Learning from its experiences, the movement has moved beyond reaction to play a more pro-active role, in the process gaining a foothold in forums and at levels it did not have before. At the legislative level, for example, concerned groups have been given passes to assembly sessions, observer status at the meetings of a number of standing/sub-committees, and access to information in some provinces. Increased interaction with women from political parties has resulted in the beginnings of a cross-party women’s caucus in three provinces. Struggles, adversities, setbacks and failures have compelled the women’s movement to self-critically examine its conceptual framework. The lack of clarity and consensus on some issues is currently a major hurdle in the way of a united and strong stand against the policies of successive governments. Yet, the fact that the women’s movement is trying to grapple with these issues and understand them is a positive development. This, perhaps, is one of the unanticipated results of its failures. Had success been immediate, it is unlikely that the women’s movement would have moved this rapidly into examining its position on secularism, class, patriarchy and feminism. While some clarity of vision has been achieved through this process, much more thinking, questioning and dialogue is required.

The failures of the women’s movement are fairly apparent. The most glaring being its failure to get any of the discriminatory laws (e.g. the Hudood Ordinances, the Evidence Act) repealed and its inability, despite long and protracted campaigns, to prevent the passage of laws like the Qisas and Diyat Ordinance or the Shariat Act. These failures have perhaps most forcefully driven home the reluctance of most individuals, groups and political parties to take issue with laws introduced in the name of religion. Whether this is due to a genuine lack of information about the measures and understanding of their implications, or due to a reluctance to oppose what may be ‘Islamic’, or because people are concerned about being branded ‘un-Islamic’, an image which could affect their popularity or political alliances, it is clear that a much more effective strategy is needed to counteract the laws.
The movement's links with women's groups and other civil society organisations across the country are still too weak to pose a real challenge to authoritarian governments, and are insufficient at the constituency-level to hold public representatives accountable. Nor has the movement been able to effectively mobilise housewives or working women belonging to the 'silent majority'. Partially this may result from the image projected of the movement by vested interests of a militant, 'un-Islamic', 'westernised' group, partially limited resources may impede the kind of outreach and interaction necessary. But, undoubtedly, a major cause is insufficient knowledge and understanding of each other's concerns or issues among women from different regions, sects, ethnic groups or classes. Though some initial steps have been taken towards establishing linkages between different groups and identifying common areas of interest and mutual support through women's NGOs and groups, these remain inadequate and slow-paced.

Organisationally, the movement has not always been able to maintain its momentum and public pressure, and has floundered in its strategies at some critical moments. If fatigue, too many demands and limited resources have played a role, at times the movement's activists have failed to correctly assess the situation as, for example, when the Pakistan Peoples Party (PPP) government came into power in 1988. Knowing that the removal of discriminatory laws was on their agenda, activists accepted that the PPP was having problems establishing its authority. As a result, pressure groups in the forefront of the women's movement more or less decided to sit back and wait for things to happen at the appropriate moment instead of pushing for their demands. The failure of the PPP government to take any legislative action on women's issues was a major set-back for the movement both internally and externally. Similarly, having spent years fighting the Shariat Bill, in the period immediately prior to the bill's passage in 1991, the hopelessness of the situation and the inevitability of the Act's passage (in whichever form) appears to have partially paralysed the movement. While seminars and meetings were held, prepared materials hastily distributed and hectic lobbying carried out in the last few days, the entire scenario lacked the collective fervour and enthusiasm of earlier years. In retrospect, had the movement managed to mobilise sufficient angry presence on the streets,
outside the Parliament house and inside the corridors and galleries of the National Assembly, perhaps more could have been achieved.

Future Directions: Strategies for Success

Some important lessons can be drawn from the past experiences of the movement regarding who and how to lobby, the tactics to be used and the linkages that need to be created and/or strengthened.

One over-arching lesson is that the commitments of political allies, parties or leaders can never be taken for granted since women’s rights are never a priority for any of them. Examples abound of political parties reversing their stands, entering into alliances with reactionary groups and ignoring their commitments to women, delaying the issue as controversial and trading off or compromising women’s rights for other gains. Consequently, regardless of which government is in power, women must keep up relentless pressure to gain their rights. This helps the few sympathisers within the party to push for positive action, forces stragglers to take a stand and neutralises those opposed. To ensure that no government forgets or ignores the women’s issue, or shelves it temporarily till ‘more critical’ issues are decided, women themselves must first be convinced that their issues are amongst the most critical of national issues. The pressure must be maintained at different levels and in different ways, since any one tactic in isolation would be ineffective.

On laws, action must include extensive lobbying with legislators from the ruling party, so that they can apply pressure from within the party. While the government can often afford to ignore the opinions of opposition members, it remains vulnerable to pressure from within its own party ranks. This tactic is particularly effective in the case of a coalition government, since any serious split within it can provide hefty ammunition to the opposition and can even bring down the government. In the case of the Qanun-e-Shahadat, opposition to particular clauses of the proposed Bill from members of the ruling party contributed towards a watered down Act. Particularly in the final days before the passage of the Shariat Act, with the Opposition strongly attacking the Bill, and many political allies within the National Assembly choosing to remain
silent or neutral, it was the pressure brought to bear within the IJI ranks that possibly forced the government to make some accommodations.

High profile lobbying should be accompanied by 'quiet' behind the scene lobbying. 'Quiet' lobbying allows for a more honest exchange of views and for sharing information and advice about effective strategies, without embarrassing either side. Public lobbying, with MNAs and MPAs for example, makes it more difficult for the concerned legislature to ignore women or to appear insensitive to their demands. Nor can legislators later justify inaction by claiming that they did not know or understand the issue. In the Akhtar Hameed Khan case, 'quiet' lobbying was more effective since the concerned persons did not want to be seen publicly supporting the stance of opponents on a sensitive issue like blasphemy. On the Shariat Bill, private and public lobbying were both useful. Private interaction provided valuable information on the positions of various parties and groupings, and on which persons could possibly make a difference. However, despite being told privately that most politicians did not accord women's issues priority and that they should therefore use arguments relating to parliamentary sovereignty, women continued their public lobbying on the basis of women's rights. This persistence paid off obliging each one of the speakers on the final day, to address the issue of women's rights. The WAF position paper was read out on the floor of the house by a PPP MNA, while other parties like the MQM - until then silent on the issue - spoke up strongly against the Shariat Bill and, additionally, raised the issue of the Hudood Ordinances and the adverse effects on women.

Concerning policies, relevant senior political persons must be lobbied since, in reality, decision-making remains in the hands of a select few. Interaction with bureaucrats who translate political decisions into policy, plans and programmes, is also critical to ensure that their interventions relating to women are both meaningful and effective. Furthermore, since bureaucrats work less publicly than politicians and because their jobs are not hinged on people's political perceptions, they are in a better position to disregard potential political ramifications. It is sensitized bureaucrats who introduced the sessions on women's issues in government training institutions mentioned above. Similarly, it is thanks to the bureaucracy carrying on with the processes, that work on
CEDAW and the NPA was able to move forward. However, in working with government, care must be exercised to ensure that the process of collaboration remains one of cooperation as equal partners rather than one of co-optation. Today, NGO representatives are making a substantial input into governmental reports, policy papers, official committees etc., both because of external pressure and internal inadequacies. This input is crucial to the government's image and performance at the international levels, and is another lever which can be used to effectively exert pressure. Lobbying should also be done at the provincial level since many matters of concern to women lie within the domain of the provincial governments. Indeed, even when the matter falls within the domain of the federal government, pressure from the provincial governments is important and, for example, the strong stand by the Sindh legislature rejecting the ID card policy definitely had an effect on federal policy.

An on-going need is to lobby political parties to incorporate women’s issues in their party manifestos which can then be used as a reference point by both those within and outside the parties. To use manifestos effectively, however, strong groups must be established at the constituency level, so that public representatives worry sufficiently about losing their seats in the next elections if they do not accede to demands. This would be particularly effective in constituencies where representatives have won by a small margin and stand in greater danger of losing their seats if even a small group opposes them.

Direct lobbying with women’s wings or women members of political parties would only be effective if the women are first united within their own parties and also strengthened with the necessary information and skills in how to use this knowledge effectively for advocacy within their parties. Cross-party alliances of women in political parties have already been initiated in three provinces. It is important for the women’s movement to create common ground with these coalitions and to gradually develop a relationship of mutual trust. Another option the women’s movement must consider seriously is that of directly moving into the political arena itself, so that more can be done within political parties.
In terms of tactics, maintaining a high public profile is critical. To some extent, every government is vulnerable to public opinion and susceptible to public pressure, and even more so to international opinion and pressure. Media campaigns, demonstrations, signature campaigns, distribution of printed materials, press conferences, seminars etc. are essential for putting pressure on the government as well as other political parties. While this does not always ensure success, particularly if the issue is a controversial one, no issue will receive sufficient attention without it. Numbers are important to a successful campaign - whether it is the number of persons in a demonstration, the number of protests or demonstrations, the number of signatures on a signature campaign, or the number of articles, editorials, telegrams etc. Supporters in the opposition and within government circles find it useful to be able to refer to specific and sufficiently large numbers. Finally, pressure must be exerted as publicly as possible. If, for example, a hundred telegrams are sent on a particular issue, this fact must publicized. Otherwise it allows the government to ignore the pressure without any public embarrassment on its part.

All protests, objections, suggestions or recommendations must be accompanied by a clear-cut demand in very concrete and practical terms. If demands are not clearly enunciated, the government can formulate an inopportune measure while claiming that appropriate action has been taken in response to women’s demands. The Approach Paper prepared for the Eighth Five-Year plan by a male bureaucrat is a classic example of what can be made of comprehensive reports which were not always able to spell out the solution in terms comprehensible to the planners. Demands must also address the issue at stake in its totality to foreclose the government changing a small portion or aspect of the matter. For example, in the case of the Qisas and Diyat Ordinance, a major issue raised by women was that a woman’s diyat was half that of a man’s. The final bill omitted this particular clause, temporarily confusing the opposition, and allowing the government to claim that it had acceded to women’s demands, while in actual reality the ground effect was the same (See Qadir Shah, this volume).

The physical presence and visibility of women in sufficient numbers at forums where decisions concerning them are being made, is also
effective. The presence of women in the galleries, corridors and cafeteria of the Parliament House during the reading of the Shariat Bill, helped ensure that the MNAs who spoke on the final day addressed the issue of women’s rights. If the presence of just a few women for a few days had this effect, one wonders what the impact would have been if the building had been jam-packed with women throughout the debate. According to one MNA, had even a crowd of 500 women collected outside the National Assembly building, it would have prevented the Shariat Act from being passed. While not necessarily true, it certainly indicates the potential of large groups to draw attention to their issues. Similarly, the presence of women in courtrooms where cases relating to women are being debated, invariably assures more attention and care on the part of the judges and the lawyers.

While the women’s movement has to be careful not to be seen as encouraging foreign governments, particularly suspect governments, to intervene on their behalf, interventions on more general issues e.g. minority rights must be brought to the attention of the international community. Thus, for example, the government was embarrassed by questions raised intentionally on its ID card policy in relation to minorities. While the women’s movement should avoid direct intervention of foreign governments in matters relating to them, it is important to have the UN agencies, the foreign press and women’s and human rights organisations the world over raise the issue. This is always an embarrassment to embassies and Pakistani delegations going abroad, and reports are immediately sent home. Unfortunately, the international embarrassment is often more effective than any local protest. Telegrams, letters and protests directly to the government of Pakistan as well as the Pakistan embassies in their countries from women’s rights and human rights bodies should also be encouraged, as also action from regional networks.

Whenever possible, it is useful to formulate a quick response before positions become crystallised and before the processes of law making or policy making are put into motion. This requires constant monitoring of committees and advisory bodies to obtain advance information on laws and policies under preparation. Prompt action on the ID card issue and Anti-Obscentiy Bill resulted in both issues being shelved. Getting a
thorough knowledge of how the system works and gaining a strong foothold within the concerned circles is equally important.

Comprehensive materials in support of the issue must be disseminated to concerned legislators and policy makers. While it is highly unlikely that the majority will read them, it provides usable material for the few sympathisers who are willing to raise the issue but do not have the time to do any homework on it. Hence, the PPP was able to use the WAF and HRCP materials in its arguments against the Shariat Bill.

Since women’s issues are never a priority with any political party or group, any material explaining the implications of a law or policy on women could also try to show how it impacts other groups or issues. Demonstrating the wider impact of a law or policy also gets other groups involved in the campaign. Thus, for example, WAF and HRCP documents on the Shariat Bill also raised issues on minority rights, parliamentary sovereignty and the independence of the judiciary.

A strategy recently tried out by WAF for the first time is that of challenging issues in court as public interest litigation. While the experience was an uplifting one for all women involved and must be used, caution has to be exercised while doing so. The judiciary in Pakistan has not always measured up to the expectations or confidence reposed in it, and the confusion created by the laws and constitutional amendments may well result in negative decisions. Moreover, any challenge would have to be made in the Supreme Court or under the writ jurisdiction of the high courts, since decisions of the Federal Shariat Court (FSC) may well result in further erosion of their rights. But if laws are challenged under writ jurisdiction as being violative of the fundamental rights in the Constitution, chances are that the discriminatory clauses may be struck down, but the offensive law would remain. And if the issue becomes an ‘Islamic’ one, the final authority would lie with the FSC. Constitutional lawyers have advised women’s groups to try to solve the problems of ‘Islamic’ laws politically rather than by addressing them as legal issues. However, other matters e.g. the citizenship laws, or portions of the labour laws, which are not ‘Islamic’ laws could possibly be challenged effectively in the courts. An unfortunate reverse has already been suffered when a number of
women's NGOs challenged the Hudood laws in the FSC as not being in accordance with Islamic provisions. The inevitable negative decision was a major legal and moral blow to women's rights. Learning more about the legal system and laws, and developing the mechanisms for doing the necessary homework, is also crucial to success.

To deal with government from a position of strength, the women's movement must further strengthen its linkages with other oppressed groups, activist bodies, trade unions, student unions, professional groups etc. While maintaining its focus on women's issues, it must give and derive support. This becomes important not only to bring its concerns within the mainstream of democratic and political issues, but also because no government is likely to give women's concerns the priority attention required unless it is in a position to cripple the government even for a short period of time. This was amply exemplified in the transporters' case, when the law of Qisas and Diyat was introduced containing a clause adversely affecting the transporters. A lightening strike was called by them, critically affecting the economy of the country. Within twenty-four hours the 'sacred' law was amended!

Simultaneously, the women's movement must develop linkages and build support for itself with those involved in the criminal justice system i.e. the lawyers, the police and the judiciary. Not only is this important because of all the laws which create physical and legal insecurity for women, but also because their support would help in providing freedom from fear. Support from lawyers associations at the time women were put in the lock-up after demonstrating against the law of evidence was not only of immediate legal help, but also a tremendous morale booster. Immediate and effective action against the police by a High Court Judge in Karachi in the case of a woman whose report was not being registered, gave new courage to the women agitating the matter.

Mobilising overt public support from a wide-ranging spectrum of political parties, organisations and groups ensures that the issue in question cannot be ignored or dismissed as the demand of just a handful of women belonging to a particular class or area. To be seriously considered by those in power, the concern must come across as a 'national' issue. Where it is important to show a united front as, for
example, through joint action committees, it is equally important that pressure simultaneously be maintained at an individual organisational level, so that the efforts cannot be dismissed as being the action of one group using a number of names. Pressure needs to be sustained and maintained on a regular basis. Once a slack period sets in, it becomes difficult to build up the same momentum. Organisations and groups working together on issues must spend more time in planning and coordinating these efforts for greater impact, rather than handling things in a haphazard fashion. Coordinated planning would also divide the burden of work between the concerned groups and allow them to take responsibilities for tasks they are better equipped to handle.

In the long-term, awareness-raising about issues concerning women must be done on a much wider scale. The movement must liaise more effectively with the vernacular press which has a wider readership in the country and reaches out to people who have less access to relevant information. Simultaneously, more efforts must be made for interaction with women at the grassroot level, both for getting information to them as well as to be able to reflect their concerns on its agenda. Women's organisations are already making a substantial input into service delivery and developmental work, as well as longer-term programmes to enhance the knowledge-base and capacity of civil society and women's groups, all of which is showing significant results. But to build on the base being laid down by this work, elements of activism must be gradually introduced into all these efforts, and a pro-active strategy adopted to put pressure on those making decisions rather than just making inputs into limited space already defined by those who make decisions.

Conceptual Framework

Ultimately, however, before the women's movement can even begin to think in terms of substantially achieving its goals, it must first clarify its own position on a number of issues by initiating a critical self-analysis. For example, is the women's movement fighting for women's rights within the existing social framework or is it challenging the patriarchal institutions under which these injustices are inevitable and accepted? Is it going to demand its rights within the Islamic framework or is its stand going to be secular? Is it going to develop its strategy on the basis of its
women's rights agenda or is it going to demand them within the framework of the human rights agenda? Is it going to merge itself with pro-democracy movements or will it maintain its own distinct identity?

Past experiences suggest some difficult answers. Difficult, not only because they imply a radical shift in ideology and personal relocation in the class-structured social system, but also because they mean facing up to the magnitude of the task involved, the success of which is not likely to be seen within our lifetimes.

If women are to ever achieve equality as a matter of right, the struggle must begin to understand and acknowledge that it has to take on the task of dismantling the patriarchal social structures and systems which perpetuate the subordination and oppression of women. While different groups and strands within the movement may choose to handle the issue in different ways best suited to their own social environment, a clear understanding of the issue and the ultimate objective must be there. Attempts to win equality within an inequitable system can at best achieve the bestowing of certain favours by the dominant class and gender, without establishing the attainment of those gains as a matter of right. Granted as a benevolence or appeasement, such gains are likely to be withdrawn if 'responsibility' is not demonstrated in handling them or if 'ingratitude' or 'lack of appreciation' is shown by overstepping the boundaries laid down. This is apparent in the attitude of governments that 'grant' women certain concessions and are then offended because women are not satisfied with the efforts undertaken on their behalf.

The question of secularisation continues to divide different strands of the women's movement. Some feel that demanding rights within a secular set-up amounts to a denial of religion or a denial that Islam guarantees equality. Others believe that a secular stand would alienate a large section of society - not just the orthodoxy (which already imputes western influence, un-Islamic views and cultural alienation in the women's movement) but the majority of the people who identify with Islam. This implies the handling of the issue at two levels - conceptually and strategically. Conceptually, those within the movement must themselves begin to understand that secularisation does not mean the denial of religion at a personal level, but represents an acknowledgement
and validation that the values of equality and human rights are a basic and integral part of religion, and must be permanently laid down and accepted as secular law so that they are not subject to re-interpretation or reversal at the whim of any obscurantist force.

Past experience has shown that women’s attempts to invoke their rights within a religious framework have, at best, resulted in gains that are either partial or temporary. In the process such attempts empower the obscurantists who have consolidated and increased their power in this arena over the years, who receive international support and who have strategically placed their agents at critical positions of power. Moreover, even the most liberal and progressive of the male ulema (Islamic scholars) seem to have a saturation point on women’s rights beyond which they are unwilling to move. Finally, even if progressive interpretations are accepted for certain periods of time, because the gains remain within the realm of religious discourse, they are always susceptible to a renewed debate. While some women scholars of Islam-or Islamic feminists - are currently involved in a re-examination of the scriptures and the evolution of a feminist theology, it will be years before such research bears fruit and even longer before it becomes accepted. In fact, however valuable, the results of such research are more likely to become controversial, be declared heretical and incur the wrath of the ulema belonging to the entrenched schools of thought, since it would amount to a direct invasion of their territory.

The secularisation of the laws, therefore, must be ultimately accepted as the only means of attaining any continuing measure of success. Once this is accepted, however, it should be open to different groups to devise the approaches and strategies most suited to their circumstances. Given the harsh laws relating to blasphemy and the Ideology of Pakistan, and having had some experience of how they can be used and interpreted, caution would in any case have to be exercised and legal advice sought to avoid any dangerous consequences.

At the same time, democratic traditions and practices are not going to develop overnight in Pakistan, nor are institutions like the Council of Islamic Ideology and the Federal Shariat Court - which have done a major share of damage to women’s rights - going to miraculously
disappear. Since the circumstances are unlikely to change in the near future, the movement will have to learn how to deal with the situation as effectively as possible. While some may choose to put pressure to have the institutions demolished, others may for the moment prepare to use religious arguments to expose them. For organisations like WAF, still largely urban based and mostly consisting of middle-class women, working within the 'Islamic' framework increasingly seems unpalatable. For other organisations and groups with roots in rural areas and less advantaged groups, a similar position may be more difficult to evolve. Nevertheless the debate on this must be intensified and extended, since defensive positions and compromises based on the existing situation will only strengthen the hands of those opposed to the rights of women. For those who can afford to take a stand, the option of secularisation must be declared openly. While an initial negative reaction is to be expected, it is likely to acquire legitimacy over a period of time, just as the issue of women's rights has and continues to acquire legitimacy. Such a stand could also encourage co-called secular political parties, which have made rapid about turns for reasons of political expediency, to come back to the fold.

Women in the forefront of the struggle have always seen the women's rights issue as a human rights issue, though it has taken years of struggle for the world to recognise it as such. It is essential for women to bring their concerns unambiguously within the ambit of the human rights framework so that the issue acquires a universal legitimacy, and the oppression of women can be recognised as a crime against humanity instead of being defended under the garb of religion or dismissed as a mere cultural transgression. Strategically, this becomes even more critical since national governments, which manage to slide out of international covenants on women's rights issues relatively easily under the cover of religious injunctions, would find it more difficult to justify how basic human rights can be violative of what is claimed to be Islamic. The recognition of women's rights as a human rights issue, would oblige governments to review their positions on women's rights and to maintain a better human rights record which could affect their access to aid. It would also be more difficult for foreign governments to
ignore this record, as they have done in the past, when being supportive of the national government in power to suit their own political purposes.

Equally clear is the need for the women’s movement to ally itself with the democratic or people’s movements within the country. While the martial law government of Field Marshal Ayub Khan may have managed to do more for women with the stroke of a pen than any democratically elected government, the martial law government of General Zia was able to do much more damage in reverse. In any case, reforms initiated by authoritarian regimes never acquire the legitimacy or win the acceptance of those demonstratively in accordance with ‘the will of the people.’ Only within a framework that ensures democratic processes and recognises and ensures the rights of all human beings, can women hope for recognition of their demands as their rightful due. Within a system of entrenched power and authoritarian governments, any winds of change which could shake however slightly the foundations upon which the status quo rests, would constitute a danger to be immediately crushed or neutralised. Strategically, alliances with people’s movements would give the women’s movement a strength not otherwise available. Within these alliances and common struggle for democracy, however, the women’s movement must maintain its own distinct identity and agenda. Experience has shown that women’s issues often have to take a back seat when ‘more important’ national issues are at stake, and are the most easily compromised in the interests of political expediency. Even if the dream of genuine democracy were to be realised, special efforts would still be needed till such time as women are integrated fully into the decision-making processes of the country at all levels as a matter of right.

While the women’s movement reviews it positions and strategies, the alarming pace of political developments and frequent restructuring of political alliances currently taking place in Pakistan is likely to keep it constantly on the alert. Not only must women keep pace with political developments in the country, they must also constantly watch out for and take serious note of what may seem like isolated moves towards retrogressive thinking and authoritarianism, whether it directly affects women or not. Isolated moves have a habit of developing into distinct trends and patterns, and may be more difficult to handle cumulatively at
a later stage. Thus, vigilance and reaction must continue to form a major part of the efforts being undertaken. And, above all, the movement must regularly and collectively review its own efforts and strategies critically to see how limited resources can most effectively be utilised.
History of the Passage of the Shariat Bill

The Shariat Bill was initially introduced as a private members bill in the Senate by Qazi Latif and Maulana Sami-ul-Haq in 1985. The bill was referred to a select committee and meanwhile the treasury benches introduced their own measures for Islamisation in the form of the Ninth Amendment Bill. The select committee found major deficiencies and flaws in the bill and circulated it for further comment.

With the dismissal of the Junejo government, progress on both the bills was stalled. In June 1988, Zia-ul-Haq promulgated the Sharia Ordinance, based on the recommendations of a committee set up for the purpose. Strongly criticised even in religious quarters, it remained unenforced. After Zia-ul-Haq’s death, President Ghulam Ishaq promulgated a slightly revised Sharia Ordinance in October 1988. Meanwhile, the PPP government of Benazir Bhutto came into power and it allowed the Ordinance to lapse by not introducing it in the National Assembly. In March 1989, Qazi Latif and Sami-ul-Haq again moved their ‘Enforcement of Sharia Bill’ in the IJI controlled Senate and this, along with the Sharia Ordinance, was referred to a committee. An amended bill was presented to the Senate in May 1990 and passed. The PPP government was put in the position of either passing the bill in the National Assembly within 90 days or having a joint sitting of both houses on the issue. Before any decision could be taken, however, the President dismissed the PPP government and dissolved the National Assembly.

The new IJI government created a special committee to look at the Sami-Latif Bill and to suggest amendments so that it could be passed as a consensus bill. While the committee was still deliberating on the bill, the Sami-Latif Bill was again moved in the Senate as a private members bill in December 1990. In April 1991, Nawaz Sharif addressed a joint sitting of both houses and declared his intention of moving a constitutional amendment declaring the holy Qur’an and Sunnah as the supreme law and also of tabling the Sharia Bill. The constitutional amendment bill was never tabled, but the government introduced the ‘Enforcement of Sharia Bill’ in the National Assembly in April, 1991. Though the select
committee to which it was referred failed to reach a consensus, a slightly amended version of the bill was presented to the National Assembly in May 1991. With some government amendments introduced into the bill, it was passed by the National Assembly, followed by the Senate, on May 16 1991.

Endnotes

1 In 1981 Fehmida and Allah Bux were tried and found guilty of zina (adultery) and given the maximum punishment under the Hudood Ordinances. The previously married man, Allah Bux, was sentenced to stoning to death while Fehmida was awarded 100 stripes. The case was later dismissed after having been taken to the level of the Supreme Court (Jahangir and Jilani 90:55).

2 A partially blind girl, Safia Bibi became pregnant after she was raped by her employer. Her father filed a rape complaint at the time of her delivery and the Sessions Judge found her guilty of zina and sentenced Safia to 3 years rigorous imprisonment, 15 lashes and a fine of Rs.1000/-. The alleged rapist was acquitted owing to want of evidence. WAF organised an emergency meeting and raised an outcry against this and eventually the sentence was reversed by a suo moto decision of the Federal Shariat Court.

3 All Pakistan Women’s Association was formed in 1949 under the leadership of Raana Liaqat Ali, wife of the first prime minister of the country. It was conceived as a voluntary, non-political organisation open to all women of Pakistan above 16 years of age (Mumtaz and Shaheed 87:52).

4 Jalsa is a large gathering or meeting often used to denote a political rally.

5 Currently both sides have gone in appeal. WAF maintaining its original petition to prevent privatization.

6 Appointed by Zia-ul-Haq on 10 July 1983, the Ansari Commission was assigned the task of examining recommendations made by previously formed committees and to submit viable proposals regarding the system of government. Its recommendations regarding women included closing the office of the head of state for women, setting up a separate women’s university and restricting women’s participation in elections by raising the minimum age requirement for women candidates to 50 years. Most of these negative recommendations, however, were not adopted (Mumtaz and Shaheed 87).

7 For example during 1994-95, the government ran a campaign against violence against women on the television, the first tenure of Benazir saw several TV programmes focused on women’s rights.

Reference


The Other Side of the Discourse: 
Women’s Experiences of Identity, Religion 
and Activism in Pakistan*

Farida Shaheed

Abstract: The present paper looks at three interlocking but distinct issues: the increasingly religious idiom of political expression in Pakistan since the mid-seventies; women’s everyday experiences of gender and religion during the intensive state-led ‘Islamisation’ campaign of 1977-88 as narrated by them; and, in the light of these, the ability of activist women’s groups emerging during this period to cut across class and other identities. Even separately, documentation and analysis on these subjects is limited. In the absence of women’s recorded narratives of their lives and of their experiences of religion, analysis has often reduced people’s experiences/relationships with religion to the political use of the latter in the public arena. These two phenomena are not synonymous. The women’s accounts presented here point to the different levels at which the two operate and even suggest a disconnection between them that needs to be examined.

Introduction

The ability of the women’s movement to bridge women’s distinct identities of class, ethnicity or urban-rural locations has so far been analyzed in terms of the class background of activists and whether the feminist discourse was secular or not. I suggest that class - though significant - is not enough to explain the inability of the current women’s

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movement to cut across other identities and that the reasons may have less to do with the language of feminist discourse than with the public political nature of the movement in which the tendency to focus on national level legalistic rights is so strong that it almost excludes women's personal lives where definitions of gender and attendant control mechanisms are experienced on a daily basis. Further, as discussed in the paper, developments taking place simultaneously at different levels do not necessarily have the same direction and the contradictory impact of these needs to be borne in mind.

In exploring the interlinkages, this paper draws upon three basic sources: a personal and continuing involvement in the debates and activities of women's advocacy groups; women's experiences of everyday life collected in a year-long study on Women Religion and Special Change; and the Women and Law Country Project of Shirkat Gah. This last included a nation-wide survey documenting women's knowledge of statutory laws and the actual practices that govern their lives, and since 1993 has worked with women in numerous grassroots groups on issues relating to law and rights.

The Politicisation of Religion

Until the advent of General Zia-ul-Haq's martial law regime in 1977, the dominant central elite's attitude towards religion, dictated by self-interest, vacillated between ignoring religion as a personal matter irrelevant to the national project of modernisation, attempts to appease (or silence) the small but extremely vocal politico-religious groups, and an opportunistic use of religion to further their own political power (Mumtaz and Shaheed 87; Rashid 85). The class acceding to state power at independence had internalised the premise of the colonial discourse that any religious/cultural tradition deviating from the approved Eurocentric Christian tradition was incompatible with the desired goal of modernity and progress (Nandy 83). Culturally fragmentated and politically heterogeneous, the populations of the colonised territories were divided by class and geographical location with numerous cultural-structural entities ordering life co-existing either in harmony, or in competition with each other for legitimacy and supremacy.
Delegitimised in the era of nation states and modernisation, diversities were ignored or suppressed in the nationalist struggles (Lateef 90). Post independence, sub-state bonds of community have not only proved resistant to attempts by central elites to promote markers of identity that would justify their own leadership (Brass 79) (and distinguish this ‘nation’ from others), but have strengthened as people’s response to unequal economic and social development and blatant injustices takes the shape of a ‘re-tribalisation of society’. The continued fragmentation of society is perhaps best exemplified by the parallel systems of law and governance that continue to flourish in Pakistan where, on the ground, the operational law is rarely that of the state, particularly in family and gender matters (Shaheed 94).

Concepts of gender, intrinsic to any definitions of a collective self and reflective of the dominant ideology, accompany contests for political supremacy and attendant cultural battles from the international to the sub-national level. Leila Ahmed (92) and Lata Mani (89) have shown that women and gender had a special place in the discourse between the imperialists and the colonised, consequently contemporary attempts by politico-religious elements to appropriate definitions of gender are not as a radical break with the past but a continuity. The complex manner in which religion determines the possible for individual actors, particularly women, cannot be reduced to the use of religion as a mobilising force in the political arena. In fact, I would posit that the capacity for political mobilisation hinges on the personal and social roles religion performs. For many people religion is not only a faith but an essential marker of self-identity. Informing their lives, religion serves as a code of ethics and behaviour and is part of the prism through which they view the world. However, attitudes towards and practices flowing from any given religion are determined as much by collective memories, existing social structures and power relations as by the doctrine, evident in the disparities across class, ethnicity and sects. In each community, religious beliefs are so tightly interwoven with cultural practices that customs unconnected to and some blatantly contradicting the doctrine are practiced as religious (Shirkat Gah/WLUML 94, 95a and 95b; Balchin 96). Yet, within this cultural entity, the boundaries of the acceptable are not fixed but part of a dynamic process.
People's responses to the shifting parameters of their lives involve more than a mechanical accommodation to external forces. Interaction actively engages people's perceptions and world views (continually modified in the process) in which religion plays a greater or lesser role depending on historical experience, social grouping, political preferences, etc. Adaptation is a dynamic two-way process, and it is the ability of religions to continuously reinterpret traditions in the light of altered circumstances that allows religious continuity. The real question, perhaps, is why religion has such an appeal as an idiom for political expression today (Rashid 85; 94; Kandiyoti 89). A full discussion of this is beyond the scope of the present paper that presents only some developments in the Pakistani context that have helped promote a conservative religious discourse in the public arena.

By the mid-seventies, at the international level, in the wake of the petrodollar boom, the idea of a Muslim identity as an alternative axis of international alliances had found a positive response, opening the space and providing the justification for people to create/recreate a collective identity in the likeness of those with oil power. While Zulfqar Ali Bhutto remained in power (1972-77) Pakistan maintained close links with Libya, Iran (ruled by the Shah) and Saudi Arabia - linkages that also marked a deliberate shift in orientation from South to West Asia. When the Shah was replaced by Khomeini in Iran, Pakistan strengthened its ties with Saudi Arabia.

At the ideological level, the modernists (liberals and dictators alike) who ruled until 1970, failed to bring about any major improvement for the majority. The seventies saw leftist groups coopted into Zulfqar Ali Bhutto's Pakistan People's Party or harassed to the point of redundancy; and Bhutto's own populist ideology of 'Islamic Socialism' (liberally mixed with nationalism) also foundered on the basic issues of economic progress, social reforms and human rights. In the mid-seventies, opposition to the PPP came from a motley collection of political parties but was articulated in a religious idiom by politico-religious forces led by the Jamaat-e-Islami. Though the use of religious discourse was not new to Pakistan's political arena, the conservative politico-religious discourse acquired legitimacy in the seventies through the complicity of the 'mainstream' or 'secular' parties such as the Awami National Party.
and the Tehrik-i-Istaqlal who, in their antagonism to Bhutto, went along with the discourse for reasons of political expediency. Coinciding with a general disillusionment with the fruits of the political process, this prepared the ground on which Zia was to erect his ‘Islamisation’ programme. Described by some as the high point of fundamentalism in Pakistan, Zia’s decade (1977-88) actually witnessed the convergence of interests between the military rulers and politico-religious groups - the former seeking political support for credibility, the latter seeking access to power consistently denied them through the electoral process. In terms of social configuration, this was an opportunity for the emerging class of traders and entrepreneurs to make their mark on the political structures of power and it is amongst this class that the religious idiom, intersecting with political ambitions, found the greatest support. The religious discourse initiated under Zia emerged against the backdrop of a much wider crisis of national identity in which a politically illegitimate martial law regime turned, as others had, to religion (Islam) possibly as a means of containing intra-state conflict, but definitely as a cloak for imposing ever more repressive and undemocratic measures and preempting opposition to these. While regional tensions within the state remained unaffected, the state’s policy visibly immobilised opposition to the regime (Rashid 85). Interlinking state power and religiosity, the regime gave currency to the latter as a key for opening the door to political power. With politicians bent on proving their “Islamic credentials”, the ensuing battle royale for the mantle of religious leadership saw heightened sectarianism and associated violence, and deepening intolerance (see Rashid and Shaheed 93).

Women were peripheral to the contest for political power but gender definitions were central to the newly religious political discourse and women became easy targets of General Zia-ul-Haq’s version of Islamisation in which, for the first time, the state led an offensive against women’s rights through legislation and administrative directives, and attempts to restrict women’s mobility and visibility and access to economic resources. Yet, one tends to forget that women are heterogeneous and experience the contradictions between self and other individuals and institutions (including the state) modulated not just through gender but also through multiple other factors such as class,
ethnic and religious identity. The discourse and debate on women remained almost exclusively urban and, ironically enough, this decade marked by retrogressive steps and the rhetoric of the religious right, saw the largest number of women entering the formal labour market and the informal sector (Pakistan Institute of Labour Education and Research & Shirkat Gah 93; Mumtaz 88); female applicants for higher education increased as did the number of technical training institutes for women; and in urban areas even as dress codes became more uniform, an unprecedented number and new class of women started appearing in public places of leisure such as parks and restaurants.

Women’s Relationship with Religion

Towards the end of the Zia era (1988) a study on Women, Religion and Social Change documented women’s everyday experiences to identify women’s participation in religion and patriarchal structures both. Part of the research was a 139 household survey interviewing all resident women aged 15 and above. More anthropological than sociological in nature, the study was unconcerned with statistical validity. Instead it explored how women think and express themselves on different aspects of their lives: space, time, family and self/body as well as religion. Over numerous interactions women were mostly asked to describe situations/activities/ experiences/feelings. For example, women were asked to describe their families, their houses, their neighbourhood, their city/village, their day; what they did on religious and secular holidays and personal events; what things they enjoyed, who they admired, places they visited and avoided. They were specifically asked who in their household they felt had authority over them and who they had authority over; whether this was justified, and - exceptionally - the reasons for this. They were also asked whether there were advantages/disadvantages to being a woman. They were not, however, asked what they thought of religion or of politics or/and the impact of these on their lives. It was felt that women’s narratives should be as unguided as possible, and that the impact of and women’s relationship with religion should, emerge unaided.

To capture generational changes, only households with at least two generations of women were selected. The sample of over 400 women is
therefore not unbiased and, for example, excludes families with a single adult woman. Research was mostly conducted in the two largest cities of Pakistan: Karachi and Lahore, where change was most likely to have occurred, though one village from each province was included as a counterpoint. Using a snowball technique, the upper class Lahore sample is biased towards families with at least one woman activist.

To explore the influence of collective identities on women’s lives and perceptions, the study covered Christians, Parsees and Muslims; the last subdivided into ethnic groups, religious sects and villages that, for the purpose of the study, were taken to be ‘communities’.

The Karachi-based ethnic groups were the dominant Urdu-speaking community (originally migrated from what is now India) devoid of any attachment to a rural hinterland, the migrant Pukhtuns who maintains strong links with the distinct (and conservative) tribal/cultural identity and mores of the North West Frontier Province, and the indigenous Sindhis. In Lahore, Sunnis and Shias were looked at separately. Families were categorised into three approximate classes: upper, middle and lower income (identified through place of residence and through community informants, and cross-checked by observations). Not entirely satisfactory, this classification nevertheless served as a rough guide.

Questions and comments that would challenge the validity or logic of the answers or stop the flow of women’s narratives were consciously avoided. A clear picture of the respondents therefore only emerges in reading the entire interview transcript and that of other family members. While the data does not easily lend itself to statistical analysis, the transcripts give a fairly detailed picture of women’s daily lives, including the level of harmony or discord within a household. Comparing responses across classes and communities provides insights that suggest areas for future research and documentation.

This paper focuses on women’s descriptions of their family, authority, ideals and the perceived advantages/disadvantages of being a woman (this last most clearly revealing women’s analyses of their situation/oppression). Responses revealed some interesting patterns, the most significant in the context of the present paper, being (a) the centrality and paramount role of the family in determining the
parametres and experiences of gender definitions, (b) the living reality of
religion in women’s lives through prayers, rituals and practice, and (c)
the cognitive disconnection between the two.

The Family Prism

The fulcrum for many activities, the family is the focus of social
interaction on a daily basis, the location of honour (izzat) and the
primary means of identity (see also Weiss 92). Women’s responses
reflect strong patriarchal structures. Asked to simply describe their
family, women included statements to the effect that women have no
identity except that of their families, or that ‘a woman is recognised by
the men of the family’. Though many women spoke in general terms
(“we/they are”, “it is”), specifically mentioned individuals were
predominantly male. Descriptions started with:

“Which family? in-laws or my maihka (consanguine family)? If anyone
asks about my in-laws, then I will speak about my father-in-law, my
husband and dewar (husband’s younger brother), what they do, what
their names are, or I will speak of my mother-in-law. And if the question
is about my maihka, then obviously I will speak of my father and
brothers because a woman is recognised by the men of the family”, “I
introduce my family with my father’s or father-in-law’s name”, “I will
tell them about my husband and brothers...”, “Our family is good, my
father is...”, “Our family is very good because my father-in-law was...”,
“It is a very good family. Two of my jaiiths (husband’s elder
brothers)...”

The family’s centrality is equally obvious in women’s perception that the
cracter of family members and the good or bad fortune one may have
in marriage are essential determinants of the quality of a woman’s life. A
younger unmarried woman, for example, said: “My brothers love me.
Everything is provided for.” A married woman: “what greater benefit
can there be than a good husband,” another who felt advantaged as a
woman: “I married a man who treated me so well as a wife and as a
woman.” Another wished that her “husband [had been] been
broadminded, then the atmosphere [of her home] would be good,” her
daughter echoed the same sentiment saying, “I wish mother could have a
say on some things. Everything is in father’s hands.” The extent to which a woman’s married life depends on her husband’s character was illustrated by the different responses of two sisters married into the same family and living together in one household. Subjected to violence, the younger one said “[being a woman] was never a problem at my parents home, but having come to my in-laws, I have come to know how women themselves use other women, and how men mistreat their wives whenever they want. It is not without good reason that people cry at the birth of a girl.” In contrast her elder sister, who seems to have a more reasonable, certainly less violent husband, says: “No particular problem. Whatever God has made, he’s made well. Only men are of no use at all. Whatever my heart desires, I fulfill it.”

Family control is not exclusively a male dominion and women spoke of how mothers, mothers-in-law, and sisters-in-law intervened in their lives and also of their own authority over their children and younger siblings of both sexes. The level of control exercised by parents, siblings (particularly though not exclusively brothers), and in-laws determines the scope of a woman’s freedom of movement, access to resources and definition of self. The family is not, however, just about control and identity. It is also where the bulk of women’s face-to-face interactions and relationships are located and where ‘joys and sorrows are shared’. For the vast majority of women, the extended family and the immediate neighbourhood define the outer limits of mobility and social interaction. Perceived as the seat of honour and the anchor of a woman’s identity, the family is presented to the outsider in a positive light even when women question, criticise, or condemn the restrictions imposed on them by the family. Many women stated they would/could not speak badly of the family to outsiders “even if my relatives are bad” (N.B. they*were not asked whether their family was good or bad, only to describe their family). This does not, however, blind women to the gender and age based structures of control and authority that operate in the family, or the resulting problems faced by women.

At the individual level, female identity is experienced each day in tasks assigned (or assumed), interactions with others within the family (and to a lesser degree outside) and in the restrictions placed on women’s potentiality. The dynamics of a class-based society mean that poor
women - already disadvantaged in so many other aspects - also had the narrowest base for negotiating space for themselves as women. Coupled with less rigid controls, access to education and resources allow women to expand their reference points and take greater initiative in shaping their own lives.

Control varied by religious or ethnic community and class. Upper class women tend to enjoy greater freedom, space, voice etc. than others. As a community, Parsee women were most likely to say that no one had authority over them (50%). This group also the best educated, is concentrated towards the upper brackets of Pakistan’s income levels, and had the highest percentage of working women. In sharp contrast, only exceptional Pakhtun and Sindhi women felt able to make this statement (3.6 and 7.5 % respectively). Descriptions of what they do when they disagree with decisions made by others confirmed the dissimilar spaces available to women. Younger Pakhtun women most frequently remained silent; unmarried daughters because: “our views are not accepted”, “talking back to parents is not liked in our family”, “in the end, elders have to decide everything, especially my father and brothers”; married women because: “my husband decides everything in consultation with his elder brother” or “my husband never asks my opinion on anything, what difference can be made?” “If I disagree I keep silent, I don’t give arguments because things will inevitably happen as these people want.” In other communities mutual consultations and women airing their views were more common, and elder women had a greater say in everyday matters though ‘important’ decisions were still taken by the male authority.

By and large, women accepted the status quo and the way authority is exercised because “he is my husband”, “they are my parents”, “I am their mother”, “they are younger”. Sometimes parental authority (occasionally including that of in-laws) was justified as deriving from their greater experience. Explanations for a husband’s authority fell into four broad categories; “because he is my husband”, “because one has to,” “he knows more about the outside world/official matters”, or “because he earns and provides for me”. Younger unmarried women were more likely to question the system’s gender biases. More than half of those critical of the authority structure were unmarried women, 44 %
were aged 15 to 24 years (36% of the sample). Only 14% of those questioning authority were 45 or older, but this age group - largely coinciding with the category head or female head of household, were also most likely to say that no one has authority over them (65% compared to 26% of the sample). Young unmarried women who accepted no one's authority all had at least a BA level education as did the rare daughters-in-law who expressed similar sentiments.

Families imposing many restrictions were characterised as conservative/narrow-minded or following the pattern of a particular community or Pakistani society. The connection between 'religiosity' per se and a strict control over women was not made. Only one 55 year old doctor mentioned the religious conservatism of her family in relating her personal struggle for independence, but religion was only one factor in a list headed by cultural norms. She described her family as: "a custom-bound conservative Pathan family which has a fundamentalist religious, feudal and superstitious mind". In contrast a 41 year old woman saw her family as "educated, religious and liberal". Women do not therefore, seem to view religiosity as a deciding factor so much as whether the family is custom-bound and conservative or liberal; while religion can be a part of either scenario.

Married women unhappy with their situation tended to see this as their misfortune in marriage and in-laws rather than analyzing the family structure which would necessarily mean questioning the same structure in their natal families. Even when they resented the imposed restrictions, all women presume that parents, at least, have (or had) the women's best interests at heart. Many gave this as the reason for accepting parental authority despite their complaints, often adding that their parents loved them and fulfilled their wishes. Explaining her lack of open rebellion, one unmarried Pukhtun woman said: "it is a big problem because whenever I am told to do anything, the first worry is that today we are at our father's place, but when tomorrow we have to go to someone else's place [meaning marriage], maybe the past will cause problems. That's why I fear. Therefore I have to think seriously all the time [about my actions and behaviour]".
Neither the structures operating in the family nor most relationships within these were perceived as deriving from religious tenets; the only possible exception being husband-wife relationships. Five urban women attributed their husband's authority over them to his position of "god-on-earth" (*majazi khuda*). Four, aged 43-55, were from economically better-off families, the fifth was a 35 year old from a poor family. Two aged village women spoke of their husbands being their "lords" (*sir da saeen, malik*). However, this is only seven women out of a total of 407 interviewed, less than four percent of those ever-married. In any case, this - now increasingly rare - belief derives from customs rather than religious doctrine and, indeed, is antithetical to the religious doctrine of the respondents, i.e. Islam. There is an obvious need to further explore the extent to which the opinion that women are duty-bound (or obliged) to obey their husband derives from religious underpinnings and the extent to which this statement is an acceptance of the reality of their lives.

Women's narratives point to the difficulty of challenging definitions of gender dictated by the family in the minutiae of everyday life. The family is also a woman's main support base. Hence, though changing a woman's everyday life is in large measure dependent on redefining gender rules within the family, without access to non-family support systems - that simply do not exist for most women - this is a risky enterprise. Not only is there the certainty of having to re-negotiate terms with a primary support base, a woman can be completely cut off and even killed. As one woman said: "and if I didn't accept [her husband's authority], where would I go?" Isolated by zealously enforced patterns of mobility in a small family- or kinship-centered social circle, women rarely interact with wider circles that could provide models of different lives and self. The wider the point of comparison is, the greater the potential is for women to change their life patterns. In the survey, statements by women whose families had migrated from small towns or villages to large urban centres show altered perceptions catalyzing desires to redefine the contours of their lives. Prior to the relocation, the imposed definitions of gender applied to them were the only visible ones and went unquestioned. In the new environment their own families attitudes appeared suddenly conservative and their own lives more
controlled than that of their peers. In the words of one woman “since coming here I have seen that there is much strictness in my family.”

The Boundaries of Dreams

An intensely male centered society curtails women’s ability to dream of altered lives also because it provides so few positive female role models. Women’s voices on who they admire conjure up a male dominated landscape. The very limited horizons within which women are obliged to live their lives and conceive their hopes for the future is visible in the inability of a sizeable number of rural women to name any woman they admired at all. Even the personal acquaintances women admire tend to be men though upper class women - whose circles provide women the greatest opportunities for fulfilling potentials - mentioned more admired female acquaintances than the poor (18% and 8% respectively). Women politicians, particularly Benazir Bhutto (who contested elections and became Prime Minister during the study), inspired the poor more than the rich and without politically significant leaders, the pool of women who inspire others would shrink drastically. Despite their diverse religions and backgrounds, very few women admired a person whose significance was purely religious. The public personalities named were active in the political or social (and less often cultural) arenas, some bridged the fields of religion and politics or occasionally culture (Sufi poets). Different patterns emerged for different communities, pointing to the importance of community - whether defined in religious or ethnic terms - in women’s consciousness of self and others and their interaction with and integration in the wider Pakistani society.

At the close of a decade long intensive ‘Islamisation’ campaign, women’s narratives certainly convey feelings of impotency and frustrated desires, but their analysis pinpoints traditional culture (that includes but is not equivalent to religion), societal norms and male control rather than religion as the root cause. Not even those active in the women’s movement opposing the Islamisation campaign analysed the source of oppression experienced in the everyday as stemming from religion per se. Most women activists failed to refer to religion at all. Examples of those who did are: “In the period of Hazrat Mohammad and Hazrat Zainab, the role of Hazrat Fatima-tu-Zehra and Hazrat
Zainab are both very clear...Following her footsteps, we can come on to the street and fight for our rights...”,” “Their self-confidence is so fragile that men just cannot tolerate that their women too have the right to go out. It’s actually their own problem and they are the ones who have started all this issue of hijab [the veil] etc. Pakistani men are mentally sick.” “Our society is no good...There’s no freedom. If a boy does something, no one says anything to him. If a girl does something, she is hauled up. Even if there’s no reason, people still gossip/ bad mouth her. There are constant problems, one has to suppress oneself in all matters. [A woman] cannot live according to her own likes and dislikes. [She] has to give in to others.”

Across communities non-activists women distinguished between what religion says and the dictates of a male dominated society as exemplified by the village woman who felt that God has made all things well, it is men who are useless. One elderly villager said: “Women are the mothers of prophets...God has given her much honour. Other things depend on our [level] of understanding.” A sixty year old city-dweller felt that “Although God has made all men and women the best of living things, the woman is very oppressed. You can say she is a second class citizen. Women cannot do many things though they wish to do so for their children and for society. Our way of life is such that every sacrifice is said to be a must for women and not for men. At times like this I feel hurt.”

In Karachi, a middle-class woman stated: “After God, woman is that being which is called ‘mother’, which is called dharti (mother-earth), which is called earth...The disadvantages of [being a woman] is created by a class society. The woman is disadvantaged only by the system. In a broadminded, free and social democratic society, there is no sex discrimination. This only happens in our imperialistic, materialistic, ignorant and backward society.”

A Sindhi woman felt: “in the present society, and seeing the position of women, being a woman is a problem in everyday life.” Others also stressed aspects such as: “in the present society, and seeing the position of women, being a woman is a problem in everyday life”, “men don’t take women to be human beings”, “a woman is considered inferior to
men and she has to do everything with their permission.” “The values and norms of our society are such that women are given less respect than men and... have no independence to make decisions.”

The paucity of female role models may partly explain the frequency with which the perceived disadvantages of being a woman were so often prefaced with the refrain: “had I been a boy/man...” This appeared almost like a litany proceeding statements such as “I would have been able to work outside,” “I could have done all those things I could not do being a girl,” “may be immediately after being divorced I would have remarried,” “I would have been able to go about where I liked,” “I could have the freedom to study or do a good job and go on tours,” “I would have done great things,” “I would have been happy,” “I could have lived like I wanted to.”

A persistent complaint was that women had no or little freedom of movement. Strictly controlled mobility affected women’s leisure, socialising, studies, (where relevant) work possibilities and coping with crises. “Nowadays I am alone, I cannot go out for anything. If a child is sick I cannot take them to the doctor, etc.” Younger women, time and again, spoke of the discriminatory attitudes towards girls and boys in their families and outside. Brothers were allowed out and not questioned (or questioned less), men did not need permission to go anywhere while women could be refused permission to leave the home even for the purpose of attending a mother’s funeral. Women were prevented from pursuing their studies and holding jobs. They were expected to do chores for their brothers, and live according to the desires of others in their families. Many resented this. Younger women complained more than their elders but at least some women from all ages, classes and communities voiced complaints that stemmed from the fact that, as one poor urban mother said being a woman “is a problem because we have to accept a man’s word.” Not once did any woman say that the disadvantages of being a woman or problems faced were ordained by or stemmed from God’s word, or religious dictates. One woman explained: “because he is earning, I have to half-heartedly agree with him on many matters.” Others clearly identified the problem as being located in their families or community e.g. “In our family we have to obey the men who are very strict”, “In our family educating girls is considered a bad thing.
Also girls do not get freedom to move about on their own will.” “It’s a
great problem in our family women do not enjoy liberty nor can they go
out of the house, nor can we do anything according to our wishes.”
(emphases mine). The implication of specifying a family or community
is that change is possible for some women, if not for themselves.
Compare these responses to those of other women who for one reason or
another have a sense of personal achievement:

“I think I am very successful in my life. I have a house. I am educated
and trained. I have every type of facility and independence. If I didn’t
have independence, then I could have wished I were a boy. As it is, I am
happy.” “For a woman there are many problems, but I am proud of
being a woman. A woman can do many things. She can change life. I
have done everything which I wanted to.”

These women’s voices do not easily fit into the strain of feminist
analysis within and outside Pakistan that views religion as a primary
factor in women’s oppression, nor do women seem to feel any
compulsion to project their religiosity (contrasting with their apparent
need to project their family positively). Indicating a more inwardly
focused relationship with religion, most women’s accounts of their daily
routine do not mention religious practices at all. Yet, women’s answers
to a direct request to describe any religious activity engaged in on a
daily, weekly or monthly basis dramatically illustrates the extent to
which religious rituals and practices - as much as household
responsibilities, childcare, livestock or agriculture, studies or a job -
shape and structure most women’s days irrespective of their religion,
rural/urban setting, and income level.

Religious events, each with its own rituals and ceremonies, also
structure the year. But, where religion is a sub-theme of the everyday,
the important markers of a lifetime are non-religious personal events
such as births, marriages and deaths and, sometimes, educational
achievements. Nonetheless, religion features in the first three through the
rituals and ceremonies practiced (the last may also be marked by a
religious thanksgiving). Personal secular occasions such as birthdays
and anniversaries are celebrated only by the affluent urban class and
some middle class urbanites. Official events such as Independence Day
and the birth and death anniversaries of public personae may be noted or 
used as occasions for outings but do not entail a sense of personal 
participation or commitment.

For women, religion bridges the realm of the spiritual and social. Neither 
daily nor episodic religious events are seen by women as intrusive in 
their lives; if anything they are welcomed. The social interaction that the 
religious framework provides women on occasions of prayer, dars, 
khatams etc. is unsanctioned and unattainable in any other form for most 
women. For men, tea shops, fields at lunch, cattle markets, and streets, 
not to mention office and work related activities in cities - or for that 
matter sports clubs - provide spaces and settings for social interaction 
and support groups. Yet the participatory nature of religion is neither 
limited to nor dependent on its function of social bonding. If periodic 
religious events provide a vehicle for reaffirming membership in a 
community, the individual, in and by herself, is the pivot of daily 
prayers. Many women expressed a sense of communion and peace in 
praying which, even forgetting for the moment the 
spiritual/psychological aspects, provides adherents a break from their 
daily routines and chores, allowing women space which is theirs 
absolutely. It is in its capacity to provide self-affirmation at the personal 
psychological level as well as that of the social collectivity that religion 
is unique. Through its rituals, practices, and structure, religion provides 
a feeling of participation and belonging in the most immediate sense, 
unavailable to vast numbers of women in other aspects of their lives 
(Ahmed 91).

This participatory aspect of religion - critical for the individual woman 
in my opinion - is rarely taken into account by feminist analysis. Nor 
does the activism of women’s groups in Pakistan provide women at large 
with equivalent means of participation in an alternative framework. 
Without meaningful substitutes, it is unlikely that women will willingly 
abandon the self affirmation and social participation they currently enjoy 
in the religious framework. Women’s own narratives do not speak of 
oppression as either emanating from or ordained by religion. Instead, the 
restricted repertoires of permissible female experiences and the resulting 
sense of frustration or impotency was attributed to gender identity, and 
what is allowed or disallowed through this definition imposed by men or
society. In short, these accounts of women’s everyday experiences suggest that while religion interwoven with cultural traditions colours and shapes the context of women’s lives, the actual contours of this life, the avenues that are open and the barriers imposed - the road map as it were to living your life - are perceived as socially determined and male imposed, with elasticity increasing with class and according to ethnic identity.

This does not mean, of course, that religious beliefs and norms do not play an important role in justifying existing patriarchal structures or that religious tenets do not inform attitudes towards gender and women specifically. There is no doubt that they do, indeed, as part of people’s worldview, are bound to. My point here is that women did not express this linkage when they could have. One could have expected statements to the effect that “our religion teaches us that men are the guardians/keepers (hakim) of women”. Instead what transpires in these interviews is women’s resistance or resignation to the reality, and not the discourse. In fact, it is significant that hardly any of these 400 women referred to the political discourse so evident in the mass media and the focus of activist women’s groups, much less to laws, directives, and policies. Only a few exceptional activists referred to the recent negative impact on women of state measures and the religious discourse, and that too, indirectly. This absence of a narrative connection between women’s everyday realities and the ideological discourse suggests that there are two distinct levels at which gender identity is experienced and defined: the public arena of political discourse and the more tangible personal everyday existence of women.

The Religious Discourse and Women’s Responses

The politico-religious discourse ascendant during Zia’s period did not affect all women equally. Rural women, i.e. the majority, were affected least directly though they felt the impact of measures and of legislative changes. Indirectly, rural women suffered the consequences of reduced expenditures on, and general neglect of women’s development programmes, especially in the areas of education and health. But the discourse of prescribed dress codes, demands for gender segregation, and campaigns to push women back into their homes had little impact.
Nor was it likely to. Better-off rural women were already living in segregated seclusion, while the poor had no option but to continue their agricultural and livestock activities side by side with their menfolk. In fact, neither the state nor the politically ambitious religious elements focused on rural women who, if anything, were held up as the truly authentic indigenous concept of womanhood. The political discourse was notably not (and still isn’t) interested in the conditions of women working in the fields, or the exploitation of women in brick kilns or construction. The primary concern of those leading the discourse was, of course, how to stay in power or accede to it. Insofar as women were concerned, the focus was on changed and changing circumstances and on how to cope with (and control) the implications of these changes for gender. As Fatima Mernissi insightfully notes, if the discourse calls upon women to veil, not work, or behave in a particular manner, the call itself bears testimony and is a response to the reality of (some) women not veiling, going to work, behaving differently etc., i.e. to women’s success in redefining traditional notions of gender in their favour to a degree that provokes a response (Mernissi 87).

Like most political debates, the discourse was the loudest in middle to large cities but for many - men and women - the official discourse of Islamisation, couched in the language of the justice of Islam, and respect and protection for women, etc. must have sounded quite familiar, echoing as it did popular culture, and would not have been perceived therefore as a cause for alarm. Few women were aware of how this was being translated into practical measures and the repercussions for women.¹⁴ Working women undoubtedly faced harassment in public spaces and in the workplace, but it is difficult to gauge whether the incidents significantly increased or whether, thanks to the emergence of vocal women’s advocacy groups, they received more attention. Similarly, it is probable that the general misogynist atmosphere further reduced women’s self-assertiveness resulting in even more precarious terms and conditions of work. But in Pakistan, factory shifts and work floors have always been gender segregated, married women discriminated against, and female workers assigned the least qualified and poorest paid tasks as a matter of course. How much better the conditions would have been without Zia’s ‘Islamisation’ is a matter of
conjecture. Conversely, despite a decade of official emphasis on gender segregation, some factories started integrating floor shifts in the early nineties (obviously for reasons of economic efficiency rather than any concern for modifying the rules of gender).¹⁵

Professionally employed middle and upper middle class women were most outraged by the anti-women collusion of state measures and religious discourse and, convinced they were the main targets of the religious rhetoric (see Shaheed and Mumtaz 92), formed the main force of a vociferous opposition to state policies. These women daily encountered the impact of the new conservative discourse in their homes through the state-owned television that blamed working women for the (real and visibly rampant) corruption in society and the disintegration of values in the family; in the streets going to or returning from work and at their work place, where every man seemed to have been granted a state licence to pass judgment on women’s dress and therefore - and by a quantum leap - moral ethics. In cities non-working elite women, too, were shocked out of their complacency by the government adopting the discourse of the politico-religious parties that, until then, had been disparaged as anti-modern and insignificant. Both these groups of women had made important gains first during the nationalist movements and then in the early decades of independence: redefining the parameters of their personal lives and substantially increasing their space in terms of mobility, education and employment.¹⁶ Unfortunately, many of these changes occurred within the insulated boundaries of class privilege in metropolitan locations. In a society segregated as much by class as by gender, the public visibility of women’s changing lives was minimal and class identity shielded women whose appearance or behaviour embodied this change from overt criticism. For other women changes were far less dramatic, the most important being access to and acceptability of education with its bonus of increased mobility.

Led for a decade by the Women’s Action Forum (Khawateen Mahaz-e-Amal), the limited women’s ‘movement’ was unable to catalyze a mass-based movement that crossed class boundaries and bridged the urban-rural divide. However, women activists confronted a stifling atmosphere: a martial law regime that - amongst other things - had abrogated the constitution, suspended fundamental rights, and banned political parties,
demonstrations and pamphleteering; an incessant use of state-owned electronic media to project a distorted definition of female identity; a veritable on-slaught of administrative measures, government directives and legislation all seeking to reverse - at the very least control - advances made by women in redefining their identity and space. Under these circumstances, it is commendable that WAF succeeded in its self-defined role of a 'lobby-cum-pressure group' with some measure of success (see Zia, this volume). In the prevailing conditions many women felt unable to openly join in activist groups and public protests. Lower middle class women attending WAF meetings articulated the probably dissimilar impact of activism for themselves and for upper and professional middle class women: 1) losing jobs was a greater danger for less privileged women than upper middle class activists who, anyway, were better equipped to handle the consequences; 2) if jailed, poorer women could be raped unlike better connected activists, and; 3) if women were beaten up in the course of their activism, upper and upper middle class women could expect accolades from their family members, for lower middle class women the same events could lead to further abuse at the hands of their own family members. These not insubstantial differences were recognised as valid by upper middle class women activists who also accepted that because they were better positioned to take the risk, their own activism needed to be that much more visible. Recognition did not, however, translate into strategising on how such differences could be addressed. At the time, the general pressure under which women activists were mobilising makes it more understandable that little attention was given to this problem; why subsequently these issues were not, on the whole, addressed is another matter.

It is important to realise that if activist groups failed to mobilise women across class and other identities when WAF opposed particular laws (justified through religion) from within the framework of Islam (1981-91), this situation did not change after it declared itself secular in 1991. One must ask, therefore, whether the principle stumbling block to building solidarity was not something other than the religious/secular nature of the discourse adopted by women's groups, (a frequently and
hotly debated question within women’s groups that consumed considerable time and energy).

Some of today’s stumbling blocks are rooted in the specific conditions prevailing in the late seventies and eighties. Activism was led by upper middle class professionally working women, i.e. precisely those women who had most successfully redefined the parameters of gender for themselves. Not only did they stand to lose the most from a narrowing down of those parameters they also felt gender based discrimination most acutely. Class privileges cushioned them from many discriminations and urban living and class integration diluted the potential impact of other identity-based restrictions. In contrast, women who suffer other forms of oppression in addition to gender (e.g. by virtue of class, religion or ethnic identity), necessarily have concerns not premised on gender. In societies such as Pakistan, sharply defined classes and high rural-urban disparities accentuate the very real differences in the lives of women. The greater the differences between women’s lives is, the more difficult it will be for an urban middle class women’s ‘movement’ to reach across its own experiences to encompass the realities of other women’s lives and contexts, and the more likely it is that divisions will act as barriers to women of one class (especially those having most successfully altered their lives) providing effective leadership and mobilisation across classes. Unless the dominant feminist groups recognise this and start addressing the particular concerns of different women in their discourse and activism both and consciously include leadership from different backgrounds, the base of the movement will likely to remain small or fragmented.¹⁸

The fact that this period of activism materialised in direct response to a state sponsored on-slaught on women’s rights had two consequences. First, the energy-sapping pace at which activists had to counter the agendas of the state and the discourse of right-wing religious groups operating in tandem left women activists - much like Alice through the looking glass - running to stay in the same place. This left little time for theorising, even less for setting their own agenda so that, instead of being shaped by an independent feminist analysis, women’s activism came to resemble a negative mirror image of the discourse it opposed. Second, the urgent need for countering the laws and other state
initiatives kept the focus of activism on legislative changes. It was of course imperative to resist the laws being proposed not only because they drastically reduced women’s formal rights but also because of their far reaching, equally disastrous implications (see Mumtaz and Shaheed 87; Jahangir and Jilani 91; Zia this volume). Yet, as confirmed by Shirkat Gah’s Women and Law research, the formal law is unknown to the vast majority of Pakistan’s women (family and many other matters continue to be ruled by customs), and has little meaning except for those personally confronted by its - usually unpleasant - implications (such as the Enforcement of Zina Ordinance). Consequently, many women may not have identified with the legal issues that dominated the discourse and activism of the women’s groups.

Whether related to law or not, campaigns - then as now - have focused on exceptional situations. Campaigns on violence against women (including domestic violence) for example, have been launched on worst case scenarios. Horrifying though such cases are, they may produce a cognitive dissonance amongst women reluctant to see the connections with their own lives. Nor have most high publicity campaigns been linked to concrete measures directly supportive of women survivors and victims. While it is far easier to mobilise animated support against blatantly unjust laws or the consequences of violence than for the more mundane issues (e.g. education), focusing on the law or exceptional situations both neglect the sources of women’s everyday oppression.

The study, Women, Religion and Social Change, identifies the daily control mechanisms: low mobility curtailing and controlling interaction with others and impeding access to medical facilities, educational institutions and employment opportunities, and an exclusion from household decision-making, including choosing a husband. Interactions between the urban based women’s resource centre (Shirkat Gah) I work with and a number of grassroots organisations in squatter settlements, small towns and villages leave me convinced that middle class ‘professional’ women’s groups dominating the feminist discourse need to carefully listen to other women’s articulation of their needs and to support them in pursuing their own agendas, rather than imposing preconceived ideas and priorities that stem from our own experiences and locations.
In *Feeling Foreign in Feminism*, Maivan Clech Lam presents a wonderfully articulate criticism of how the dominant "white professional" or bourgeois feminism" in the United States has appropriated the right to conceptualise the lives of women of colour and speak on their behalf from a position of power and privilege. I feel the same criticism can be made in the context of Pakistan specifically (but probably South Asia generally) with respect to those who dominate the activist discourse. She says:

> certain white feminist agendas in the United States appear not only off target but decidedly filmic. That is, they come across as too cleanly and detachedly representational, with little connection to the lives of women I know best, or to the difficult consequences that these women face when they try and change.... I certainly do not assert here that white bourgeois feminist accounts of their own lives are filmic; I state only that theirs of mine, on the occasions when they presumptively universalise their accounts of the lives of women, often are. (Lam 94:867)

I could not agree more with Lam when she states that exponents of feminism exercising the privilege that springs "from their relatively unproblematic access to authority and resources, which in turn have a way of generating one another" must learn to unlock the grip of arrogance when evaluating/analyzing what Isabelle R. Gunning calls 'culturally challenging' practises. To do so, Gunning suggests: a self examination of "the limitations imposed on her consciousness by her own homegrown subjectivities and needs"; a coming "to terms with her given status as heir of an ...order" and learning what that status signifies to other women "subjugated by that order"; and finally training "herself to hear, rather than talk, the lives of these women, in the fullness of their complexities - lives that these women hope to modify, even radically, but not jettison, at least not in the majority of cases." (Lam 94:871-872)

Without learning these lessons, urban-based activist women cannot be a meaningful reference point for others, though their discourse can still be heard. Better read in feminist literature and linked to international groups and concerns, middle class activists are most likely to engage in
discussions relating to the theoretical basis for action. This is fine provided that this better connected, less oppressed and more visible/vocal section of women does not level out (or perpetually putting into parenthesis) the very real differences in women's experiences and locations and impose its own analysis and reality as the only one for all women - something that unfortunately seems to be happening in the context of women and their relationship with religion. Perhaps the most significant contribution of the urban middle class women’s groups so far has been in catalyzing ideas and groups elsewhere. At this juncture, it seems critical to forge links not only between different groups of women but also between initiatives addressing women’s basic needs (that tend to ignore the question of rights) and those promoting women’s rights (that tend to by-pass women’s needs). The growing links between urban women’s groups and grassroots organisations have great potential providing linkages are a two-way process. For, until grassroots women’s groups start shaping (and not merely becoming integrated into) the feminist discourse, it is unlikely that women’s groups in Pakistan will effectively overcome the barriers and distances imposed by identities other than gender to forge a broad based women’s movement.

Finally, a fundamental issue confronting the women’s movement in Pakistan is the seeming lack of correspondence between feminist theory that sees the inter linkages between the political and the personal as an intrinsic factor in controlling women, and the activism of advocacy groups that have so far concentrated, almost exclusively, on strategies and structures for public political intervention. It is true that many of today’s most vocal women’s rights advocates gained their experience of activism at a time when the need to place women on the national agenda and resist a retrogressive trend encouraged them to focus on issues which caught the public imagination and the attention of policy-makers. But, because women experience patriarchal control through a collusion of mechanisms simultaneously operating in the public and private spheres, women’s activism is obliged to evolve effective strategies for both.
Conclusion

I have tried to problematise what emerge as gaps in consciousness and analysis in the spaces located between women’s everyday experiences of patriarchy and religion on the one hand and the political aspects of these on the other, and to look at the implications for the women’s movement in Pakistan. Feminists need to examine why women’s narratives of the everyday make little or no reference to the forces operating in the public arena; they need to be conscious of, and their activism informed, by the dissimilarity between women’s own accounts of their relationship with religion and the dominant thread of women’s activism that sees religion primarily as a source of oppression.

Two challenges to the women’s movement go beyond the discussion of the role of religion. The first involves rethinking the almost exclusive reliance on structures and styles of activism borrowed from political movements so often criticised by feminists precisely for ignoring the personal aspects of women’s oppression. Without renouncing the public political side of the struggle, women must devise creative strategies for meaningful change in the private personal realm so that individual woman can redefine the constructs of gender within the family and loosen patriarchal controls in their daily lives. The second stems from the incontestable fact that it is the limitations and oppression of being female that unites women across class and ethnicity, poignantly exemplified by the chorus of women’s voices repeating: had I been a boy I could have, I would have, I may have... The absence of a positive definition of the female gender - not premised on women’s reproductive powers - may partially explain why community has a stronger appeal than either gender or class, for community identities (ethnic or religious) allow women to share in myths of greatness and strength and not just oppression (this is also true of oppressed classes and may have similar repercussions for class-based struggles). Moreover, implicit in the concept of community is the tacit or overt assurance that the community will protect its ‘members’ (however they may be defined). Existing women’s groups, whose hopes for a better future usually depend on successful negotiations with state structures, cannot make an equivalent claim. Systematically integrating issues of development into their
activism as well as their discourse, women’s advocacy groups need to devise mechanisms for direct interventions that do not rely exclusively on the - often discredited - state apparatus.

Like patriarchy, religion operates at both the personal and public levels and can be seen to pose a similar challenge. Even though women’s narratives suggest that the interface between religion and politics is not the primary - certainly not the only - framework in which women relate to religion, there is no doubt that the manipulation of people’s relationship with religion in the political arena affects women profoundly. If the ascendency of religion in the political sphere has less to do with concerns about gender than political bankruptcy in the pursuit of state power - and the failure of the state to fulfill, and of politicians to actively pursue, the social contract - concepts of gender have occupied a central place in the accompanying discourse. In their bid to monopolise the public discourse, politico-religious groups have been alarmingly successful in manipulating symbols and shifting the parameters of the debate. With meanings generally becoming less reflective of the plurality on the ground and progressively more dichotomous, the strident voice of the politico-religious parties is steadily eating away the space for autonomous definitions and experiences of religion previously open to women. Increasingly, vast numbers of women whose faith is a living reality are being pushed into a no-win choice: to give up their faith altogether or to conform to the dictates of groups whose political agendas are cloaked in religious discourse.

While there is an urgent compelling need to vigorously and vociferously oppose - by all means and at all levels - the discourse of politico-religious groups that seek to straight-jacket definitions of gender, it seems important that women activists avoid the trap of falling into the dichotomous logic of dominant male groups by rigidly counterposing feminism and secularism on the one hand and religion and women’s oppression on the other. (Dictatorships and fascistic tactics are not, after all, the monopoly of the religious right.) This ‘either or’ choice not only imitates politico-religious and other identity-based political elements who use it to further their own ends, it also fails to adequately answer the needs at hand. To successfully redefine their lives, women have to
simultaneously redefine markers of identity and self other than gender. These other markers are not necessarily the same for all women, for some it may be class, for others religion or culture, for yet others one’s profession. I see no reason why these should have equal weightage for all women, nor why one group of women should dictate to another what are the most critical markers for them at any particular point of time.

If, as feminists, we reject external impositions of ‘womanhood’ and insist on exercising the right to self-definition, it seems illogical to then reject the right of other women to define - or redefine - gender in ways that have meaning in their lives, even if not in ours. Feminist groups need to consciously promote autonomous choices for women, and respect the differences in choices made by women. Undoubtedly, the insistence of women who want to retain (or not oppose) certain practices or beliefs may be ‘culturally challenging’ for others, such as issues of religion. However, women - as also men, but we are concerned here by women - must have the right to challenge both the doctrinaire, legalistic version of religion and the ethnic and religious chauvinism currently ascendant in the political arena without, necessarily, being obliged to renounce either their religion or their ethnic identity. Instead of a headlong confrontation, a focus on concrete issues and desired changes can bridge the distances and differences and allow women to formulate their own justifications for introducing change. Through networking and their actions, activists and autonomous women’s groups can catalyze change by becoming reference points for identity and self other than those defined and promoted by the dominant male ideology (whether politico-religious or secular).

If the general thrust of this paper has been to highlight the personal aspects of gender that control women’s lives it is not because the political and legal aspects are unimportant, but because I feel this is a neglected area in Pakistan - both in scholarship and in activism. Nor do I mean to undervalue the role of urban-based middle class activists. Indeed, had this class of women not aggressively opposed both the religious discourse and the policies adopted under Zia (the former continuing after his death and the latter still on the statutes), the prospects for women’s equality in Pakistan would have been even bleaker than they appear today. My concern here is that the self-
professed feminists in the broader women's movement not reduce the basis of the feminist struggle to their own existential realities, and that the movement not become exclusivist to the point of inducing a widespread 'feeling foreign in feminism' syndrome. Such a narrow perspective denies the disparate existential realities of women that define the parameters within which women do daily battle with the definitions of gender imposed by patriarchy and that are the contextual springboards for an engagement in the broader political struggle for women's rights. Without recognising and accommodating the real differences between women there is a danger that the feminist discourse-like the religious discourse-may find no resonance amongst many women who see in it little connection with their own lives.

Endnotes

1 The Pakistan Women and Law Country Project was part of the multi-country action-research Women and Law in the Muslim World Programme of the network, Women Living Under Muslim Laws.

2 I have borrowed this concept from Nandy (83) who says that the greatest tradition is the tradition of re-interpreting traditions.

3 In Pakistan's case this is visible in the holding of the Islamic Summit in 1974 which served as a means to both launch the Muslim alliance axis internationally and was used as an occasion for recognizing Bangladesh and closing the chapter of the civil war.

4 The most popular slogan was that of fighting for Nizam-e-Mustafa, i.e. the system prescribed by the Prophet Mohammad (pbuh).

5 This regional study was conducted in Sri Lanka, India and Pakistan under the aegis of the International Centre for Ethnic Studies (Colombo).

6 Even such loosely defined 'communities' provided insights. The most cohesive identities were those of the Parsees and the Pukhtuns. Christians in Lahore did not seem very different from other Lahore groups. Shia respondents had a strong sense of community based on religious affiliation and not geographical location. Sunni was too broad a religious category and Punjabis ethnically too vague.

7 Others were widowed or single women living with other relatives.

8 Women also referred to religion in the context of sexual relations within marriage. A fair number said sex was a religious duty but this was almost inevitably accompanied by statements that it was a pleasure, natural, part of marriage etc. One woman, believing sex to be a religious duty because of the man's financial support, solved her problem by starting to earn and denying her husband sex on the religious ground that he no longer maintained her.

9 Newspaper reports of women mutilated or killed by brothers, fathers or other male relatives for presumed illicit sexual relations testify to the extreme control of women's from within the family. Exercising free will in marriage can provoke equally violent reactions. Oppression in the family is vividly portrayed in women's
accounts of their lives and in their fiction. See for example Badran and Cooke (90).

10 One third of the Punjabi village women could think of no women they admired.

11 Responses of Christians and Parsees, for instance, indicate an isolation - as a community - from the rest of the nation. Christians were least able to name anyone they respected, while the orientation of the Parsees appeared more international and westward-looking, with admired persons including composers of classical western music, renaissance artists, and international politicians unmentioned by most other respondents. At the same time, if the Urdu-speaking women in Karachi admired the leader of the ethnically defined militant political party, the Mohajir Qaumi Movement, he was not mentioned by women from any other group. I also believe that the inability of women to name persons they admired reflects an isolation (or alienation) from the environment. More than one third of the Parsee respondents, could not name any person at all, one fifth named foreigners. Equally isolated were the Christian respondents two-fifths of whom failed to identify anyone they admired. In fact, Benazir Bhutto was the only person named at least by some women in each of the communities defined by us.

12 It is worth noting that the distinction some feminists make in Pakistan that the people are not religious because their religion includes aspects which are unorthodox or in contradiction to the doctrine, as for example, the belief in the supernatural power of certain shrines, or trees etc. is irrelevant here. Those who practise such rituals, perceive these as an integral part of their religion or religious practises. Such actions cannot be said to make these women (or men) less ‘religious’ in their lives.

13 Women were most affected by the Enforcement of Zina section of the Hudood Ordinances (1979). In 1993, 75-80 % of women prisoners in four main jails were charged with Hudood offences. (HRCP; no date:58). For details see Jehangir and Jilani (90).

14 In 1988-90, the Pakistan Institute of Labour Education and Research and Shirkat Gah - Women's Resource Centre jointly carried out a study, Female Participation in the Formal Labour Force, interviewing approximately 1000 women. Asked about the existing laws, the vast majority were clueless as to the text or implications of the new legislation, directives and ordinances. On being explained the discriminatory Hudood Ordinances, 1979 (covering all extra-martial sex including rape), the response was that if this was Sharia (Muslim jurisprudence) then it must be all right.

15 Personal observation in a survey of leather industry in 1992- several sports apparel and accessories factories in Sialkot (Punjab) had integrated their floor shifts as had one of the footwear industries in Karachi. At the time of the survey, managers of some footwear factories in Lahore were considering similar action.

16 The Muslim Family Laws Ordinance (1961) enhanced space - if not actual rights - within the family; higher education and remunerative work became acceptable for many; by 1975 all branches of the civil services were opened to women; and a limited number gained the right to chose or have a say in who they would marry.

17 Statements made in my presence during WAF meetings.

18 For a lucid discussion of the issues stemming from multiple sources of oppression: culture, race and gender see Razack (91) and (94).
19 I do not mean to suggest that there is no need for theory, only that it too needs to be rooted in the diverse realities of women’s lives.

20 One reflection of this lopsidedness is that women’s groups in Pakistan have as yet to initiate collective support mechanisms for dealing with personal oppression even for women within their own class. It is only very recently, that an initiative in this direction has been established by a new women’s group, Bedari, in Islamabad.

21 The entire postmodernist discourse concerns itself with this issue.

22 I am not questioning the sincerity of belief amongst members of politico-religious groups (indeed, I have no reason to presume a lack of conviction). I am merely emphasizing that theirs is a political agenda rather than a religious one, in that its significance outside the political framework would be minimal.

References


Creating Spaces: Shirkat Gah’s Outreach Programme

Amtul Naheed and Shahnaz Iqbal

Abstract: This paper presents the underlying reasoning that led Shirkat Gah, a women’s resource centre, to start a programme aimed at promoting a critical understanding of the legal system, the contradictions that exist between customs and the law, and the linkage of both with structures of power, political processes and social movements in Pakistan. Our paper reviews the evolution of the Women Law & Status Outreach programme from the perspective of those who helped develop and who are primarily responsible for its implementation. Illustrating the different strategies developed and adopted by the programme, the paper examines the obstacles confronting such an initiative, but also the impact the Outreach programme has had. In the final section we put forward those lessons and challenges which go beyond the programme itself.

Introduction

Acutely aware of the cross cutting influences that confront women in the interface of culture, custom and law, Shirkat Gah Women’s Resource Centre carried out the Pakistan component of the international action-research programme Women and Law in the Muslim World Programme of the network Women Living Under Muslim Laws (WLUM). Starting in 1992 with three major research components i.e., archival, legal and field research, the Women and Law (W&L) project in Pakistan was a first attempt to document the varied customary practices that exist across the country and to gauge the knowledge and impact of the formal law. As results of the research started emerging, a series of workshops were held with lawyers, activists, social scientists and politicians to discuss the findings, to elicit feedback on the legal and political status of women, and to review and brainstorm on past, present and potential strategies for increasing women’s rights.
In keeping with the framework of the international Women & Law Programme, the research findings of the Pakistan country project then fed into concrete actions and interventions. Other than producing publications and informed lobbying with government policy makers, the project led to the formulation of an Outreach programme that rapidly became a cornerstone of the integrated Women Law and Status Programme (WLS) that brought together SG’s various pre-existing rights and related initiatives with the findings of the W&L project. The focus of this paper is the Outreach programme that started being planned in late 1993 and is currently running in three of the country’s four provinces.

The Context

The W&L field research was informed by Shirkat Gah’s analysis and understanding of the forces that bolster patriarchal controls over women in Pakistan. It seemed clear to us, for instance, that women perform two type of roles in society: those socially classified as acceptable roles for women and those that fall outside this social definition of women-appropriate roles. These two types of engagements represent what Mernissi describes as a “split between what one does and how one speaks about oneself. The first has to do with the realm of reality; the second has to do with the realm of psychological elaboration that sustain human beings’ indispensable sense of identity.” (Mernissi 87:6) Caught between the need for an acceptable elaboration of self and the often conflicting needs dictated by harsh reality, women are pushed into assuming non-sanctioned roles. Yet women rarely integrate these non-sanctioned activities into their gender identity because to do so would open them to societal condemnation. Women’s need to disseminate or deny their own actions in order to remain within the approved definition of womanhood, allows men to consume women’s contributions at two different levels. In societal terms, the refusal to recognise those activities carried out by women that fall outside the social definition of ‘women’s work’ invisibilises women’s work and contributions. Because their contributions are hidden, women are seen by men - and perhaps more importantly - see themselves as mere consumers and not producers in society, undermining self-esteem. More pragmatically, men gain the material benefit of women’s
contributions while simultaneously subsuming this into their own contributions to society.

The dissonance between reality and projection of self was observed in a study conducted by Shirkat Gah in 1990\(^2\) on rural women that carried out time use diaries (noted by a 24-hour observer since the women were illiterate) complemented by direct questions on various activities as in any regular survey technique. The study showed that women either are oblivious of (and therefore invisibilise) their own input and activities, or deliberately avoid mentioning certain activities which do not fit into their projected self-definition. Hence, in response to directly asked questions, women who had been observed carrying out certain livestock and farm operations later either overlooked this or, in some cases, actually denied doing such activities. This may partially be due to the fact that women’s work remains invisible to both men and women, but partially this is the result of social prejudices that identify certain tasks and/or crops as male rendering them unsuitable or unacceptable for women. The study not only confirmed the consistently higher nurturing role of women as compared to men, it contradicted the worldwide myth of women spending far more time on their personal grooming and leisure than men. In fact, women spent less than one-tenth of their day on themselves, whereas men spent a quarter of their time on personal grooming or leisure activities (shaving, toiletry, drinking tea and gossiping etc.).\(^3\)

Another crucial way of maintaining women’s subjugation is through the control and restrictions placed on women’s mobility. SG’s study on Women, Religion and Social Change in Pakistan.\(^4\) for example, revealed how women, specially young girls, were allowed to go to the fields even alone to work on agriculture lands and for activities related to livestock care. The same girls, however, were not allowed any social activities such as visiting a friend in the village or going shopping. When these young women managed to negotiate special permission for such activities, they were inevitably accompanied by a younger brother (some times a small boy) or an elderly woman. Restrictions on mobility are relaxed in instances when the women’s movements bring the family direct economic or other material benefits. In contrast, any movement that is seen as a woman exercising her autonomous will for her own benefit is severely curtailed and closely monitored. Thus, women were
allowed to go to the fields since this is directly related to the income of
the family but were forbidden to socialise, an activity that brings no
direct benefit to the family.

A similar logic operates for young female factory workers whose
movements are controlled by their families as observed in another
study. For the sake of the income they bring to the family, young
women and girls were permitted to work and even do overtime until
late at night. The same girls were not allowed, however, to join or
participate in trade unions, to visit friends or to go shopping. In most
cases the income earned by younger women was in the control of the
families. These examples show that women have no decision-making
powers regarding what they do and what they don’t, and have little
scope for asserting what they, themselves desire.

Conducted in 1993, the different research components of the W&L
project undertaken by SG helped us to both broaden and deepen our
understanding about the discrimination facing women inside and
outside the house, and showed the startling level of ignorance that
prevails on all matters relating to law. The research on customary
practices in particular brought to light some very discriminatory
practices and crucial issues related to women’s lives. It showed us how,
for centuries, women have been kept illiterate, fated to be silent, and
condemned to living in the confines of chaddar and chardivari (the veil
and four walls of the home) with lives unsung and concerns unvoiced.
Indeed, women have been treated so badly and for so long that they
have been conditioned into feeling that they are somehow lesser beings
than men. Patriarchal society has denied women importance to such an
extent that women have developed a strong belief in their own
hollowness and now contribute to undermining their own worth, seeing
the birth of a daughter as an unwanted burden.

Society puts considerable time and effort into elaborating justifications
and reasons to keep women under control. These beliefs have produced
the extreme marginalisation of women in all spheres of life and the
interwoven whole has adverse affects on the lives of women.

The Women and Law Project field research vividly brought home the
overwhelming ignorance of the law in society in general, and amongst
women in particular. The team came across different situations
poignantly highlighting the effects of this ignorance of law as in the case of a young couple whose parents had betrothed their children at birth as is customary in some parts of the country. As the two grew up, they started liking each other. However, their respective families became embroiled in a dispute and decided to break the engagement, needless to say without consulting the couple in question. Determined to stay together, the couple ran away to a nearby town where they got married according to the provisions of the 1961 Muslim Family Laws Ordinance (MFLO). The women of their families were less concerned about the couple having run away in defiance of the parents’ wishes (since this type of elopement occurs with reasonable frequency all over the country), than the fact that - in their view - the pair were now living together in sin without the benefit of a solemnised marriage. This, because they had not performed the customary practice of touching heads seven times in front of witnesses. The fact that the couple had formally registered their marriage according to the laws of the land was irrelevant. The families neither knew about the nikahnama (the legal document registering a marriage under the MFLO) nor gave any value to this alien and irrelevant procedure. Of paramount importance was the centuries old custom in their community.

Another poignant example of how women can be deprived of their religious and legal right of inheritance came to our knowledge during the exploratory field visits in central Punjab. Naziran, a woman with two brothers, wanted to assume control of the agricultural land she inherited from her deceased father. Her desire to get her share in land was itself against the social norm of the area where all women automatically give up their right of inheritance. But in this case, some of the local people had a soft corner for Naziran as she was very poor compared to her brothers, ensuring that Naziran had some support within the community. The conflict continued for some months but ended with Naziran being defrauded of her share in the following way. Her brothers had a fake national identity card (used in many legal documents in Pakistan) made in her name. Then, the wife of one of the brothers posing as Naziran accompanied the brothers to court and once there made a statement that she, Naziran, had sold her land to her brothers and had in compensation received $x$ amount of money. On learning of this fraud, Naziran did not know how to proceed, nor did she have any money to file a legal case against her brothers for fraud.
As a result she was forced to compromise for as less as one lac rupees (Rs. 100,000 or US $2000) while she was entitled to get 20 lac rupees (or US $40,000) as her right.

The field research also brought to light women’s resilience in the face of societal submission. The most unusual was that of a woman from NWFP who found a unique way of getting back at her husband who had taken a second wife. Although the formal legal system under the MFLO provides for punishment if a man remarries without the consent of the Arbitration Council, it does not invalidate the second marriage. In any case, this option was not available to her in the overwhelmingly male dominated Pukhtun culture of her area. Frustrated at the humiliation she was put through, without access to redress in the formal court system, and convinced she would not receive a sympathetic hearing from the informal system, she devised a very ingenuous strategy based on her own circumstances and resources, i.e. knowledge of religious edicts. At the time she was nursing her newly born baby and she knew that Islam prohibits marriage between a man and woman who have suckled from the same woman. (This concept is so strong that the term often used for referring to a sibling is ham-sheera, literally meaning ‘of the same milk.’) Using these two facts she set out to annul both her own and her husband’s second marriages. She made some tea, mixed her own milk in two cups and served her husband and his new wife the tea. After they had both drunk the tea, she informed them of what she had done and told them that since they had shared the same breast-milk they were now each other’s brother and sister and that therefore their marriage stood dissolved. By the same token she had become the ‘mother’ of her husband so her own marriage also stood dissolved. When her husband contested this, she called in the elders of the village and explained the situation. On learning of the events, the elders supported the woman and ordered that the man separate from both his wives since his marriage to both stood annulled. This is not an example we would cite in the communities, firstly because both speaking of the act and the act itself are likely to be viewed as highly inappropriate, and secondly because few women are likely to find themselves in the same position, minimizing the scope for replicability. Nevertheless, it is a telling statement of the woman’s ingenuity in devising a strategy to resolve her dilemma within the patriarchal confines of her conservative environs.
The research revealed several important aspects that instructed the Outreach programme: customary practices differ not only from one province to another, but also between communities within each province; these practices have a stranglehold over the lives of women; almost inevitably, the customs allow women less autonomy and space than the provisions of the law. The inability of most people and specially women, to distinguish between customs and law leads to numerous, often serious, problems. For example, the MFLO lays down formal procedures for the dissolution of marriages and provides women and men a certificate of divorce from the relevant local council (lowest tier of administration which deals with marriages). In reality however, the oral tradition prevails and verbal marriages and divorces are common and acceptable due to existing customary practices. Both research and our outreach work has produced examples of women who after being verbally divorced by a previous husband, marry another man in good faith. Not infrequently these women have been charged of having extra marital relationships under the Hudood Ordinances zina section because of their inability to provide any proof of their earlier divorce. The adverse consequences for women of the zina section of the Hudood Ordinances are discussed by Warraich and Balchin (this volume). With some exceptions, largely consisting of activists, the negative implications of the Hudood Ordinances remain unknown.

The research demonstrated how the violation of women’s rights occurs in the name of customs and/or religion, depending on what suits society in a particular situation. For example, the legal and religious right of consent to marriage, delegated right of divorce, fixing of the amount of dower, the share in inheritance etc. are often denied women in the name of customs. On the other hand, men practice polygyny by saying that it is their religious right and often circumvent the legal restrictions placed on it.

The high level of ignorance concerning the content of existing laws combined with the feeling of helplessness to change the situation prevailing amongst most women, led Shirkat Gah to launch a programme to inform people about (a) the difference between customs and laws, and (b) how to access legal redress. By providing information and a support system we hoped the Outreach would enable women to analyse the situation they find themselves in, to better understand the
forces that control their choices and to expand their space and choices. A basic objective of the WLS Outreach is to raise awareness/consciousness regarding existing statutory laws and customary practices so that women are empowered to create options and implement choices on issues affecting their lives. For, as Salma Sobhan says:

The basic tenet of empowerment is that women not only have the right to make decisions concerning the fundamental issues affecting their lives, but they also need to determine the nature of these choices. It is not sufficient for women to have legal rights; it is necessary that they be able to avail themselves of those rights. It is in the context that legal literacy becomes an essential ingredient of empowerment (Sobhan 92:229).

Since it started six years ago, Shirkat Gah’s conception of its Outreach programme has grown and evolved and in 1997 crystallized into ‘legal consciousness’. This was coined by us to define our perspective of promoting an understanding and demystification of the law by enhancing people’s capacity to distinguish between customs and law, and exploring the relationship between law and human rights to strengthen the notion of social justice and people’s participation in building a democratic society. Legal consciousness therefore implies a critical understanding of the law and the legal system from the perspective of rights, social justice and development. Hence it goes beyond the common concept of legal literacy which tends to merely explain the content of the existing law, and of legal aid programmes that are normally restricted to assisting people gain access to formal legal redress.

Devising and Developing the WLS Outreach

Even before the Outreach was started, SG had decided that it would not work directly in communities. Several considerations led to this decision. Conscious of the significant support required by women to act upon their choices, the most important consideration was that advice and support be available within the communities themselves. Not only did SG lack the financial and human resources to set up offices in each
Community it hoped to start working with, SG's self-defined role is that of a catalyst and facilitator. It was felt that setting up multiple branch offices throughout the country would move SG towards a service delivery institution, clashing with SG's policy of facilitating initiatives and supporting them to run independently. Consequently, the strategy adopted for the Outreach was to locate and to work with existing community-based organisations (CBOs); to strengthen their capacity and to help them establish independent linkages with other organisations and government institutions.

One of the components of the research phase was to identify potential groups who would be interested in working with legal and women's rights issues. This was supplemented by asking NGOs that SG networks with to recommend appropriate groups. This was not an entirely successful procedure, as we were to learn. The initial planning workshops held in Lahore and Karachi after the field research brought together a number of potential groups identified in this manner. The exchange of views and the intervention ideas generated at these meetings were interesting but only a few groups later became fully integrated into the Outreach. Hence while two very exciting groups participated from Baluchistan, we have been unable to start an effective programme there even today. Similarly, we had initially thought of working with institutionally strong groups that we knew were engaged in advocacy and rights issues. In fact, our experience showed that these groups usually already have substantial prior commitments and pre-scheduling and therefore find it difficult to accommodate a new programme activity such as ours.

In early 1994, the Outreach programme started in Sindh even though the WLS team was situated in the province of Punjab because the largest number of groups had expressed an interest from that province. This was possibly due to the comparatively higher level of politicisation in Sindh. The WLS Outreach programme started in Punjab in 1995 and spread to the North West Frontier Province (NWFP) in the second half of 1996.

The WLS Outreach programme works closely with other parts of the WLS programme: advocacy and international networking, research and law related interventions. It has developed over the years to its present
components of capacity building of the groups we work with through training, providing information, enhancing linkages through networking, facilitating access to trainings and services provided by others and by providing consistently available advice. More recently the WLS has established a limited legal aid and counseling component, largely concentrated in Lahore that not only works closely with but over-laps the Outreach activities. The training perspective of the WLS has shifted from an initial desire to take as an entry point the identified felt-needs of CBOs in a variety of fields (preventive health, solid waste management, dramatics and office management skills) to a more focused approach to women's human rights, an emphasis on legal consciousness and an extensive paralegal training course (roughly a two-month course).

Our own work is to establish rapport with CBOs, to assess the potential for collaboration, to identify their felt-needs, to respond to their requests for information, advice and linkages. This means keeping up to date with new materials produced and programmes run by others, finding appropriate resource persons and a constant self-growth, not to mention orienting new team members and maintaining a high involvement in advocacy initiatives. But perhaps the single most important task of the Outreach team in Lahore, Karachi and Peshawar is to build the type of mutual trust that allows the programme to function and expand in difficult circumstances and sometimes a hostile environment. All of this is easier said than done and being based in Lahore, which is the central office for the WLS, and as two of the main persons to have developed and shaped much of the Outreach, we have been both guides and guinea-pigs.

For us there were few signposts for charting out the Outreach. Other organisations were working at the grassroots to build capacity but most concentrated on small group formation and institution building in a development context. None of these focused on women's human rights and the complications that arise from the parallel and often conflicting existence of customs and laws. For their part, existing interventions centred on rights and legal awareness or literacy did not even recognise the significance of customs to achieving women's rights. Additionally, most were - and remain - limited in the length of interaction foreseen with grassroots and community-based organisations. A few
organisations were offering paralegal training but their content and perhaps intent differs from ours. Consequently, when we set out, there was nothing written or planned to present or share at the first meetings.

The exploratory visits were themselves a first for the Outreach team. Before the programme had even started there was a joke in the office that field trips would entail country wide trips lasting months on end and that the team would be living like nomads. We knew in fact that the visits would not involve such drastic changes in our lifestyles, but still we were unsure of what shape the Outreach programme would take. We only knew that it would be developed gradually in collaboration with other CBOs/NGOs and communities.

For one of us (Naheed) the first ever Outreach visit took place in September 1993. It was also the first series of meetings with various CBOs/NGOs in Sindh for the programme. She was the only one travelling from the office and to make matters worse she was taking her five month old baby with her. She was given various tips by Shirkat Gah’s Coordinators about the travel and stay, briefed on the organisations to be visited and provided the names and contact numbers of all the persons they knew in the area. The office also paid for a baby-sitter to accompany her on these trips. All possible arrangements were made, but the tension and worry remained about whether the visit would bring fruitful results. She was also worried about how the baby would fare during the 10-day trip, and how to ensure that he receive proper food, medicines and all the other baby-related complications that arise. Naheed therefore embarked on the trip filled with a mixture of enthusiasm and trepidation.

To her relief, the communities were very responsive since they rarely had visitors interested in specifically focusing on those issues and problems faced by them. Also, luckily both for Naheed and the programme, her son proved to be a good traveler and adjusted to the situation even though he often had to make do with bread and biscuits dipped in milk. He also proved to be an asset for the WLS Outreach programme since a baby provided an instant means of rapport, opening channels of communication. Surprised to see a small baby, some of the women would ask Naheed how she managed with a baby when she had
to travel from place to place. Even today, the women remember the baby and whenever we meet always ask about him.

Later, when the two of us shared the responsibility of field visits with a male colleague, Sohail, there was a different set of issues to be addressed. In Pakistan it is unusual for men and women not related to each other to be travelling together. Although we, as a team, were reassured by the presence of a male colleague, nevertheless this stepping out of the norm could not be ignored either from the perspective of the Outreach groups and communities or of the general members of society we encountered on the way. On one occasion, on a night flight from Lahore to Karachi, Naheed had to deal with a fellow-traveler who having taken a liking to her, changed her attitude the moment that Sohail appeared. Naheed had to explain that (a) Sohail was a colleague, (b) that Naheed herself was married and had a son and that her husband had dropped her off at the airport knowing Sohail was accompanying her and that (c) had she been eloping she would have done so on an early morning flight and not at 11:30 at night.

From the programme side, the fact that we were not only women helped in a number of ways. Sohail was able to speak with the men while we spoke with the women, and later, where there were tensions between male and female members of a CBO, we were able to use the example of Sohail’s presence on SG’s team to suggest that men could be as committed to women’s rights as the women themselves. Other women’s organisations confronting the issue of whether or not to make men members of their organisation also looked to us for advice. But this was to come later.

At the initial meetings, the overwhelming isolation of women stemming from discriminatory customary practices in the guise of religion was more than apparent. Lasting for hours it was in these meetings that the women would be the most animated, when they would speak of their lives or of those they knew. There were heart rending cases such as that of a young woman of eighteen being married off to a man old enough to be her grandfather, of a woman whose child was snatched from her by her husband leaving her bewildered and clueless on how to get the child back. A horrific example of subjugation and callous behaviour of family men was illustrated by the
story of a young Syedani (Syeds are said to be direct descendents of the Prophet Mohammad, and therefore accorded a high social status). Because her maternal uncle wanted to get married to a young woman, he used the custom of exchange marriage, watta satta, to insist that in exchange this young Syedani would marry his future father-in-law. The old husband was so suspicious of his young wife that he would not let her out of his sight for fear that she would run away. To prevent her escaping at night, he would tie his wife’s shalwar drawstring (nara) to his own so that, literally, she could not budge without his knowledge. She had sent repeated messages asking for help to her maternal village through the mirasans (a caste whose traditional role is that of singing and match-making in the communities) but in vain. Nobody came to see or rescue her. The constraints put on her by her social standing as a Syedani prevented her from venturing out herself and so she remained, forever a prisoner in her husband’s house.

Such stories notwithstanding, women in the CBOs/communities would recognise the denial of their rights and a lack of mobility and decision making but still prioritise their needs as training in health, income generation and education. There were various reasons for this: women’s isolation and the obvious lack of any kind of information on how to improve their situation; the notion that the law only becomes relevant when there is a specific problem; women’s lack of questioning of discrimination exercised through customary practices that have become an intrinsic to their lives and way of thinking. It was also the first time that anyone had ever discussed social discrimination and legal issues and they needed more time to think about these idea. The most important factor, however, was the perceived threat from the men. The women were convinced that they wouldn’t be allowed to take up these issues as women, and they feared that the men would use this new activity as a pretext to discontinue women’s activities in other areas. So strong was this fear that initially the women had requested the Outreach team to ensure that the men should get no wind of the discussions being held. In contrast, the active CBO members felt a strong need to create awareness about the importance of preventive health methods, education and other relevant local issues. Additionally some of the more politically active groups requested Shirkat Gah to help them get training in theatre techniques. At the same time, when they first met us, CBOs displayed some skepticism about our future work due to their
previous experiences of false commitments made by other organisations.

On returning from the field, the Outreach team chalked out a tentative programme in the office. This was then discussed with potential Outreach organisations at their sites. Subsequent meetings and visits provided opportunities for further discussion and clarification of the WLS programme. At these meetings the Outreach team would often give examples from our own lives or those of our colleagues both to encourage a willingness to share examples from their side and to show the potential for change. For instance, if one of us had married of her own choice or had decided not to have a formal dowry (jehez), she would discuss it as having set a precedent in her family. Examples like these helped gain the trust of the CBOs/communities, an important factor for the programme’s success.

To help start the activities in Sindh, a Sindhi speaking activist from Karachi was employed with the Lahore-based team continuing its regular visits to Sindh to supervise and guide activities. Unfortunately this did not work out because it was not possible to orient her on the essence of the WLS programme at long distance. Consequently, the burden remained on our shoulders in Lahore with the number of visits producing a hectic pace. This situation continued until 1995 when Shirkat Gah’s efforts to locate an appropriate permanent person for the WLS team in Karachi bore fruit, i.e. a Sindhi-speaking person based in Karachi and willing to travel into Sindh. Finding an appropriate person was especially difficult because the ethnic conflict in the province accompanied by armed violence created a tense atmosphere and few Karachi-based women were prepared to venture into Sindh. The reduced load on the Lahore team allowed us to expand the Outreach in Punjab that year. The Punjab based organisations with whom we wanted to work had comparatively less development experience than those in Sindh and therefore needed more orientation on development issues. On the other hand with the reduced amount of visits required to Sindh, the Lahore team was able to give more time to the Punjab organizations than it had to those based in Sindh. Over the years, the WLS team has expanded in Sindh further relieving the Lahore team. In the meantime, however, the initial year of activities in NWFP (starting 1996) also had to be supervised from Lahore. By 1996, WLS had
introduced a mandatory orientation ‘internship’ in Lahore to both build the team and a common perspective.

A major criteria for including CBOs in the Outreach was that members share SG’s perspective on law and rights. In keeping with SG practice, emphasis was placed on adopting participatory methods and the willingness of the CBOs to work with SG is a basic consideration. Normally two to three visits are needed to ascertain the potential for working together with any given CBO. Once a CBO has been included in the Outreach, the CBO is visited once every two months. Interaction is more frequent, however, since we meet during trainings and CBO members also sometimes visit SG offices. In the first two years most of the primary issues and requests of the partners are dealt with. This is also a crucial period for building up mutual trust.

Running parallel to this, information collected through archival/legal and field research was and continues to be converted into different published forms by Shirkat Gah (training modules, charts and simple information booklets) and disseminated to CBOs and NGOs. Relevant materials produced by others on law and other topics are also circulated. In a few cases the Outreach has helped establish small libraries at the request of specific organisations (e.g. Sindhiyani Tehrik in Sindh and Bedari in Punjab). An important source of information amongst the community, particularly for young literate and/or educated women, these libraries have also served as a basis for selecting topics for discussion during their meetings.

First Lessons

The first paralegal training conducted in Hyderabad in 1994 for Sindh-based CBOs was a learning experience in more ways than one. After only six months of sporadic interaction, the team was still unsure of the relationship that we had managed to build with the organisations. So much so that we were nervous about whether the CBOs would even turn up for the training and kept reassuring each other that some were bound to come since we had reminded them several times. We realised that we had managed to establish some rapport and that the groups were interested in learning about the law when thirty women from
seven CBOs turned up (additionally three WLS Outreach team members attended the session as participants).

The training was arranged in collaboration with another organisation that runs paralegal training courses fairly regularly. External lawyers were arranged and different sessions were conducted by different lawyers. But logistically, everything that could go wrong did so.

Tando Adam, a town near Hyderabad, was chosen as the training site because of its proximity to the CBOs and its low cost. When we arrived, however, we discovered that due to unscheduled movements, army troops were requisitioning the facilities. The residence could not cater to both us and the new troops due to arrive. As it was, they erected a tent partition to segregate the paralegal training group from the army men. The noise of the troops arriving and setting up camp kept many of us awake all night. We had also had to purchase foodstuffs for the duration of the training in this self-catering facility. This, we later had to sell when we were obliged to shift venues to hotel accommodation. Thus in the scorching July heat with temperatures as high as 120 degrees, the entire troupe of trainers, participants and three toddlers had to move to Hyderabad. Once there, we had to confront further logistical problems. Since there had been no previous bookings, the entire group had to re-locate the training three times from one hotel to another in the course of the training. At the end, we felt like a tribe of nomads with baggage always packed and ready for another move. Moreover one of the hotels was in such a dilapidated state that, for example, negotiating the bathroom became a challenge since stepping on some tiles sent up an unexpected jet of water or turning on a tap produced unexpected results elsewhere. Despite all the mayhem, however, not a single day of the training was missed and most importantly everyone’s humour remained intact. Participants, in fact, were very understanding and appreciative that the SG team had to play various roles during the training such as being managers, facilitators, trainees, and sometimes resource persons. Since then we have learnt through trial and error how to balance our budget with functional accommodations and also learnt that for all long term training sessions, it is essential to be based on home ground, i.e. where the office can provide backup.
This first training and the subsequent follow-up conducted by SG itself were turning points for the Outreach programme. The actual training fell short of expectations for several reasons. Those running the paralegal training had no previous experience of conducting such sessions for CBOs whose education was fairly basic. Consequently sessions largely consisted of lectures on various aspects of law. While the WLS team conducted nightly discussion sessions and introduced the use of video clips, there was still far too little interactive methodology. The sheer span of the subjects could not be adequately covered in the short period of time. It was also difficult to assess how much the participants were absorbing, much less retaining. And, finally, while for the sake of accommodating and ensuring the learning of the participants (the majority of whom were Sindhi-speaking) some of the lectures were entirely in Sindhi, this meant that the almost entirely non-Sindhi speaking SG team and some of the participants lost out on these sessions.

It quickly became clear that irrespective of inadequacies, the information that was transferred and the fact that this was the women’s first experience of being exposed to instruction regarding law produced some very impressive results. Most of the young participants were later able to immediately raise issues relating to their personal rights and to effectively lobby for them. One, a medical student, pressurised her parents and succeeded in breaking her engagement which had been arranged without her consent. Additionally many other parents in that area not only accepted her assertiveness but some themselves broke off their daughters’ engagements of conveniences. Another young participant had been married off as a child. Now she had completed her graduation while her husband was an uneducated and un-cooperative person. During the training she started thinking of her options of getting out of this marriage. After convincing her parents she filed for the dissolution of marriage in court and won the case. Another did not leave her husband, but used her new-found knowledge of the rights she had under the law to re-negotiate greater space for herself within the marriage. When the first news of the annulment of the engagement reached Shirkat Gah several months after the training, there was much celebration. The fact of having helped to catalyse change in at least some women’s lives provided an important confirmation that the WLS Outreach was worthwhile and on the right track.
Coupled with the subsequent follow-up of the training conducted by SG itself, this first experience inspired the SG team to embark on the elaboration of its own paralegal training (PLT) course and in determining the future direction of the programme. WLS team members visited each of the organisations that had attended the PLT to clarify any questions they may have on specific aspects of the training, to monitor any developments and plan for the future. In these sessions we tried to explain topics covered in the training by eliciting the experiences of the participants in the intervening period or based on issues they felt to be of importance. In this first follow-up, participants were keen to learn the procedure for filing a formal complaint with the police. For this we used exercises that simulated actually registering a complaint (First Information Report or FIR). This form was very effective and was subsequently used for all our paralegal training programmes.

These visits were also a breakthrough in terms of trust and collaboration. For the first time the CBOs spoke of the WLS activities as 'our' programme/work instead of the previous 'your' programme terminology. When we later discussed this at an internal evaluation we felt it was somewhat like the nervousness NGOs feel with respect to donor agencies when we ask ourselves, "why are they showing such interest, what's their agenda?" Furthermore, unlike other interventions at the grassroots we were not offering any concrete services or financial benefits and instead spoke of working together for changing society. It took longer for CBOs to understand this new approach and the value of our work and intervention. Second, the trainees were more receptive to training conducted by WLS team members because we regularly visited and were familiar to them. In turn, this promoted trust and encouraged them to ask their questions and therefore to learn more than they could with 'outsiders'. The idea that the SG team itself become paralegal trainers had been discussed and a tentative outline designed. This first training was, in some ways, a testing of the waters to explore future directions. The positive feedback from CBOs and participants convinced us to go forward.

Shirkat Gah developed its own paralegal training course between 1994 and 1996 to meet the needs of activists in non governmental and community based organisations. Focused on the issues and problems
activists encounter in their work, the programme was designed to train paralegals to conduct awareness sessions themselves, to facilitate CBOs in demanding their rights and to support the engagement of such groups in legislative reform activities. SG actively encourages paralegals to mediate and secure reconciliation in disputes without going to courts. Only where this is not possible, do they act as the link between the legal system and the community. In this latter role, they need to liase with practicing lawyers, assist the community and/or specific individuals to seek legal advice and assistance, and be able to conduct primary investigation in cases collecting necessary information.

Learning from the Programme

With the Outreach programme charting unknown territory, a process of evaluations was deemed essential. In addition to on-going assessments, the WLS team periodically carries out in-depth evaluations. Evaluations with and by collaborating organisations take place during visits and on a yearly basis and include planning. These allow the team to understand the needs identified by the collaborating organisations, to collect and later review the requests formulated, and to see which activities can be accommodated during the different years.

The WLS held its first major internal evaluation in late 1994. Since the Outreach had only started that year, much of this related to the research components and early teething problems of designing the programme. One of the initial teething problems had to do with the nature of our intervention as we defined it. When we started, many large organisations running training programmes were providing participants with substantial per diems and other facilities. This we neither wanted to do, nor did we have any budget for this. This was a habit we had to change through our work, and it required considerable persuasion. The January 1997 internal evaluation was an important turning point for the Outreach. In reviewing the entire WLS Programme to date, emphasis was given to the Outreach. Each group we had worked with, the inputs provided, the results and future potential was assessed, and the reasons for impact or lack of visible change were also analysed.

By this stage, SG was no longer having to search for potential groups to work with. Indeed, we were receiving many more requests for legal
awareness sessions and incorporation in the WLS programme than could be accommodated. Consequently, it seemed an appropriate moment to shift the capacity-building to a more law and rights focus, releasing time from trainings in other fields and aspects carried out previously. It was also clear that the timeframe for working with groups had to be longer than the original two years guess-timate. In order to marshal limited resources, we thought it would be more effective to select fewer groups to work with and to distinguish between the groups themselves, rather than to spread ourselves too thinly by working with a large number of groups. Some that seemed to have the potential to develop into resource centres for their own areas needed to be provided maximum inputs. A concerted effort was needed to familiarize these ‘core groups’ with national and international issues and to involve them in lobbying and campaigns. Particular attention needed to be given to the institutional strengthening of two-three such groups per province. A larger number of groups (roughly two dozen) should be provided capacity building training, leaving a much larger and looser group for general networking that would be sent information and called to selected events.

Legal awareness sessions emerged as a key to both catalysing interest amongst the CBOs and for assessing their potential and interest in the WLS issues. Growing out of the earlier discussions held by WLS on customary practices, the legal awareness sessions became more formalised in 1997. These short (half day to three days) sessions are conducted in the localities of the CBOs at their request to enable more women to participate. The topics vary from Basic Rights to Family and Criminal laws and are identified by the communities themselves. There are numerous benefits to holding these on site, apart from the reduction in cost. Attendance at a legal awareness sessions promotes an understanding of the value of the inputs being provided by the Outreach by giving tangible shape to the otherwise abstract ideas of women’s rights and the difference between customs and the law. This is a more effective way of promoting a rights discourse than any presentations or literature. For example, during one legal awareness session, we found that 17 out of 19 participants had been married below the age of 16, which is prohibited under statutory law. Sharing personal histories illustrated how marriages contracted during childhood were in fact used by men to control women’s lives and the extent to which the decision
on whether to continue or break such marriages is totally beyond the women's control. (Child marriages are done verbally following different customary practices. If the marriage is being registered the Nikah Registrar will increase the age of the bride and the groom wherever needed.)

The arbitrariness of decisions taken by the men showed that the real issue was not upholding a centuries old custom or of family honour but one of control. In one child marriage, the men of the family insisted that the marriage be accepted as valid by saying that the girl had been married in her childhood after drinking water on which Qur'anic verses had been recited. Yet in another case in the same village where the girl herself wanted the child marriage to be upheld but her family men did not, the men stated that she had been too young at the time of nikah to have understood the implications of the ceremony and that, therefore, the 'marriage' should be considered null and void. The fact that she was now old enough to understand and was asserting her discretion was, of course, over-ruled.

The legal awareness sessions brought about an understanding amongst the team of the importance of involving the men of the CBOs and of the community. The men were interested in discussing family law and their questions on these matters, since they had never had an opportunity to do so. Held in their communities, these sessions require the full involvement of the local organisation in preparation and mobilisation of participants. Other than promoting a sense of joint ownership, this helps the CBOs to develop the organisational/managerial aspects of their work and contributes to their reputation within the community at large. It also allows us to assess the internal dynamics of the organisation and to help promote democratic norms in their workings.

Another decision to concentrate on groups that were relatively easy to access for the WLS flowed from the difficulties we had experienced in maintaining the level and consistency of contact required for bringing about effective change with villages which were very distant. Such groups also required higher levels of input than our capacity as a team could provide. Mere proximity does not, of course, eliminate problems of communication and, for example, the fact that Swaani Sanjh is only
60-70 kilometres from Lahore has not resolved the problem since the villages they work in do not have a telephone connection. Nevertheless the fact that they are within a couple of hours from Lahore at least ensures that either they or we can catch a bus and arrive at the other’s office if all else fails.

Legal assistance developed in direct response to field needs as the Outreach programme grew and had not been initially foreseen. WLS quickly became conscious that providing awareness of legal redress in the formal system could be counter-productive if we could not ensure that people then had access to legal assistance when needed. In response to immediate needs, we introduced legal assistance but simultaneously started exploring ways of institutionalising legal aid and assistance on a wider scale. In 1997 we decided that it was not enough to exclusively depend on facilities external to SG. The growing demand for legal assistance and the paucity of free legal services, pushed SG into taking up an increasing number of cases (including mediation and intervention) thanks to the success of our community interventions and law related training. We therefore had to expand the scope of legal assistance by providing some direct legal aid and counseling ourselves.

After the 1994 experience, SG developed its own paralegal training course complete with modules and has successfully run two full courses for CBOs. (The modules have been adapted and used for other audiences in shorter sessions.) Having had to initially rely on external resource persons, the WLS team members have now developed the capacity to do the main facilitation ourselves and only a few external lawyers are invited as subject specialists. This has freed us from multiple logistical complications and having to fill in as facilitators ourselves at the last minute or re-organising the sessions. We have also found the field visits of the paralegal course especially useful, giving participants first hand exposure to how discriminatory laws directly impact on women, how the police station functions, and how to approach the courts. For instance, whenever trainees visit the women’s sections of jails, they are surprised to find that the majority of the women in jail are defending themselves against charges under the Zina (Enforcement of Hudood) Ordinance.
Having started with a virtually exclusive focus on women, the Outreach and especially the legal awareness sessions and the second PLT (1997-98) now includes men. The PLT being a residential course of three weeks each, we were initially nervous about having men and women attend together and whether younger women would, in that case, be allowed to attend at all. This was discussed with the first all-female batch of paralegal trainees, with different CBOs and within the office multiple times. In the end we decided to take the risk and having men and women together was a big success. Not only did it simultaneously respond to the request of CBOs comprising both men and women and address the ground situation where frequently women feel uneasy approaching police stations or the courts on their own, it actually helped the learning process. It provided an opportunity for men and women to share their different perspectives and to pool their dissimilar experiences and areas of knowledge. The condition was that preferably one man and one woman should attend from each organisation, none could nominate only men. Apparently the communication was not clear enough since we received a panic letter from one CBO extremely concerned that they would not be able to attend at all since there were no men in their organization. We assured them that they could instead send two women which they gladly did. The experience also served to highlight our own hesitation in breaking what appear to be rigid social norms and demonstrated that sometimes there may be less of a problem than we suppose if we only dare to challenge imposed rules.

Increasingly the publications intended for the Outreach have focused on training materials. These are not only important from the point of view of the training SG provides others, but for the CBOs and their work in their own communities. All such publications are tested with CBO members before finalisation to elicit feedback and to examine and judge the relevance and effectiveness of manuals, posters, pamphlets etc. The most important of these is *Women Law and Society: An Action Manual for NGOs* which summarizes the differences between customary practices and the provisions of formal state law and provides details through concrete examples of options and their likely outcome.¹⁰ (The examples are drawn from our experiences of research and field both.) It has become an indispensable tool of the WLS Outreach programme, while CBOs consider it “the book not to leave home without.”
But when all is said and done in many ways, the visits to CBOs function as the bread and butter of the Outreach even today and are vital to all other aspects. They provide opportunities for facilitating organisations to cope with day to day issues, such as accounts, report writing, legal matters or any other problems that may have arisen; to settle the dates, contents, sites and participants etc. of the planned Outreach trainings; to follow up and receive feedback about the previously conducted activities and to evaluate how they are implementing WLS programme in their communities. Over and above this, visits build the bonds of friendship, mutual support and understanding that are so essential for any outreach work and collaboration.

**Drawing Strength from Impact**

It is on these visits that we often first hear of changes in social attitudes and on the ground developments from the women and men we work with. These changes that have been confirmed in various evaluations indicate that the Outreach has indeed helped to build women’s self confidence, to increase their mobility, access to and usage of both the formal and informal legal systems. We are convinced that one of the reasons for the successful inroads made in challenging traditional practices is that the Outreach has never imposed its agenda on the CBOs or communities and allowed them to develop and address issues at their own pace. In some instances, instead of challenging the existing systems directly, CBO members have adopted a very prudent and non-threatening approach to bring about important changes in existing practices. For example, in a small town of Sindh, Noori, an activist of the local CBO, was going to marry and desired to secure maximum rights in her marriage. She created an environment where she was able to fill out the nikahnama according to her own choice, inserting a number of protective and enabling clauses and conditions. She first enlisted the support of her mother who negotiated with the future in-laws and also visited us at Shirkat Gah to discuss how to fill in her daughter’s marriage contract. Noori managed to have the specifications of the jewelry she was to be given by her future in-laws written into her marriage contract so that, later on, there would be no question of her in-laws or husband confiscating this as ‘their’ property. Additionally, she
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had a monthly amount specified for her maintenance during the marriage, and fixed the amount she was to be given as haq meher over and above the jewelry. Half of the haq meher was prompt and to be paid at the time of marriage. All of these were radical departures from the traditions of the community. But, to avoid opposition, Noori observed all the existing customs as far as the surrounding rituals were concerned. She agreed for instance to be kept isolated for seven days prior to the marriage ceremony, wrapped up in a massive chaddar (traditionally believed to enhance the beauty of the bride) with a symbolic knife and lemon to ward off evil spirits. She also agreed to the ritual of knocking heads together to solemnise the marriage. Noori explained that when breaking with traditions to gain basic tangible rights, it was better not to challenge those rituals and practices which were superficial and basically innocuous, even if useless and irrational.

Like all the other firsts, the first legal case supported by the Shirkat Gah team; of a woman who had been married in childhood in an extremely remote village of Sindh taught us many different lessons. Unhappy though she was in the marriage, Latifan had been resigned to her fate because there was not even a single example of the centuries-old practice of child marriage having been challenged in her area. Only when she attended the first paralegal training arranged by us, did she learn that marriage was not necessarily a life-time sentence. During the training she had asked the facilitator for details on what could be done to terminate a child marriage, learning both the options available and the procedures involved. Already living separately for many years, she first broached the subject with her own family. Her family was far from supportive and her father even resorted to physical intimidation when she brought up the subject. Initially, though she wanted to divorce her husband she was unwilling to approach the courts because she felt that a court decision would be unacceptable to her husband and both their families. She therefore asked her husband to divorce her through oral repudiation, the only form of divorce generally acknowledged by the community but her husband refused.

She discussed her dilemma with us during our field visits. When we initially suggested that she see a lawyer, she was reluctant. Though we did not repeat this suggestion, we continued discussing the matter on each of our field trips (usually at her initiative), expressing our interest
in her well-being and giving her what moral support we could. Over the next year, a number of developments took place. Her husband said he would agree to divorce her if she arranged a second marriage for him. At the same time, thanks partially to our constant efforts and partially to Latifan’s own initiative, her family slowly came around to accepting that she should get a divorce. The change in her family’s attitude gained momentum when her husband took a second wife. At the end of two years Latifan informed us that she was finally ready to approach the courts.

In 1996 she had gained enough self-confidence and, supported by her family (and, of course, SG) filed a case of khula (redemption, one form of divorce initiated by the wife). In the meantime, negotiations continued with the husband to ensure that he would not oppose her legal action. Instead the husband approached the local influential (who traditionally adjudicates such disputes) to resolve the matter between him and his wife and suggested he would agree to divorce her providing Latifan paid him Rs.10,000 (approximately US$ 225) as compensation. This is a substantial amount for a non-cash economy and especially for women who have no means of income. Nevertheless, Latifan started collecting the amount. However, things became more complicated when the local influential (landlord) heard that, thanks to Shirkat Gah, a lawyer had been hired and was coming to the village for Latifan’s case. Outraged that someone in his area should dare to approach the formal legal system, he instantly imposed a fine of an additional Rs.30,000 on Latifan and threatened the Outreach team members with dire consequences should one of us dare to visit the village again.12

Latifan immediately phoned the Karachi based team to warn them not to appear for some time since tension was high and the landlord was threatening to shoot anyone from our team who showed up. The lawyer, based in the closest town with a court, offered to mediate with the landlord. Luckily for us, while we were still weighing up the potential benefits and dangers of such a move, the landlord was arrested for some other matter and we could proceed with the court case. Latifan’s case continued until 1997, when she was finally able to get her khula. The case taught us many things. First we realised that taking a case to court was not simply a matter of providing legal
assistance. Even before the decision was taken we had to provide significant support in order for the woman to arrive at the decision itself, and simultaneously to address her family members. We also discovered the need to keep very close links with whichever lawyer we hired since in remote areas few lawyers have any experience of family law and in this case the divorce was unnecessarily delayed because the lawyer failed to carry out a small procedure. Finally, we learned how necessary it was to constantly shift our attention and intervention from the legal system to the informal system and to cope with both simultaneously.

Another early case reassured us about the quality of our paralegal training course. A dispute arose over inheritance when a young woman was denied her share in parents' property in a Sindh village. This is a very common practice. What was unusual was that she decided to contest it. Against the wishes of both the main landlord of the area and members in her own family, the concerned woman approached the court for relief and won the case. The fact of her winning was in itself commendable, however for us it was equally important that the paralegal trained by SG in the area (a petite young woman of 21 who appeared no older than a school girl) was able to provide proper guidance with respect to her rights under the law and for the procedure involved. In addition, the paralegal gave her the self confidence needed to go to the court despite the fact that this was a unique case where a woman had stood up against the customary practice of denying women their right to inherit property in that social context.

In NWFP, the Outreach has managed to make some inroads in the traditional system. Here the local traditional system of dispute resolution is the entirely male jirga where the men decide on behalf of women who are also represented at the forum by men, usually male relatives. The traditional system remains firmly entrenched in this part of the country so, together with local CBOs, we have been trying to promote social justice for women within this informal system. After several years of interaction with the WLS team member there, the jirgas operating in our Outreach areas have started to recognise the formal legal system and to give statutory provisions weightage in their deliberations and decisions. They now regularly consult the Peshawar-based WLS team who happens to be a lawyer, on the provisions of the
law before arriving at a decision regarding women and family matters. For example, one of the jirgas sat to hear the case of a woman who was regularly beaten by her husband and had finally been sent back to her parents with a newly born daughter. After consulting with SG, the jirga settled the case in favour of the wife and ordered the husband to agree to his wife’s demand for dower and divorce to which she was entitled by virtue of her nikahnama (marriage contract). Further, in a truly radical departure from accepted norms, the jirga ruled that the woman would be free to re-marry of her own free choice.

Similarly, in Sindh, the team has started to make slow progress in re-orienting at least those exceptional landlords willing to interact with us, on how to address issues of violence against women. In a village of Punjab, the Outreach group was advising a betrothed couple at their marriage. A local influential, himself a lawyer, who used to oppose the work of the local CBO, was most impressed when he found out the extent of the group’s knowledge about family law and its procedures. The local maulvi (also the Nikah Registrar of the area) on the other hand, asked the group’s members what benefit they derived by advising women of their potential rights in the nikahnama. The women responded by saying: “First tell us what benefit you derive from negating these same rights. Only then will we explain what we derive.” Since then the maulvi has not taken issue with them.

Again using knowledge of the law outside the court system, mediation has been carried out successfully by some CBOs. An active worker of Swaani Saanjh, for example had a long history of being battered by her husband. With the Outreach team supporting her, she was able to ward off the beatings by convincing community women to stop turning a blind eye or condemning women victims of domestic abuse as being at fault. She managed to mobilise their active support and then took up the issue with her husband. Since then, SS has actively helped other village women facing similar problems. In one case, a mute woman from a neighbouring village approached SS after her husband threw her out of the house and her in-laws snatched her infant daughter whom she was breast feeding. SS members met her in-laws to convince them to take her back as the woman did not have anywhere to go for refuge and, perhaps because of her infirmity, preferred to stay with her husband and children. The group also put pressure on the in-laws by saying that
SS had many contacts with lawyers and other groups in the big city who, if it became necessary, would support the woman through all means and would also intervene if the husband/in-laws misbehaved with her again. (When relating this story, the SS members told us that Shirkat Gah was the primary group they had in mind.) SS accompanied the woman to her husband’s home and continued to visit her regularly to inquire about her welfare. Some other organisations have also adopted the role of mediators-cum-negotiators. Significantly, this indicates that the community has come to accept CBOs in this role, a new phenomenon in local dispute resolutions. Moreover, women also find this type of intervention effective as they do not want to have to approach the courts unless absolutely necessary because of both the long procedures and attached social stigma.

We are ourselves constantly surprised by the ability of the communities to accept new ideas and act upon these. Recently, during a two day-legal awareness session in a central Punjab village, Pandok, women were surprised to hear of the concept that dower - which is often misinterpreted through customary practices - should technically be fixed in keeping with the economic status of the family. One woman (married some 30 years ago) shared the learning with her husband and started a discussion in the family. The husband said that he had been unaware that the dower should be fixed according to the financial status of the husband and not the traditional amount of Rs.32. He said that he was ready to rectify his earlier mistake and promptly gave a buffalo and a calf to his wife as dower. The next day this became the talk of the village and, far from being ridiculed, was highly appreciated by the entire community.

Legal awareness sessions on citizens’ rights and police responsibilities have had their own positive results. In the recent external evaluation of the WLS programme (May 1998), one of the Outreach CBOs told the evaluators that the training clarified the role and the duties of the police clear to them and “took fear out of our minds”. They cited an example where after the training they had caught the local policeman overstepping his authority. The CBO checked the policeman and made him apologise for harassing ordinary citizens.  

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More generally, over the years we have seen a slow acceptance of registering marriages in the Outreach communities. Trainings conducted by the Outreach team on the importance of registering marriages combined with instructions on how to fill in a nikahnama with clauses/conditions to give women greater rights within marriage have provided CBO members the confidence to have their own or their daughters' nikahnamas properly completed. In one community, thanks to the awareness work being done by the CBO, the haq mehr (dower) has been increased from the traditional Rs.32 to Rs. 4,000 - a substantial gain. In other communities, CBOs have also managed to have the haq mehr increased, in two recent cases to as much as Rs. 50,000. During our visits, CBOs have reported a decrease in wife abuse and second marriages on the one hand and an increase in the demand for maintenance when a wife and children are sent back to her parents' house on the other. Many wives now know that they are entitled to maintenance during their marriage and thus demand that maintenance along with the delegated right of divorce be included in the nikahnama.\textsuperscript{14}

These were hoped for changes, but there have been other less expected changes showing positive impact thanks to the extremely pro-active Behbud-e-Niswan Network. In the city of Faisalabad, for example, the Tax Department sent notices for property taxes and people were upset with this new imposition of house taxes. The local women approached Behbud-e-Niswan-Network (one of the Outreach core groups) for information and help. BNN organised a delegation to go to the tax office and phoned the tax officer for an appointment. The tax officer co-operated and in the meeting clarified all the laws, rules and regulations concerning tax. As a result, many houses in the BNN Islamnagar locality who had wrongly been issued tax notices were saved from paying unnecessary property tax.

The trainings provided through the Outreach which are not directly related to law and customs have also had noticeable impact. This was manifested when the skills learnt in theatre trainings were effectively used to condemn discriminatory customary practices and to raise awareness regarding basic human rights. For example Sindhiani Tehrik, a broad based organisation working throughout Sindh, had requested and thrice received theatre training of varying levels, from basic to
advanced techniques. Sindhiani Tehrik has regularly been using this skill in mobilizing their communities against discriminatory social practices with audiences that sometimes number in the thousands and range from the rural poor to university graduates.

The preventive health training, for example, has had a visible impact on BNN. Soon after the training, when one of their members found that the water she drew from the tap in her house had a minute but strange unidentified object floating in it, she had the sense to keep it overnight to discover what it was. On seeing a substantial insect swimming about in the glass the next day, she realised that the water supply must be contaminated. BNN then organised a delegation to meet the water authority, WASA, and after lobbying managed to have the authorities address their problem. All the water lines in the area were inspected, the damage identified and the water pipes repaired.

These initiatives and changes are tangible evidence of the impact the WLS programme is having and, though localised, they signify the potential of a snowball effect on the community at large. The small examples, in fact, are only the visible tip of more substantial changes taking place: even one woman who manages to have her marriage annulled or dissolved; or to stop herself or others from being battered; or have protective clauses inserted in her marriage contract to ensure mobility, the right to work or study; or to have the delegated right of divorce; when after thirty years of marriage a woman is freely given a meaningful dower by her husband; if this occurs in an area where this has never happened before, it undoubtedly opens the door of opportunity to all other women.

Beyond the Programme: Lessons and Challenges

The Outreach programme is unique in many ways and it was intentionally kept flexible at all stages. Initially there was little option. No similar interventions existed that could provide lessons and guidance. The possible problems and constraints in the field could not be foreseen, neither could the time frame be exactly determined. The Outreach programme expanded gradually and did not follow a blueprint. Learning as we went along, the team made collective decisions for including or excluding activities, reviewing the groups we
were working with, and re-orienting our programme as a whole. It has not always been easy, nor has there always been a convergence of views. We have all struggled to develop the programme, and have continuously faced both expected and unexpected challenges.

Despite a general agreement on the programme and a shared perspective of our objectives, there has been considerable debate within the WLS team about the different aspects of the programme: which organisations to work with, for how long and how much time should we devote to each. The decision of working with structurally developed organisations made at the initial stage continued to be debated for more than two years. Once, after visiting a new organisation, Shahnaz and another WLS colleague returned very excited about its enormous potential and enthusiasm to work on women’s rights. However, without the benefit of a first hand experience of the group, others within the office differed on its capacity to be included in the Outreach given its lack of formal structures and institutional base. These differing assessments were made on different premises: those who supported the inclusion of the group were basing themselves on Shahnaz’s prior experience of the group in question and on the potential shown by the group in the interaction visible to both of us who had visited them. The opposing opinion was based on theoretical principles which, though developed by us as a team, were nevertheless, still abstract. As in many other aspects of our work, the theory proved to be less sound than the experience. Today, Shahnaz’s original assessment stands vindicated since the group is one of the best core groups in Punjab and highly appreciated by everyone. At that time, however, the two supporting their inclusion deferred to the majority view. This CBO was only included one year later, after the team as a whole had gained further experience of conducting the Outreach and analysed the success of the programme in some places and its failure to take off in others.

As the Outreach team we found ourselves caught in the midst of several conflicting pressures. Initially, the high expectations from the entire team that our exploratory visits to start outreach activities should have immediate positive results - especially given the resources spent on field trips - put us under considerable pressure. Later on, the stress and pressure was due to expectations of quick and visible results on the part of both SG colleagues and the communities themselves. Sometimes it
seemed to us that no consideration was being given to the fact that social change is a slow process and that the Outreach programme was attempting to change centuries-old patriarchal values, and further, that we were starting from scratch without the benefit of similar projects that could provide guidelines and with no previous experience of such work ourselves. In their enthusiasm, the CBOs expected us to produce near miracles since the communities not only wanted rapid solutions to difficult and often complex problems, but additionally wanted us to ensure that there should be no backlash within the community when they broke entrenched traditions.

As it is, because WLS aims to change attitudes and neither provides services nor results in any physical changes, it is at times difficult for us to explain SG's programme inputs and our limitations. The community based groups, naturally enough, view themselves and their needs in a holistic manner. Since they have come to trust us, they feel able to ask for our help on each and every issue. By itself this is a good thing, but problems arise when we are unable to meet the expectations both of a personal and programme related nature, and cannot respond to their needs, no matter how genuine they are.

As the persons most closely associated with the CBOs, the Outreach team has a different level of rapport with the women of the CBOs than other team members. We are therefore sometimes caught between two compulsions: on the one hand, a compulsion to take whatever supportive action is needed by the CBOs and their members irrespective of whether this exactly matches the parameters of the WLS programme or not, and on the other, the need to remain within the programme parameters and to meet the managerial requirements of the office. Even though we understand that the latter is at least partially shaped by the reporting and accounting procedures required by donors, this does not always help us resolve the issue at hand. Nor does our own conviction that we need to exercise caution in extending assistance beyond the programme limits to one organisation or person (to avoid either being accused of favouritism and/or expected to extend the same help to others) always help. One example of such a dilemma involving extending support on a personal matter occurred when one of the women who had been suffering from a boil on her arm for a few months came to Lahore for a training. She came for the training but
also because she felt SG could help her receive appropriate treatment in Lahore. Early on in the training, the condition worsened and she started running a high fever. When the doctor saw her he advised an immediate incision to drain the pus. The conflict arose as to whether the programme should be facilitating her medical treatment or not. Initially we ourselves felt that she should go home for treatment since we were fearful of her abusive husband’s possible reaction if we kept her in Lahore. For her part, she felt - correctly – that she would receive better treatment in Lahore than in her poorly equipped village. In the end the general opinion was that this fell outside the programme’s parameters. Feeling obliged to help her anyway, the two of us decided to raise the money for her treatment ourselves and to have her stay at one of our home’s for the convalescence. We asked some of the WLS team to contribute towards the expenses, but we did not share this with others, especially our senior colleagues, until much later for fear of being reprimanded for not having sent her home.

At the programme level, when confronted by a genuine need, e.g. income generation or health related matters, the tendency is to immediately want to help out. This can sometimes lead to making promises on behalf of the programme which are either unrealistic or divert attention from the main purpose and activities of the programme. In the long run, such diversions can lead unconsciously to a change in direction. To help build a common understanding of the programme, in the past two years WLS has conducted several exercises to help clarify the concepts of the new (and not so new) Outreach team members themselves.

Donor-defined requirements in terms of quantifiable outputs and results and in terms of financial accounting add to the pressure. The first was experienced early on when we felt compelled to show immediate results and to reach out to an ever-increasing number of groups. We are fortunate that Shirkat Gah has had the ability to insist that the optimum number is not always the largest and that changes cannot be reduced to quantitative assessments. The strict accounting required by some donors to produce receipts for each expenditure in a cultural context where there is no tradition of receipts for anything is a source of constant tension in all field work. To document expenditures, we are obliged to obtain receipts for each and everything. This is not an easy
task given that, as a rule, most shopkeepers or rickshaw-wallas do not provide receipts and can become hostile when we insist. In one case when the SG driver insisted on obtaining a receipt for a toll tax, the toll officer first refused. When we insisted, the enraged official stormed off to return with a fistful of receipts and threw them into the car saying “So you want receipts? Here, have as many as you want!” In Karachi, a taxi driver of a somewhat different temperament, was puzzled at the request for a Rs.20 receipt (less than fifty US cents). After patiently listening to the 10 minute explanation forwarded by our colleagues, he smiled and took the pre-prepared receipt form proffered by the team. Instead of signing, he drew a butterfly on the receipt and inserted the date figures in the wings and returned it with the comment: “here, please tell them that this is my signature.” For a while matters became further complicated when we ended up administering some part of small seed money on behalf of one of the donors for the CBOs. The CBOs could not distinguish that neither the money nor the requirements were SG’s. One of them jokingly told us “from now on, if we go by foot to the next village for motivating the villagers, SG will be asking us to make out a formal receipt.” As amusing as these incidents seem in retrospect, they point to a very real source of tension within the organisation and between us and the groups we work with. In the latter case, this complicates matters for the Outreach team since it is neither the management level of the WLS team, nor the donors who face these criticisms from the CBOs but the Outreach team which also has the greatest interaction and closest relationship.

Such interactions can exacerbate tensions between NGOs and CBOs. As it is, an increasing number of CBOs are critical of the fact that funding agencies extend financial assistance only to big established organisations instead of to even those CBOs whose capacity is sufficiently developed. Indeed there are many active and motivated CBOs doing excellent work at the local level who are unable to access financial support. Conscious that this is a growing concern of the Outreach organisations, we have felt obliged to add yet another component to our activities: that of writing and vetting proposals for them, linking these groups with funding agencies and sometimes writing letters of request for them.
A general and on-going challenge is that of team building. First, it has been very difficult to find motivated people with the combination of conceptual clarity, an adequate level of English both for report writing and being able to read relevant literature, who in addition are at ease working with the communities. Women’s mobility is, in any case, viewed negatively in Pakistan whereas, of necessity, an Outreach team member has to be extremely mobile. In this both of us, (indeed others in the Outreach team as well) have been fortunate in having supportive husbands and families without whom we could not have traveled and worked as freely as we do. Moreover, in addition to facing the changing forces of the political scenario, an Outreach person has to be able to work in difficult terrain where the general social environment can be complicated by politically inspired riots and violence, general lawlessness etc. In Karachi, for example, the team has had to cope not only with the tensions between the Urdu-speaking community in Karachi and Sindhi nationalists in the interior of the province where most of our work is located, it has also had to cope with general violence, bomb blasts, strikes and curfews which sporadically disrupt our work. The Outreach team has occasionally had to deal with the threat of violence, as in the case of Latifan, and be prepared for emergencies that always seem to crop up. Additionally we have had to guard against the fragmentation of the WLS team into its various components, not for any other reason but that, with the expansion, each is so busy with their own work that communication and sharing are undermined. Therefore in the last two years regular visits and exchanges between the offices have been accompanied by a concerted effort to ensure that the Outreach, publications, legal interventions and international networking remain closely inter-connected.

At a general level, however, the foremost challenge continues to be external: the uncertain political environment and the misuse of religion by both traditional conservative forces and newly emerging political groups (i.e. ‘fundamentalists’) for their own ends. The negative perception generated by these forces mean that organisations such as ours have to invest an inordinate amount of time and energy in convincing communities that they are not working against religion. This means having to face hostilities from those who feel threatened by the potential of our intervention to change attitudes and to tilt - no matter how slightly - the balance of power. It goes without saying that
this also affects the activism of CBOs who have to face these hostilities more often and more immediately.

There is also that most mundane of matters that is still an important consideration for field work, the weather. The intense summer heat, seasonal floods, harvesting and sowing seasons all have to be taken into consideration when planning activities. And, sometimes even the best laid out plans go awry because of the vagaries of nature. On more than one occasion, we have had to cancel or re-schedule a programme due to floods. Yet we know that others we are working with face the same problems and that we simply have to be as determined as those we work with to bring about change. Few of us could match the determination shown by two Sindhi women who were to attend a WLS training but found themselves cut off on the wrong side of a flooded gully the day they were to start their journey. Determined to attend and arrive on time come hell – or literally – high water, these brave women who did not know how to swim had themselves towed across the flood water, precariously balanced on a make-do raft consisting of a charpai (a traditional string and wood bed).

Finally, at a personal level each of us has come a long way since we first started work in the Outreach team, learning immensely over the years and we take this opportunity to express our personal and individual experience.

Personal Post-Script

Shahnaz: For me the WLS outreach programme is not only a way to create spaces for those women we work with in collaborating CBOs but for ourselves as well. Learning in the course of the programme has been an immense process of self realization and breaking our own isolation. The whole idea to improving the status of women is strongly linked with women’s empowerment, and the time spent on readings, research, discussions, analysis and trainings was important to empower myself. I believe that any person attempting to facilitate and catalyse a change in other women to understand their own worth and importance, can only fulfill this role fully if he or she is aware of the issues concerning women’s lives, such as customary practices and gender biases and how these are intrinsically linked to issues of rights. I look
upon myself as a strong woman. In my life, the knowledge, confidence, and strength I have derived, and continue to derive from the work I do in the office has helped me become aware of my rights. This helps me not only to carry out my office responsibilities but equally, my strength helps me to define and re-define my role at home, not only for myself but also for my daughter.

Naheed: For me it's difficult to state in so many words all that I have learnt from the WLS programme. But my overall perspective on life has changed from one of pessimism to optimism and I can now see a clear path towards our goal of a just society. Though the tunnel is very long and strewn with obstacles, it now has a light at the end.

My involvement with the WLS outreach programme has strengthened my power of analysis towards all emerging issues and specifically towards gender biases prevalent in society. I am clearer about how the interwoven web of customs and law has pushed women into isolation and a miserable and submissive position. This clarity has given me the confidence to challenge all such discriminations with convincing logic. I feel a deep sense of satisfaction when I can successfully help women who are resigned to their fate to distinguish between discriminatory customs, law and religion. And when a woman is empowered enough to avail a choice and decide independently about herself and her surroundings and we see that choice being enacted upon, the high which the entire team feels is indescribable.

I am really happy that my work with SG and WLS has given me such opportunities not available to other women in my family. Also, now I am not only concerned about women in the communities but also about myself and other women in my own family. My activism has become an intrinsic part of my personality and I cannot behave differently at home. In fact my husband and in-laws who met me when I was already an activist and feminist do not question me or my beliefs. But my maternal family who have known me since birth see me as a totally changed person. My father who I have consciously added in the SG mailing list and who receives whatever we send to the CBOs always has many questions for me when I visit. So I always have to prepare myself in anticipation of a lively debate whenever I go to my village.
Finally having three sons, I feel, are a test of my own convictions in the kind of upbringing I give them. If in the years to come they break entrenched customs and refuse, for example, to take dowry from their wives or treat them as equal partners, I would consider it a personal success.

Endnotes

1 Shirkat Gah, literally a place of participation, was established in 1975 as a women’s resource centre with the purpose of integrating consciousness raising with a development perspective. With offices in Karachi and Lahore its objective is to increase women’s autonomy, promote gender equality and actively cultivate democratic norms.

2 *FAO Pilot Project on Time Use Surveys: Testing New Techniques for Elaborating a New Database on Rural Women.* (1991). This research an FAO Pilot Project was undertaken by Shirkat Gah as a means of testing new research instruments for a more realistic assessment/ gauging of rural women’s activities.

3 Ibid, pages 17, Chart 2.1 & 2.4.


5 *The Female Industrial Labour Force in Pakistan* (1990) conducted by SG and the Pakistan Institute of Labour Education and Research (PILER).

6 SG’s first intervention was the setting up of working women’s hostel as a turn key project, which it handed over to the government’s Social Welfare Department after repaying the loan taken for its establishment. Later, in 1981, SG catalysed the formation of the Women’s Action Forum as a lobby-cum-pressure group and while SG collective members served on the Working Committees of three of the four WAF branches, SG consciously set up WAF as an independent entity.

7 Sindhiyan Tehrik in particular asked for such training.

8 Earlier training included sessions in health, theatre and communication etc. As the programme did not have the time and resources to develop these components itself, SG has used external expertise and institutes. During the early years of the programme a large amount of time was spent organising these trainings since the CBOs preferred to prioritise trainings on these particular issues.


12 Coincidentally, in a neighbouring village, a marriage had been dissolved through the court for the first time. The woman had then re-married someone of her own choosing. The couple then had to flee the village, but had been caught and murdered. This added to the general tension surrounding Latifan’s case.


15 To deal with the demand for health trainings, WLS team arranged trainings on preventive measures and methods to decrease the ratio of the diseases. The other component of the health trainings was to sustain the communities links with government health institutes so they could avail of the facilities present in their
areas. It would also push the government institutes to enhance their performance. The programme policy was not to provide health services to the communities. But in a specific case of a CBO, Aurat Taraqiat Tanzeem, in Kathia, a remote village in Sindh, women and children had a lot of health problems. Programme arranged a doctor to visit the village to check and prescribe the medicines to the patients. The doctor a socially committed person used to take medicines with him for the patients. For the first year doctor would go twice a month to the village. During this period a young activist from the organisation, who had been part of health training arranged by SG, was encouraged to join the Prime Minister’s Health Programme to become a Govt. health worker. She had joined the programme and used all the health materials sent to the CBO by SG which were very appreciated by her trainer and she stood first in the exams. By the next year the village women asked that doctor’s visits could be lessened as the diseases ratio had decreased and the health worker also had started practicing in the village. By third year they said that there was no more need for a doctor as health visitor was available for minor ailments and for major diseases people had started going to the city as the doctor had encouraged people to come to the hospital for their health problems.


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Cassandra Balchin is a journalist working at Shirkat Gah - Women’s Resource Centre as Publications Coordinator. She has edited a number of publications evolving out of Shirkat Gah’s Women, Law and Status programme focusing specifically on the transformation of research data into tools for change. These include A Handbook on Family Law in Pakistan and Women, Law and Society: An Action Manual for NGOs. A member of the Publications Steering Committee of the international network of Women Living Under Muslim Laws, she is also closely involved in the development of consciousness-raising and advocacy materials at the international level. She continues to freelance for local and international print media, highlighting issues of rights and development.

Aisha Gazdar has a Masters degree in International Relations from Quaid-e-Azam University, Islamabad. With a background in journalism and development work, she continues to freelance in newspapers and magazines and writes on development issues. Currently, she is working as a
Programme Officer in Shirkat Gah – Women’s Resource Centre where she divides her time between publications and paralegal training. She has also assisted in the production of several documentary films.

Shahnaz Iqbal, an activist, was part of the first field team trained by Shirkat Gah to conduct research on the female labour force in Pakistan in 1988. After a brief time when she worked in a programme promoting micro-enterprise for women, she returned to Shirkat Gah in July 1994 where she works as a Senior Programme Officer with the Women Law & Status Outreach team. In the course of this programme, she has organised and conducted numerous workshops in various parts of Pakistan responding to the expressed needs of collaborating organisations with an emphasis on legal awareness/consciousness sessions. Having trained as a paralegal, she conducts legal awareness sessions for the community and helps run Shirkat Gah’s paralegal training programme.

Asma Jahangir is a well-known advocate of the Supreme Court of Pakistan. Renowned for her activism nationally and internationally, she is a founder-partner of the AGHS Legal Aid Cell and Chairperson of the Human Rights Commission of Pakistan. She has served as a member of the Commission of Inquiry for Women established by the government in 1994 that presented its report in 1997. Her untiring work for human rights has been recognised worldwide and she is the recipient of numerous international awards including the prestigious Magases Award. Recently, she has been conferred an honorary Doctorate from Queen’s University, Canada and is currently the United Nations Special Rapporteur on Extra-Judicial Killings. She has published a number of papers on legal and human rights issues, including the book *A Divine Sanction? The Hudood Ordinances (1979).*

Khawar Mumtaz is a Coordinator of Shirkat Gah - Women’s Resource Centre, and is responsible for its Women and Sustainable Development Programme. A founder-member of Women’s Action Forum in Lahore, her activism includes policy dialogues with national and international institutions especially in the area of sustainable development. The Regional Councillor, West Asia of IUCN’s global Council, and a member of the National and Provincial Core Groups for taking forward commitments made in Beijing, she has written chapters and contributed to the various policy documents including the National Report for Beijing, the National Plan of Action for Women. With a Master’s degree in International Relations, her interests have expanded to include research and publications on women, ethnicity, politics and sustainable development. She is the co-author of the
award-winning book *Women of Pakistan: Two Steps Forward, One Step Back?*

**Amtul Naheed** an historian by training, has been working with Shirkat Gah – Women’s Resource Centre for the last 10 years. With extensive experience in conducting research and development work with communities at various levels, she works as a Senior Programme Officer in the Women Law and Status programme. She blends her activism with her work which focuses on developing the WLS Outreach programme, building rapport with CBOs, organising and conducting trainings on legal awareness; arranging and conducting other relevant trainings e.g. theatre, communication and leadership.

**Rukhsanda Naz** is presently Resident Director, Aurat Foundation Peshawar. She has a law degree from Peshawar from the University of Peshawar and is a member of the Human Rights Commission of Pakistan, Women’s Action Forum, the Tribunal for Disadvantaged Persons, and the Provincial Committee on CEDAW. Her work at Aurat Foundation includes legal awareness training, dealing with legal cases and family counselling, and managing Aurat Foundation’s Women’s Protection Centre. Additionally she works at Peshawar Jail, providing legal aid to prisoners and creating awareness on discriminatory laws.

**Nafisa Shah** is a well-known free-lance development journalist based in Karachi and an activist at heart. She has travelled extensively to get close to the people whose voices she brings on record. Nafisa has written on a vast range of issues: women, environment and conservation, social development and impact of development on communities, and has been instrumental in bringing to the public’s notice the issue of honour killings. She was working with Shirkat Gah, Karachi, when she researched and wrote her paper on the traditional *faislo* system of settlement.

**Hassam Qadir Shah** has a law degree from Punjab University Law College, Lahore and practises law at the High Court Lahore and at District & Session Courts. He specialises in criminal law and since 1993 has appeared in major criminal trials in Punjab. He is also a legal advisor to Shirkat Gah, Lahore and is one of the lawyers providing legal aid through Shirkat Gah.

**Farida Shaheed**, a sociologist by training and activist by choice, is a Coordinator of Shirkat Gah - Women’s Resource Centre responsible for the Women Law and Status programme. She is a founder member of the
national women's lobby, Women's Action Forum, and an international coordinator of the network, Women Living Under Muslim Laws. Her advocacy work includes contributing to policy documents such as the National Report for Beijing, and the National Plan of Action for Women. She has written extensively on different aspects of development and rights relating to identity politics and the impact of religion, culture and politics on women. Her co-authored book Two Steps Forward, One Step Back? Women of Pakistan won the Prime Minister's Award. She is the recipient of the Annual Women's Human Rights Award of the Women Law and Development International.

Sohail Akbar Warraich is the Coordinator Law for Shirkat Gah - Women's Resource Centre. With extensive experience as a journalist, a field researcher and a human rights activist responsible for Amnesty International Pakistan's Human rights education project, he brings to the field of law a strong interest in the interrelationship between the principles of law and the realities of people's lives. He has more than thirteen years experience as an alternative theatre activist and it is against this background that he has recently been developing innovative paralegal training and legal consciousness courses for community-based organisations as part of Shirkat Gah's Women, Law and Status programme. He continues to freelance for local newspapers and magazines, focusing on women's rights and human rights issues.

Shahla Zia has a law degree from Punjab University Law College. As Joint Director of Aurat Foundation, she runs the Legislative Watch Programme that provides training on women's legal rights issues, monitors legislative assemblies, and carries out advocacy on women's rights issues and an analysis of laws and policies relating to women. An active member of WAF, Pakistan Women's Lawyers Association, and AGHS Legal Aid Cell, she was also a member of the Commission of Inquiry for Women (1997). Her policy level advocacy includes contributing papers and chapters relating to women's rights and development for policy documents such as the 8th and 9th Five Year Plans, the National Report for Beijing and the National Plan of Action for Women. Other publications include, Labour Law Booklets for Factory Women, and NGO Legal and Policy Framework for the LDG-UNDP, 1996.
In much of the Muslim world, women's lack of knowledge about statutory provisions and the sources of the customs and practices applied in their immediate community impedes their ability to change their circumstances. This understanding was the basis for the network Women Living Under Muslim Laws' international action-research programme on Women and Law in the Muslim World, which sought to elucidate how customs, law and culture intertwine to define women's lives and how the dynamics of religion and politics intersect with this.

*Shaping Women's Lives* is based on the research, analysis and field experience of the Women and Law Pakistan country project conducted by Shirkat Gah - Women's Resource Centre. This unique collection brings together an analysis of the political and legal context which determines the scope and nature of activism in Pakistan; the implementation of laws and practices in personal status law and criminal matters; and women's collective strategies in response to the situations they find themselves in.