1. Constitutional instruments of different countries enshrine the noblest aspirations of their respective people. All Constitutions, therefore, embody the highest principles of civilized norms and behaviour and political aspirations. What is important is not the letter of the Constitutional document but its realization in practical life. If the highest principles are not translated into reality the provisions of the Constitution remain pious hopes and mere lip service to those high ideals and cannot serve any useful purpose. In a democratic society it is not the written word of the Constitution of the law which ensures fair treatment to any particular class or section of the society but the steps which the state has taken to ensure such protection and fair treatment. It is the Constitution of Pakistan, with special reference to the Family Laws and judicial protection, which is the subject matter of my speech today. In the Muslim world and among Muslim communities, Islam operates as a way of life, as much as a religion. It regulates the details of every day life through written and un-written codes which have a direct impact on people’s social, economic, political and personal responsibilities and rights. These laws are fixed and are shaped by socio-economic and political developments and involve a constantly changing selection of customs, traditions, religious codes and external sources of law.

2. Prior to the partition of India and Pakistan, matters relating to marriage, divorce, dower, inheritance and succession and family relationship were governed by, customary laws as well as by the religious laws modified by the customs, subject to certain modifications by legislative enactments.

3. The act, which to some extent relieved Muslim women of customary law and the misinterpretation and misapplication of Muslim law in the matter of divorce by pronounced by the wife, was the 'Dissolution of Muslim Marriages Act, 1939.' This act continues to be applied today, practically in its original form, apart from certain amendments made by the 'Muslim Family Laws Ordinance, 1961'. Similarly, the 'Muslim Personal Law (Shariat) Application Act' was promulgated in 1937 to displace customary practice with regard to Muslims. This was enforced in the whole of India except in the Province of N.W.F.P., which already had its own Act with a wider scope (NWFP Muslim Personal Law (Shariat) Application Act, 1935).

4. Nevertheless, this Act did not redress the grievance of Muslim women and the avowed purpose of the Act to raise Muslim women to the position Islam had granted them, was not achieved.

5. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, states, “Notwithstanding any customs or usage to the contrary in all questions (save questions relating to agriculture land) regarding intestate succession, special property of females, including personal property 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 trusts and trust properties, and wakf (other than charitable and religious endowments) the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Shariat).” Agricultural land was completely excluded from the operation of the Act, and as a result, customs relating to the inheritance of agricultural land by the male heirs to the exclusion of female heirs continued, thereby depriving a large number of women of their legitimate share as prescribed under the Islamic Law. The purpose of the Act was defeated by the exclusion of agricultural land.

6. This law only applied to intestate succession and had no application to testate succession. Under the Muslim law there are limitations to the disposal of property by will.

7. The first line of legal reforms was the ‘The West Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948)’. Initially, the scope of this Act was enlarged to cover the question regarding succession (including succession to agricultural land). However, in 1951, the scope was further enlarged to all questions of succession (whether testate or intestate). The agricultural land and testate succession were no more excluded from the operation of Muslim Personal Law (Shariat) Application Act, in the Province of Punjab.

8. A similar amendment was introduced by the Muslim Personal Law (Sindh) Amendment Act, 1950.

9. Then came the era of Field Martial General Ayub Khan. Although the legitimacy of late General Ayub Khan’s rule might be disputed, he was definitely the first person to take practical steps towards resolving the problems of women in this country, particularly with respect to the legal aspects of family and matrimonial matters. At that time, a Commission was appointed to look into the laws regarding family matters and marriages and, in the light of its recommendations the family courts were established and the Muslim Family Laws Ordinance, 1961 promulgated in a codified form. Prior to this, family disputes were decided by Civil Courts, which had a reputation for delay due to difficult and lengthy procedures which created many problems for the settlement of family disputes. The commission appointed by General Ayub found that this amounted to “Justice delayed, Justice denied”. The Family Court Act, 1964, shortened and simplified the procedure and adopted all possible means for providing speedy disposal of family matters. For the first time, the law provided for a means of reconciliation, before and after the trial, referred to as “pre-trial” and “post-trial” reconciliation proceedings, respectively.

10. Also, in 1962, the West Pakistan Muslim Personal Law (Shariat) Application Act, was enacted. This Act extended to the whole of West Pakistan excluding the Tribal areas. This Act was significant in bringing uniformity in the application of Muslim Personal Law in matters relating to personal life where the parties are Muslims, in all areas of West Pakistan except the Tribal Areas. An important result of the 1962 Act was that legally women became entitled to inherit
property as the Muslim law prescribed in this regard became applicable to family life and other matters including gifts.

11. It may be noted that section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, abrogates customs and usages but it provides that the application of Muslim Personal law is subject to the provisions of any law in force, relating to matters of personal law enumerated in the section.

12. Muslim personal law is applied in courts in accordance to the sect to which an individual Muslim litigant belongs. The Muslims in Pakistan are divided into two main sects, Sunni and Shia. The Sunnis are divided into four sub-sects, following the four Imams Abu Hanifa, Malik, Shafi and Ahmed-bin-Hanbal.

13. The Constitution of Pakistan, 1973, enunciates as a principle of policy that steps shall be taken to enable the Muslims of Pakistan, individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam.

14. Part-II of the Constitution of Islamic Republic of Pakistan, 1973, provides the fundamental rights and principles of policy. Although the entirety of part II is important, I will focus on two important articles, Article 25 and Article 35.

Article 25(1) of the 1973 Constitution provides that “All Citizens are equal before law and are entitled to equal protection of law”. Article 25(2) provides that “There shall be no discrimination on the basis of sex alone”. Clause 3 of Article 25 provides that “Nothing in this article shall prevent the state from making any special provision for the protection of women and children”. The purpose of clause 3 is the protection of women and children. It is a form of beneficial legislation and encourages the State to take up affirmative action policies to protect women and children.

15. Similarly, Article 35 provides that “The State shall protect the marriage, the family and the child”. Thus, the fundamental rights and principles of policy clearly empower the state to give protection to women, children and family. However, in reality, many of these Constitutional guarantees are blatantly ignored.

16. The worst damage was done during the martial law regime of General Zia-ul-Haq in 1978, when the Hudood Ordinances (Zina, property, prohibition and Qazaf) were introduced and promulgated in 1979 and the Qanun-e-Shahdat Order passed in 1984. This had a direct impact on the implementation and interpretation of the law with regard to women. For instance, in case of non-registration of marriage and divorce, these laws have contradicted or complicated the implementation of Family Laws.
17. Issues relating to marriage, dower, divorce and custody are governed by a wide range of laws. But first let me define some concepts as recognized in Islam.

**MARRIAGE**
18. Marriage according to most of the Muslim jurists is a contract and the parties to a marriage must be adult, of sound mind, have attained puberty, and be able to give free consent to marriage. Marriage without consent is void.

19. At the time of marriage, the husband is under an obligation to fix ‘Mehr’ or dower in favour of the wife. Under Islamic jurisprudence the following marriages are considered void:-

1) Marriages within the prohibited degrees, consanguinity, affinity and fosterage.

2) Marriages of an adult and sane person brought about without his/her consent.

The bar to marriages in these instances is permanent.

**DOWER**

Dower is known by several names, including Mehr, Sudak, Nuhlah and Akr. It is the property which is incumbent on a husband to give to his wife, either by reason of it being named in the contract of marriage, or by virtue of the contract itself, as opposed to usufruct of the wife’s person. The dower can be in different forms, namely, proper dower, specified dower, prompt dower and deferred dower.

The wife may remit the dower, or any part thereof, in favour of the husband or his heirs, but the remission must be with free consent.

**DISSOLUTION OF MARRIAGE**

The marriage can be dissolved in any of the following ways:-

1. Divorce by the husband at his will, without the intervention of a court, commonly called “Talaq”;

2. By mutual consent of the husband and wife, without intervention of the court;

3. By a judicial decree at the instance of the wife;
4. By the wife in exercise of a contractual right of divorce.

**CONTINGENT DIVORCE**

Contingent divorce is permitted under Islam so as to take effect on the happening of a future event. It can be oral or in writing, but after the promulgation of the Muslim Family Laws Ordinance, a divorce of any kind is compulsorily registerable.

Like marriage, talaq/divorce has to be with free consent.

In case of a judicial decree, the wife may seek dissolution on the grounds mentioned in the Dissolution of Muslim Marriages Act, 1929, including Khula and section 10(4) of the Family Court Act. Section 10(4) of the Family Court Act lays down conditions for grant of Khula during pretrial reconciliation proceedings and makes it obligatory upon the wife to surrender the dower amount in lieu of Khula.

Khula means “to put off”, as a man is said to Khula his garments when he takes them off. In law, it is the laying down, by a husband, of his right and authority over his wife for an exchange.

Khula occurs when aversion is on the side of the wife and she takes the initiative in the dissolution of marriage by agreeing to forego her dower and other material benefits given by the husband. If the wife does not wish to seek dissolution by way of Khula, she may still seek dissolution on other grounds mentioned in the Dissolution of Muslim Marriages Act, 1929, such as husband’s impotency, prolonged insanity or imprisonment, and his failure to perform marital obligations or maintain his wife. Desertion is also accepted as a ground for dissolution of marriage when the whereabouts of the husband have not been known for the last four years.

**MAINTENANCE**

Under Muslim Law, the established essential principle that the male is the “provider” is largely drawn from the traditional translation and interpretation of Surah Al-Nisa (4): Verse 34 which begins:

“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”

It has been held by the courts while interpreting the Muslim Family Laws Ordinance, 1961, and Mohammedan Law, the wife is entitled to maintenance
during subsistence of marriage and also the post-operative period during Iddat or pregnancy.

20. However, if the wife is living separately from the husband without a reasonable cause she is not entitled to maintenance provided the separation is on account of the husband’s cruelty or non-payment of prompt dower.

21. The courts in deciding the above issues are governed by the following laws:-


2) The Muslim Personal Law (Shariat) Application Act, 1937.


These Acts were enacted with the object of replacing customs with Muslim Personal Laws in certain specified areas where the parties were Muslim.


The aim of this Act was to restrain the solemnization of a child marriage.

6) The Dissolution of Muslim Marriages Act, 1939

This is the most important piece of legislation promulgated in the area of Muslim Family Law. It consolidates and clarifies the provisions of Muslim Law relating to the valid grounds for dissolution of marriage in a suit filed by the wife.

7) Dowry and Bridal Gifts Restriction Act, 1976 (XLIII of 1976); Dowry and Bridal Gifts Restriction Rules, 1976 and The West Pakistan Dowry (Prohibition on Display) Act (West Pakistan Act No. XVI of 1967)

These laws were introduced to take measures to regulate, restrict and ultimately eliminate the practice of dowry, but till today this legislation has not been enforced.

8) The Guardian & Wards Act 1890
In Pakistan the Guardian & Wards Act, 1890, is applicable to custody and guardianship cases while keeping in view the personal law to which the minor is subject. Personal law is that which is applicable to a person on the basis of his/her religious conviction. A minor is supposed to be subject to the same personal law as his/her father.

This law applies to Muslim and non-Muslim Citizens of Pakistan. The established view is that "where the provisions of the personal law are in conflict with the provisions of the Guardian and Wards Act, 1890, the latter will prevail over the former.

The courts have held time and again that in custody matters, welfare of the minor is of paramount consideration.

The custody and guardianship matters fall within the Schedule of the Family Court Act 1964, and therefore, are decided by the Family Judge acting as a Guardian Judge.


This law is based on the recommendations of the Commission on Marriage and Family Laws set up in 1955, which submitted its report on the matter in 1956. Five years later their recommendations were considered and the Muslim Family Laws Ordinance was promulgated.

This Ordinance advanced women’s legal rights to some extent. For the first time, a uniform mode of divorce, marriage etc., were prescribed. Khula and the delegated right of divorce for women were also recognized, the latter being incorporated as an option in the standard Nikahnama. Secondly, polygamy was restricted, making it binding on the husband seeking a subsequent marriage to submit an application for permission to contract another marriage to the Chairman Arbitration Council, besides seeking the permission of his existing wives. In the event of the husband contracting such a marriage, the Ordinance made him immediately liable to pay the existing wife/wives her/their dower. In addition, the Muslim Family Laws Ordinance amended the Child Marriage Restraint Act by raising the legal age of marriage for females from 14 to 16 years. The Ordinance also provides security of inheritance of children from a predeceased son.
Matters such as dower, maintenance etc., are also dealt with under the Ordinance, which is implemented through the Muslim Family Law Rules, 1961, the Family Court Act, 1964 and Family Court Rules, 1965.

The provisions of this Ordinance not only override the provisions of statute law but also any law, custom or usage, including Muslim Personal Law.

10) **The West Pakistan Family Courts Act 1964 (West Pakistan Act XXXV of 1964)**

This Act was designed to establish Family courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and mentioned in the schedule of the Act.

Initially the disputes referred to in the Schedule were as follows:-

1. Dissolution of marriage
2. Dower
3. Maintenance
4. Restitution of conjugal rights
5. Custody of children

However, by the Family Court Amendment Act, XXIV of 1971, jactitation of marriage was also included in the Schedule. Similarly, in the Family Court Amendment Act, XVI of 1997, “Dowry” was also added in the Schedule. The last amendment in the Schedule of this Act was brought in October 2002 by the Family Court Amendment Ordinance, LV of 2002. Now the Schedule of the Family Court Act is as follows:-

1. Dissolution of marriage including Khula
2. Dower
3. Maintenance
4. Restitution of conjugal rights
5. Custody of children and visitation rights of parents to meet them
7. Jactitation of marriage.
8. Dowry
9. Personal property and belongings of a wife.

Implementation of the Family Court Act is facilitated through the West Pakistan Family Court Rules, 1965.
23. I would not be doing justice to today’s topic if I did not discuss family laws affecting non-Muslims like Christians, Hindus, and Parsis. Some of the laws affecting other religions are therefore discussed below.

24. The Constitution of Islamic Republic of Pakistan provides security to non-Muslims and the freedom to profess religion, to manage religious institutions, and safeguards against discrimination in respect of access to public places and service etc. (Art. 20 - 28).

CHRISTIAN LAWS

25. Christian laws have remained static on our statute book since 1869/1872. The Divorce Act relating to Christians was enacted in 1869. The Divorce Act, 1869 has its grounding in the English Law of Divorce because the British subjects domiciled in India were governed by this law. This law remained un-changed until 1976 when the original jurisdiction of District Judges over divorce cases was switched over to the Courts of Civil Judges with appellate powers being given to the District Judge.

26. Due to the Christian philosophy of marriage (that spouses are pre-chosen in heaven and are permanent Unions for eternity), the bonds of holy matrimony “cannot be broken, except on the charges of infidelity arising out of an adulterous act on the part of either spouse.” Besides petitions for judicial separation, nullity of marriage and restitution of conjugal rights can also be filed for under this Act. Under section 10 of the Divorce Act, 1869 a husband may seek dissolution of his marriage solely on the grounds of adultery by his wife. A wife, on the other hand, cannot petition for divorce on the ground of her husband’s adultery alone. She must show either incestuous adultery, bigamy with adultery, adultery coupled with rape, sodomy or bestiality, adultery coupled with cruelty, or adultery coupled with desertion without reasonable excuse, for a period of two or more years.

27. Under section 13 of the same act, the court is obliged to observe that there is no collusion between the parties so that the question of entering into compromise and obtaining a compromise decree is not conceivable under this Act. The onus to prove under the Divorce Act lies more with the wife than with the husband.

28. Due to this law most divorce cases by Christians are based on false charges of adultery. The reason being that the law does not provide any ground, other than adultery, for obtaining a divorce. Secondly, most Christians convert to Islam to wriggle out of their marriage. The Christian man after conversion to Islam may divorce his Christian wife by pronouncing divorce whereas the marriage of a Christian woman automatically stands dissolved on her conversion to Islam, as according to the law of the land, a Muslim woman cannot marry a non-Muslim (including a Christian).
29. The other issues arising out of the matrimonial bond i.e. maintenance, custody, dowry etc., are all dealt with under the general jurisdiction conferred on the family Courts by the Family Court Act, 1964.

30. However, the rigours of the Divorce Act should be simplified by providing an honest practical and humane solution to this social problem so that importance of the institution of marriage is not undermined. The legislature and the church may contemplate on this issue and provide a solution.

31. The other legislation concerning Christians is the Christian Marriage Act, 1872. The most interesting feature regarding this Act is that it applies where either of the parties is Christian.

32. Free consent in public before witnesses by those having the capacity, age and outside prohibited degrees of affinity and capable of consent are the essentials of a Christian marriage.

33. The Christian law strongly opposes polygamy and strictly enforces monogamy. There can be no marriage where the former husband or wife of either party is living and the marriage with such former husband or wife is still in force or has not been dissolved. National Council of Churches in Pakistan should be urged to take up the task in suggesting reforms and changes in the Christian law to make the same more practical and workable.

**HINDU LAWS**

34. There are four sources of Hindu Laws:

1) **Sruti:** Vodas which usually contain very little law.

2) **Smariti:** Collection of laws handed down through time. Included here are the codes of “Manu” “Yagyvalkiya” and “Narada”.

3) **Customs:** When there is conflict between a custom and “Smariti” texts, clear proof of usage, will outweigh the written texts of law. There is marked difference between Hindu and Muslim law.

4) **Statutory:** Enacted by the Parliament and override all of the above sources of law.

Except for inheritance laws and Hindu Women’s Right to Separate Maintenance and Residence Act, 1946, there is hardly any codified law in respect of marriage and divorce of Hindu’s. Despite the lack of codified law, suits can be filed under the
General jurisdiction conferred on the Civil and Family Courts under the Family Court Act, 1964. However, if substantive rights are not provided under the personal law in matters of divorce or dissolution of marriage then the same cannot be filed before the courts.

Marriage according to Hindu law is a holy union. It has been held by the Bombay High Court that a marriage is a Sanskara or Sacrament (1908 32 Bombya 81). It is one of the last ten sacraments that are enjoined by the Hindu religion, to purify the body of inherited impurities. The same view was taken by the High Court of Madras (1914 27 Madras 273 FB).

Being a Sacrament, Hindu marriage is not generally dissolved. Divorce is quite foreign to the Hindu system of law. Pakistani Hindu’s, both male and female cannot divorce under the law laid down in the Hindu text. However, if a custom allows divorce, it is given preference over the texts. Similarly under Hindu law, sisters and daughters do not inherit.

It is absolutely necessary that laws relating to divorce be promulgated. In India, legislation regarding divorce (Divorce Act/Laws, 1956) and legal separation of Hindu’s exist. The same can be examined.

Similarly in India, laws relating to women’s inheritance have been enacted. We should do likewise.

**PARSI FAMILY LAWS**

35. The law relating to Parsis was promulgated in 1936. The Parsi Marriage and Divorce Act, 1936, provides that in order for the marriage ceremony to be performed both man and the woman must be Parsi. The marriage is valid if the parties are not related in the degree of consanguinity or affinity. A Parsi marriage is solemnized by a priest during a ceremony called “Ashirvad” and in the presence of two sane Parsi adult witnesses. A Parsi who has changed his or her religion shall not contract marriage under this Act or any other law during the lifetime of their spouse.

Divorce in the Parsi community is difficult to obtain by either spouse. A married person may sue for divorce on any one of the grounds mentioned in the Act which includes adultery, fornication or bigamy, rape or unnatural offence, voluntarily causing grievous hurt etc.

The law also deals with matters such as alimony for the wife, provided she remains unmarried and chaste.
The law relating to intestate succession applicable to Parsis has underwent various changes since the enactment of the Indian Succession Act, 1925. The Parsi Intestate Act was incorporated verbatim in Chapter-III. Then the Amendment Act, 1939, was promulgated (Gazette of India 20th May 1939 Part, Page 854). By this Act XVII of 1939 Section 50 to 56 were substituted for section 50 to 56 as originally enacted of XXXIX of 1925. Act XVII was later repealed by Act XXV of 1942 and its sections are now incorporated in this Act XXXIX of 1925. Now if the Parsi male or female dies intestate his/her property is divided as prescribed under this Act.

If we look at the Parsi law of intestate, it is somewhat similar to the Muslim law of inheritance with the difference that Parsis are also given the rights of making a will and parting with their property after death, in any way they choose.

**JUDICIAL PROTECTION**

36. Now, the question arises whether the courts in Pakistan have been able to interpret laws so as to protect the family in accordance with the principles laid down in the Constitution.

37. As a practicing lawyer I feel that family laws are inadequate to deal with or cater for disputes arising between the parties. The courts in Pakistan despite a lack of legislation catering to some of these disputes have interpreted the provisions liberally and given affect to the acts, and provided remedy where there is no specific prohibition.

38. Generally in family disputes the courts overlook technicalities and proceed to decide the case. Interestingly, while enacting the Muslim Family Laws Ordinance, 1961, the fact that there is no specific provision relating to the maintenance of minors or matters relating to restriction on dowry articles or bridal gifts was overlooked. Similarly, in the Schedule of the Family Court Act, under section 5, matters regarding jactitation of marriage, dowry, bridal gifts, guardianship, personal property and belongings of the wife, and visitation rights of parents etc., were not initially mentioned, but were subsequently inserted.

39. The courts, however, granted maintenance to minors under the same section and were guided by other codified non-statutory laws. Similarly, the dissolution of marriage through court is not mentioned in the Muslim Family Laws Ordinance, 1961, and is merely provided in the Schedule under section 5 of the Family Court Act. The courts nevertheless granted decrees for dissolution of marriage on grounds mentioned in the Dissolution of Muslim Marriage Act, 1939. It was not until October 2002 that the most recent amendments were introduced, simplifying the procedure for dissolution of marriage in cases of Khula alone.

40. Most of the complications in matrimonial disputes arise due to non-registration of marriages or divorces. The courts in Pakistan gave protection to women and children and have
held, in case of denial of parentage due to non-registration of marriage, in favour of holding legitimacy and marriage and observed that the clause regarding the non-registration of marriage and divorce prescribes a penalty and does not declare such marriage or divorce to be void or illegal.

41. The courts in cases of inheritance by females have overlooked the bar of limitation if the woman has been deprived of her legitimate share of inheritance otherwise than by due process of law. The Supreme Court in the landmark judgment titled, Ghulam Ali and Others Vs. Mst. Ghulam Sarwar Naqvi (1) has held in cases of inheritance that brothers cannot legally claim ‘adverse possession’ against their sister, and much less “oust” her. In the case of relinquishment of inheritance by a female co-sharer without consideration, such relinquishment having been declared void as being against public policy, the presumption would be that relinquishment was not on account of natural love but on account of social constraints. Brothers of a female co-sharer were required by law to protect the rights of their sister if ever they come into possession of their land in any capacity. One who is enjoined with the protection of the others property cannot lay a claim adverse to the interests and rights of that other who owns it. The scope of the rights of inheritance of females is so wide and their thrust so strong that it is the duty of the court to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic jurisprudence is yet to take root.

42. In matters of custody the courts have mostly presumed that the welfare of the minor lies in giving custody to the mother, subject to supervision and control of the father. The grounds for disqualification of right of mother to custody are not strictly followed if the same are not affecting the welfare of the minor. In Muhammad Tahir Vs. Raees Fatima (2), the Supreme Court disallowed the father’s petition for custody of the minor children and disagreed with his contention that he was allowed to take custody from the Mother because the mother was illiterate, had no source of income and that she had developed an illicit relationship with another person. The court held that a mother who had not contracted marriage after divorce was a fit person to hold custody.

43. In Firdous Iqbal Vs. Shifaat Ali (3) the Supreme Court set aside the order of the High Court whereby the High Court had set aside orders of the two courts below by holding “Right of the father to hold custody of his minor son was not an absolute right, but qualified by the paramount consideration for the welfare of the minor. The father may disentitle himself to custody on account of his conduct and in the light of facts and circumstances of each case.”

44. In the case of illegal removal of the minor, the superior courts, in particular the High Court has held that it has jurisdiction to regulate custody by restoring custody to the parent, through its writ jurisdiction under Article 199 and under powers under section 491 of the Cr.PC., in the nature of Habeas Corpus. This power has now also been given to Session judges who are also acting as justices of peace. This has curbed, to some extent, the tendency of husbands to illegally remove minors so as to avoid payment of maintenance to the minors or to coerce, and
emotionally blackmail the wife to succumb to his demands. This is by far the most speedy and efficacious remedy.

45. In Shaista Naz Vs. Muhamamd Naeem Ahmad (4) the Supreme Court held that the High Court has the power to issue directions in the nature of Habeas Corpus under section 491 Cr.P.C where the child is illegally or improperly removed. The Supreme Court set aside the orders of the High Court whereby the High Court had granted custody to the father on the ground that the mother, on contracting second marriage, had lost the right to Hizanat, and was no more entitled to custody of the minor. The Supreme Court held that even on remarriage the mother was entitled to retain custody and the custody would not, *ipsa facto*, devolve on the father. The High Court could not have issued directions under section 491 Cr.P.C. for handing custody to the father. The father should have been directed to approach the Guardians Court.

46. In Khalida Parveen Vs. Muhammad Sultan Mehmood (5) the Supreme Court of Pakistan set aside the orders of the High Court whereby it had disallowed the petition of the mother under section 491 Cr.P.C. for recovery of her minor daughter aged 2 years on the ground that the minor was too attached to her father. The court held that the custody of the two-year old daughter by the father was illegal and improper and that the mother was entitled to custody under section 491 Cr.P.C.

47. In Nighat Firdous Vs. Khadim Hussain (6) the custody of the minor was given to the father by the courts below by holding that the father has an absolute right to claim custody of a child over seven years’ of age and that maternal aunt has no such right. The Supreme Court observed that the maternal aunt had taken care of the child when he was fifteen days old at the time of the death of the minor’s mother. Throughout this period the father had not taken any interest in the minor but after the maternal aunt filed an application for maintenance of the minor child, the father filed a custody petition. The Court also held that this would cast aspersions on the *bona fides* of the father.

48. The courts have also held that regardless of the mother’s income or poverty and the father’s preferential right to custody, the father is obliged to maintain his minor children and daughters till they get married. The superior courts have also held that where the son has become a major, but is receiving education and father is well to do, than he is obliged to pay maintenance to his major son.

49. In Abdul Rauf Vs Shireen Hassan (7) the Supreme Court held that parents are under an obligation to provide maintenance and it is a moral obligation of the parents to provide the means to support the life of their children.

50. In Arbab Mir Muhammad Vs. Irum Altamas (8) the Supreme Court observed that the father who was a well to do person was under an obligation to provide maintenance to the son, although the son had become an adult and was still getting an education.
51. Similarly, the courts have held that a wife is entitled to maintenance and an independent residence, and is under no obligation to live with the parents of the husband. In Muhammad Siddique Vs. Shahida Parveen (9) the High Court observed that it is not necessary for the wife to live with her in-laws in case her husband was serving abroad and she was entitled to maintenance and would only be disentitled to maintenance when she failed to live with her husband. Again it was held that the wife is entitled to live separately from her husband on account of his cruelty and non-payment of prompt dower.

52. In Muhammad Tauseer Vs. Additional District Judge (10) it was held that the mere refusal by the wife to live with her in-laws in the absence of her husband was no ground to disentitle her from maintenance. The wife, in the circumstances, could not be considered to be disobedient as she was under no obligation to live with her in-laws.

53. In Syed Muhammad Vs. Mst. Zeenat and others (11) the Supreme Court observed that prompt dower was to be recovered during subsistence of marriage, that no period of limitation is provided for its recovery and that the husband is under an obligation to pay the same whenever demanded by the wife.

54. In Chanani Begum Vs. Muhammad Shafique etc. (12) the Court held that the wife could refuse to live with her husband if her prompt dower had not been paid and could also demand maintenance from the husband till such time prompt dower was paid to her.

55. Where the husband has transferred some property in the Nikahnama/marriage certificate in lieu of dower, it has been held that the same is proof enough of transfer, without the transfer requiring any formal registration to this effect by the husband. On the basis of this entry, the wife can claim maintenance. In “Haji Ajab Gull Vs. Rahim Gul” (13) the Supreme Court of Pakistan held that dower can be fixed in the form of a life interest in property.

56. In case of dissolution of marriage on grounds of Khula, the courts have held that the wife can file repeated suits for Khula and is not hit by principles of res judicata as the grounds/circumstances of the suit may be different each time.

57. Even a decree for restitution of conjugal rights passed in favour of the husband does not stand in the way of the court dissolving the marriage on the ground of Khula.

58. However, in spite of all the above interpretations we find that certain prejudices exist, which when coupled with the interpretation and application of these laws, pre-determine women’s rearing, education, employment, marriage, inheritance, popular and political participation.
59. Women are powerless to challenge the interpretations given to the principles governing their lives due to their isolation, non-participation, lack of knowledge of the codified law and the sources of law.

60. The family laws also need to be changed to bring them inline with socio-economic changes as laws cannot remain static. Family Law is a living law and to maintain the status quo in law, by irresponsibly adhering to certain interpretations tantamount to subjecting family law to fossilization. Law must be interpreted and applied keeping in view the changing conditions of life.

**RECOMMENDITIONS**

In this regard, I have a few recommendations:-

1) Why should suits for restitution of conjugal rights be permitted to be filed before the family court when virtually all of the decrees obtained cannot be executed and are merely an exercise in dragging the wife into unnecessary litigation and delaying decisions in the legitimate suits filed by her? Sometimes the husband after obtaining a decree for restitution of conjugal rights asks for attachment and sale of the wife’s property in execution proceedings, on the grounds that in spite of the decree for restitution of conjugal rights she has refused to perform marital obligations. There is extensive misuse and misapplication of these suits/decrees and the same are also opposed to public interest and fundamental rights.

2) The husband’s right to divorce his wife under Muslim Law is absolute, and he does not have to give a reason for exercise of such right. Sometimes the wife is given divorce without justification after 20 to 30 years of marriage. On the other hand, the wife’s right is restricted and subject to judicial scrutiny. The husband under law is bound to provide maintenance to the wife during existence of marriage and during Idaat (after divorce) whereas the Holy Quran provides no such time limitation. Surah al-Buqrr (2), verse 241 states, “For divorced women maintenance (should be provided) on a reasonable scale.” Similarly, for widows the traditional verse of Surah Baqrr (2), verse 240 provides for one year maintenance.

Why cannot the law be interpreted to provide maintenance to the divorced wife till her re-marriage?
3) In case of dissolution of marriage on the ground of Khula, where cohabitation has taken place, the wife becomes entitled to her prompt dower which is consideration for marriage. But where she asks for Khula she is asked to surrender/or return this dower (section 10(4) Family Court Act 1964). Although (1) this is not a benefit of marriage, rather consideration for providing company to the husband (2), she has given reciprocal benefit to the husband by providing him with company, looking after him. his house and bearing his children. At most, the wife may be directed to forego the deferred dower but not the prompt dower.

4) There is no provision in the Family Court Act or Pakistan Panel Code dealing with domestic violence. Recently, jurisdiction has been conferred on the family court to pass interim orders to preserve and protect any property in dispute (section 21-A added by Amendment Ordinance Lv of 2002), preservation of which is necessary for the satisfaction of the decree, if and when passed.

This section will only be useful where the dispute is with respect to some property, the preservation of which is necessary till final decision. Domestic violence as such is not defined anywhere and protective orders to provide security to family against threat of violence by another family member, mostly husbands, is not provided for. In case of hurt, the wife can avail ordinary remedy under the criminal procedure code by registration of FIR but as a practicing lawyer my experience is that where hurt caused is simple, the police refuses to register an FIR on the ground that it is non-cognizable.

There is therefore an urgent need to define domestic violence and to introduce special law on this subject, wherein provisions for protection of the person and property of minors are provided for.

1. PLD 1990 SC 1
2. 2003 SCMR 1344
3. 2001 SCMR 838
4. 2004 SCMR 990
5. PLD 2004 SC 1
7. PLD 2001 SC 31
8. PLJ 2006 SC 742
9. 1991 CLC (Note) 227
10. 2001 MLD 1650
11. PLD 2001 SC 128
12. 1985 MLD 310