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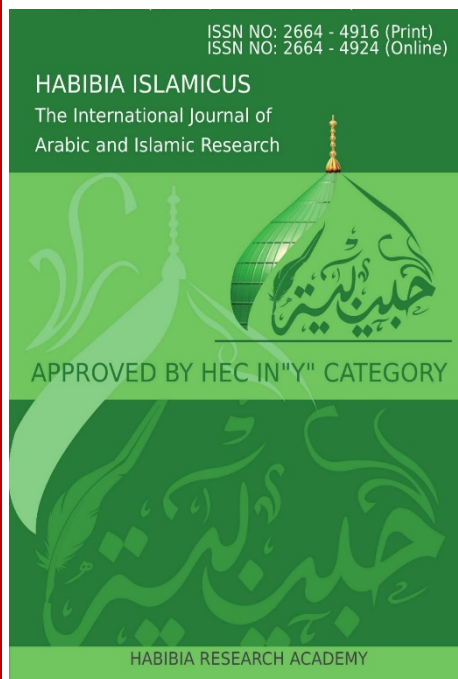
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TOPIC:

FAMILY: PRESERVING THE INSTITUTION

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FAMILY: PRESERVING THE INSTITUTION*Faiza Khalil***ABSTRACT:**

Marriage, firmly entrenched in tradition and societal norms, has long stood as a cornerstone of stable societies. Nevertheless, in the contemporary context, it is judicious to engage in a critical examination of whether we are genuinely upholding the family's sanctity and the integrity of this union. Throughout history, marriage has functioned as a legal and social covenant, providing the foundation for procreation, inheritance, and familial alliances. It has often been revered as a sacred connection, a fusion of hearts and minds, and a solemn commitment. In recent years, the landscape of our society has witnessed profound changes. Factors such as individualism, materialism, shifting gender roles, and economic self-sufficiency have prompted inquiries into the relevance and viability of marriage and the family unit. The erosion of moral values, postponement of marriage, and a surge in divorces further underscore these challenges. In this article, we embark on an erudite exploration within the realm of marital unions to ascertain whether the existing legislative frameworks adequately address the complexities and challenges surrounding contemporary families and effectively accommodate the evolving dynamics.

KEYWORDS: *Principles of Policy, the role of the legislature, age of marriage, accused of rape, fornication, arbitration council, Sindh Child Marriage Restraint Act 2013, 496 B PPC, Democracies Order of 1959, pretrial proceedings.*

INTRODUCTION:

When the Almighty addressed the angels, proclaiming His intention to establish a lineage of successive authorities on Earth, starting with Adam, He directed him to reside with his wife in the bountiful haven of Paradise. There, they were granted the privilege of enjoying abundant sustenance from any source they desired. Regrettably, it was Satan who cunningly led them astray from this idyllic state, causing their expulsion from the blissful realm they once inhabited. In response, the Divine Decree dictated that they be sent down to Earth, where they would establish their abode and secure their livelihood for a predetermined period. In this transition, Adam was endowed with divine teachings, and he fervently sought forgiveness, which his Lord graciously granted. It is indeed He who embraces repentance and extends His boundless mercy.¹ This narrative embodies the inception of life on this planet with the creation of the first human couple, a family, along with the profound lesson of seeking forgiveness from the Divine, as a unique foundation for human existence.

As the bedrock upon which civilizations are constructed, families bear a primary responsibility and an irreplaceable role in the realm of social development. It is within the familial unit that individuals acquire the quintessential life skills that subsequently find endorsement within other social institutions. At the most fundamental level, family structure and family process matters. Evidence shows that outcomes for both children and adults are not equal regardless of family background. Children reared within the sanctuary of healthy, wedded, dual-parent households exhibit a higher propensity to traverse different paths of life with contentment, wellness, and accomplishment. Such familial security and

stability insulate these individuals against adversities. In such a nurturing environment, the physiological and psychological benefits become palpable. The children show lower infant mortality rates, lower risk of drug addiction, lower numbers of engaging in criminal activities after puberty, higher academic accomplishments, and lower incidence of mental illnesses. A harmonious family dynamic invariably translates to diminished financial and emotional tolls on both its constituents and the State. This, in turn, infuses members of such stable families with a heightened sense of discipline in conforming to legal and social norms, thereby strengthening the edifice of social security. Nonetheless, we find ourselves at a juncture wherein the continuity of stable family structures has been imperiled by a steady decline over recent decades, casting a pall over the trajectory of societal advancement. An increasingly pervasive predicament entails individuals, both young and mature, grappling not solely with material impediments but also with emotional tribulations. Dysfunctional familial constructs borne from abuse, separation, divorce, or parental absence have become regrettably commonplace. This unfortunate reality disproportionately afflicts the marginalized strata of our society, placing our most vulnerable — the elderly, women, the financially encumbered, and the young — in the crosshairs of adversity.² Such a state of affairs also prevalent in Pakistan, presents a stark contrast to the State's articulated policy commitments aimed at safeguarding the institution of marriage, the integrity of the family unit, and the welfare of both mother and child.³

In the framework of a democratic government, the legislature occupies an unequivocally central and paramount position. Its overarching mandate encompasses a multifaceted spectrum of vital responsibilities, which collectively serve as the linchpin of the democratic apparatus. Foremost among its prerogatives is the solemn duty of crafting and promulgating legislation, thereby serving as the primary conduit through which the will and aspirations of the public find expression in the form of statutory law. The legislative branch's intrinsic capacity to mirror the kaleidoscope of voices within the polity and to provide an arena for assiduous deliberation renders it the quintessential institution for the formulation of policies that are inherently consistent with the public interest. It is within the hallowed halls of the legislature that the grand tapestry of democracy finds its vibrant and diverse threads woven into a coherent fabric, thereby upholding the sanctity of governance for the people, by the people, and of the people.⁴

In Pakistan, family laws, as promulgated by the legislature, are predominantly influenced by Islamic principles, alongside customary practices and legal statutes. In the realm of matrimony, it is incumbent upon any gentleman, unhindered by any legal impediments, possessing a sound and lucid mind, and a comprehensive understanding of the contractual nature of marriage, to exercise his autonomy in entering into the sacred covenant of marriage. According to the tenets of Islamic jurisprudence, it is imperative that the prospective bridegroom, or a duly authorized representative acting on his behalf, convene with the prospective bride, or her duly authorized representative, at a singular meeting. This union must be corroborated by the attestation of two adult witnesses, particularly in the instance of a female who has not yet attained the age of maturity. In such cases, consent for marriage can be bestowed upon the bride by her father or guardian. It is essential to

recognize that, under Islamic law, a woman of mature and independent disposition possesses the prerogative to enter into a marriage contract of her own volition, devoid of the necessity for her guardian's consent. In such an eventuality, the young lady retains the right of choice, to either affirm or annul the matrimonial union after she attains puberty.⁵ This stands in contradiction with other enactments of the country. According to the Federal Shariat Court, a girl who had not attained the age of maturity could enter into marriage through her guardian. On the other hand, the basic age for marriage is restricted to 18 years in Sindh and different in other provinces whereas no age restriction has been imposed by the Federal Shariat Court.⁶

Alongside, Pakistan Penal Code, has chosen to adopt a distinct stance on the matter of rape. Within its purview, the law employs the term "a person," for an accused, a notably generalized terminology, which encompasses any individual, thereby not excluding even a spouse from its ambit. The Code also prescribes penalties for those who engage in sexual acts with a minor below the age of 16, even if consent has been given by the minor for such intimate involvement.⁷ In the broader context, this legal framework creates a scenario wherein marriage before the age of 18 is rendered impracticable. It further places conditions on polygamy, necessitating permission from an Arbitration Council. A spouse could also be accused of rape. A 16-year-old, acting with full volition, engages in a sexual act, only the partner is culpable for an offense and the act of fornication shall be subject to a maximum penalty of five years.⁸ It is indeed noteworthy that marriages are subject to certain contingencies, while the consensual sexual relationships of teenagers are not deemed criminal offenses. However, when adults engage in such acts, which is a non-cognizable offense, the law stipulates that they may be liable to a maximum penalty of five years.

In elucidating the pertinent aspects of family laws within the jurisdiction of Pakistan, a salient feature worth considering also is the pivotal role of the arbitration council. The legal framework therein delineates the constitution of this Council as an entity comprising a chairman and a representative from each of the involved parties. Upon the initiation of a matter brought before the chairman, the initial procedural step mandated is the issuance of notice to the relevant parties. Subsequently, the parties are instructed to appoint their respective representatives within a timeframe of seven days from the date of notice receipt. The legislation specifies the chairman as the individual presiding over the Union Council, as established under the Basic Democracies Order of 1959.⁹ It is noteworthy that while the Basic Democracies Order of 1959 is no more in the field, the prevailing system of local government, encompassing entities such as Corporations, Municipal Committees, or Town Committees, retains the authority to adopt measures deemed conducive to advancing the cause of social welfare.¹⁰ The set up of an arbitration council may be undertaken by the current local government to facilitate the institution of the family.

The Arbitration Council's role in matters of maintenance, polygamy, and divorce is of paramount significance, as it not only serves to uphold the law but also contributes to the resolution of marital disputes within the broader framework of justice and reconciliation.¹¹ In matters of seeking maintenance by a wife from her husband, the procedure is clearly

defined within the provisions of the law. The initial step involves presenting the matter before the designated Arbitration Council, presided over by the Chairman, to adjudicate whether the husband has indeed failed in his duty to provide maintenance for his wife. The Arbitration Council is vested with the responsibility of issuing a certificate that specifies the requisite amount that the husband is obligated to pay as maintenance to his wife. In matters related to polygamy wherein a husband desiring to enter into a subsequent marriage, must seek permission from the Council. The Council is entrusted with the task of summoning both spouses and delivering a verdict on the necessity of the proposed marriage in the presence of the previous wife. If the husband contravenes the law, he will have to suffer imprisonment which could extend to one year. The Council also plays a pivotal role in the process of divorce. Following the pronouncement of divorce, the spouses are to be summoned before the Council for potential reconciliation, failing such reconciliation efforts, a divorce certificate shall be duly issued to them. Regrettably, it appears that the role of the Arbitration Council is currently underutilized and often neglected. If revived and mandated by statute before taking the dispute to the court of law, it has the potential to reduce the burden on the judiciary while concurrently facilitating the resolution of disputes between couples within their community, in the presence of their family representatives.

In matters concerning the dissolution of marriages before the court under Muslim Law, a woman holds the right to seek a decree of dissolution based on different grounds. Amongst them, the significance is such the husband neglects or fails to provide for the maintenance of the wife for at least a duration of two years. If the husband takes an additional wife in contravention of the provisions established within the Muslim Family Laws Ordinance of 1961, when the husband engages in cruel treatment, and habitually subjects his wife to assault or conduct that makes her life miserable, even if such conduct does not entail physical ill-treatment. Associate with women of ill repute or lead a dishonorable life. If the husband coerces his wife to lead an immoral life. Dispose of her property or obstruct her exercise of legal rights over it. In cases where the husband has more than one wife, he fails to treat her equitably by the Quranic injunctions.

In the realm of family matters, encompassing the dissolution of marriages, the affairs are bound by the constraints delineated within the West Pakistan Family Court Act of 1964. Upon the commencement of a trial, preliminary proceedings are administered by the presiding officer, after the submission of a written statement, to facilitate a potential compromise between the spouses. The proviso found within Section 10(4) of the Family Court Act 1964 was introduced with the primary objective of rectifying the protracted nature of separation proceedings in the past, which were conducted akin to regular civil suits, often lasting for several years. Such delays left many spouses in a state of indeterminate state, particularly the wives, who, due to the extended legal battles, were unable to contemplate remarriage as the years passed. To curb this predicament, the legislature devised this provision, vesting jurisdiction in the family court to expedite the dissolution of a marriage through khula if, despite earnest attempts at reconciliation, the parties, especially the wife, exhibit an unwavering reluctance to rekindle the marital

alliance, thus opting for a legal route to extricate themselves from this bond. Nonetheless, it is imperative to underscore that the family court, when effecting dissolution under the aforesaid proviso, must engage in thorough efforts to mediate and approach the situation judiciously, demonstrating a requisite degree of care and prudence. The court's involvement in conciliation endeavours must be driven by the aim of preserving the marital union, especially in cases where children are involved, necessitating an added level of diligence. In light of the significant change introduced by the proviso to subsection 4 of Section 10 of the Family Court Act, the conciliation proceedings should not be treated summarily or casually, lest this opens the floodgates to a widespread dissolution of marriages on frivolous or contrived grounds. The court, as a matter of duty, must delve deep into the psyches of the spouses to discern the extent of their aversion toward one another. An overly permissive approach to separation, based solely on the wife's desires and without just cause, could potentially transform this constructive provision into a means for fostering societal ills. Indeed, it has been observed traditionally in numerous instances that, through the court's intervention, spouses have embraced a harmonious reunion, promising a contented life together. However, the family court must act within the boundaries of its designated jurisdiction, dissolving a marriage only when all attempts at reconciling the parties prove futile, and there exists a compelling likelihood that the spouses will transgress the boundaries set by divine ordinance in the case of a coerced and joyless reunion.¹² However, in the context of pretrial dissolution of marriage, what we observe is that customarily the courts refrain from delving into exhaustive discussions regarding the statutory grounds outlined for dissolution of a marriage, or their specific findings about these grounds. Such matters are typically reserved for substantive trial proceedings. During the pretrial phase, the focus often lies on procedural aspects, and case management rather than a detailed examination of these grounds.

In the past, there have been enactments that placed restrictions on bridal gifts and expenditures for weddings, which were bound by specific monetary limits. However, these laws have become obsolete as the monetary values stipulated in them no longer align with current financial standards. Given that the legal age for marriage has been regulated, it is prudent to consider controlling the expenses related to bridal gifts and marriage functions by adjusting them to a value that is more in line with contemporary circumstances these days.¹³

The issue of tracing the financial resources of the husband in cases related to maintenance or financial support, especially at the time when the decree is to be executed for the wife, is indeed a significant challenge in Pakistan, and it highlights certain shortcomings in the legal and administrative systems. In many cases, the burden of proof regarding the husband's financial resources often falls on the wife. This can be particularly challenging for women, especially if they lack access to complete financial records and assets, or if financial transactions are not transparent. In many instances, individuals in Pakistan are involved in the informal economy, which means their financial activities may not be formally documented. The lack of digitized financial records and documentation in

Pakistan hinders the court's ability to effectively trace and verify the husband's financial resources and to accurately assess and grant maintenance to the wife and the minor.

In light of the multifaceted challenges before us, it becomes imperative to accord due consideration to the facilitation of the indispensable role that families could contribute within our society. Through the formulation of policies and programs designed to fortify family stability, we have the opportunity to cultivate an environment conducive to personal growth, societal harmony, and the alleviation of burdens on public resources.

A judicious avenue for enhancing family laws lies in the codification and consolidation of existing statutes into a singular, comprehensive family code. This code should comprehensively address matters such as marriage, divorce, custody, inheritance, and maintenance. Presently, the dispersion of family laws across diverse statutes and legal frameworks in Pakistan has engendered a landscape characterized by confusion and inconsistency. Harmonizing these disparate elements into a unified and coherent legal framework would not only serve to streamline legal processes but also contribute significantly to the overall clarity and efficacy of the legal system concerning familial matters. Such a consolidation, undertaken with the precision and discernment befitting the legal system, holds the potential to fortify the foundation upon which familial relationships rest, thereby promoting justice and stability within our societal fabric.

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- ⁵ . Muhammad Imtiaz and another Versus The State, PLD 1981 FSC 308. In this precedent, the focal point of consideration is the legitimacy of marriages involving women, encompassing both adults and minors and significance of consent of wali (guardian) at the time of the contract.
- ⁶ . THE SINDH CHILD MARRIAGES RESTRAINT ACT, 2013 SINDH ACT NO.XV OF 2014, section 3, 4 & 5.
- ⁷ . Pakistan Penal Code 1860, section 375.
- ⁸ . *ibid* section 496 B.
- ⁹ . Muslim Family Law Ordinance 1961, section 2.
- ¹⁰ . Sindh Local Government Act 2013, Schedule II , Part II.
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