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► To cite this version:

Ur Sami, Nimra Azher. Matrimonial Rights in Private International Law and Islamic Law: A Legal Analysis of the Problems Faced by Overseas Pakistanis. traditional Journal of Law and Social Sciences , 2022. ⟨hal-03762347⟩

HAL Id: hal-03762347

<https://hal.science/hal-03762347v1>

Submitted on 27 Aug 2022

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HAL Authorization

Matrimonial Rights in Private International Law and Islamic Law: A Legal Analysis of the Problems Faced by Overseas Pakistanis

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ARTICLE INFO

Article History:

Received:	January	8, 2022
Revised:	February	12, 2022
Accepted:	March	15, 2022
Available Online:	April	10, 2022

Keywords:

Private International Law, Islamic International Law, Matrimonial Rights, Overseas Pakistanis

JEL Classification Codes:

O15, O47, R13

ABSTRACT

Private international law, otherwise known as conflict of laws is an important aspect of international law. It deals with the issue of citizenship, nationality, domicile and renvoi. Islamic international law also talks about such issues in quite details, as Islamic law has left no area of the life untouched or un-explored. There are huge numbers of Muslims migrating from one state to another, same is the case with Pakistan, and then they get married to different women of distinct nationalities. The problem arises when they are divorced or separated from each other. This article tries to address such matrimonial issues from the perspective of private international law and Islamic international law. The methodology of research used in this article is the qualitative research methodology through library research including all the primary and secondary sources.



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INTRODUCTION

Private international law refers to the set of procedural laws that a country adopts to regulate the juridical relationship between the citizens or private parties of different nationalities. These laws are complex and multidimensional as they seek to find a middle ground between national laws and international laws when a case of a private foreign national comes to the domestic court of a state. Therefore, these laws are also called “*conflict of laws*,” as the judge analyses, scrutinizes the aspects of both domestic and international law and either amalgamates the both or chooses one

to resolve the case. There are three main components of private international law in any country to resolve a case subjected to private international law:

1. Jurisdiction: this determines which court system should handle the case if authority given by the judges.
2. Choice of law: this revolves around deciding on the set of laws against which the case should be judged and resolved.
3. Foreign judgements: It refers to the agreement to impose certain laws pertaining to specific categories that were agreed upon jurisdictions of different states/nationalities (<http://definitions.uslegal.com/i/international-private-law/>.)

Therefore, private law governs the choice of law to apply in the event of a conflict between the domestic laws of different nations related to private transactions or interactions between those nations. It is concerned with all legal relationships between private entities and includes, for example, family laws. These laws vary from country to country.

DISTNCTION BETWEEN PRIVATE AND PUBLIC INTERNATIONAL LAW

Private international laws must not be confused with **Public international laws**. The latter refers to the regulation of diplomatic relationships between states and is relevant to governments and general foreign organizations only. On the other hand, private international law or “conflict of laws” combines various laws from domestic and international sphere to govern the private matters and relationships at individual levels such as marriage, divorce, and child custody and inheritance issues (Verma, 2020). The following aspects dissects the distinction more vividly:

- a) **Consent:** Public international law is based on consent of the states but private international law is not based on the consent of the states.
- b) **Object:** Public International law looks after the interests of the states and determines the rights and obligations of the state. Private international law considers the interests of only the private parties in conflict.
- c) **Subject:** Public international law deals with states and Private international law deals with individuals.
- d) **Conflict of law:** Public international law does not involve in conflicts of laws. Private international law involves in the conflicts of laws.
- e) **Nature:** Public international is same for all the states. Private international may be different in various states.
- f) **Sources:** Public international law’s its sources are treaties, custom, precedents etc. Private international law derives from the sources such as the legislation of the individual state to which the litigant belongs.
- f) **Scope:** Public international law has wider scope that has a universal character. Private international law has lessor scope and has an individualistic character (<http://study.com/academy/lesson/public-law-vs-private-law-definitions-and-differences.html/>).

An important aspect of private international law is its understanding that countries differ in their application of the law and that it is important to measure such differences. Every society, in fact, has its own rules based on its general, religious, cultural, or social norms. **Monism** and **Dualism** draws distinction between the two kinds of interaction between national and international laws. The former refers to the notion that there is harmony between national and international laws in a country such as treatise and the international law has a direct influence on a state's national law and judicial procedures. The latter whereas, draws a line between national and international laws and not necessarily translates the international law into their national law and does not always comply with the treatise a state signs.

Pakistan being a dualist country has its interim constitution that is based on Objective resolution 1949 that makes Pakistan's legal system a framework complying both with the Islamic legal system and western democracy. Therefore, this document aims to analyze the extent to which laws in Pakistan are Islamized when concerned with the private matters of its citizens: overseas and in-house. Moreover, it also strives to illuminate the case studies and procedures that Pakistan adopts while dealing with cases holding relevance to foreign laws or international laws. Conclusively, this document aims to provide a detailed analysis of the amalgamation of national and international jurisdiction in governing the private affairs of both overseas Pakistanis and non-Pakistani citizens residing in Pakistan in four major aspects specifically:

1. Marriage
2. Divorce
3. Child custody
4. Inheritance
5. Murder

1. MARRIAGE

With the increasing emigration and immigration of individuals and families across the national borders of Pakistan, the international family law has become a crucial subject to bridge the gap between the international law, Pakistan's domestic law and Islamic law pertaining to marriage. We would first have to look at the Marriage Laws in Pakistan's domestic laws, how they differ from the obligations that are to be fulfilled by overseas Pakistanis and how in line or contradictory they are with the Islamic Laws of Marriage. In order to know what Overseas Pakistanis or foreign residing Pakistanis are we would first have to look at the classification by law:

“Any Pakistani will be considered overseas Pakistani who shall fulfill any one of the following requirements: -

- a) Having valid Visa (less visit) of a foreign country (on Pakistani Passport) with validity, not less than 6 months*
- b) Having a foreign Passport of Dual Nationality Country**
- c) Having Indefinite Stay Card / Residence Permit card / Green Card/ Sojourn/ Resident Card or Similar Card issued by Country of Residence, United Kingdom, France, Italy, Belgium, Iceland, Australia, New Zealand, Canada, Finland, Egypt, Jordan, Syria,*

Switzerland, Netherland, United States of America, Sweden, Ireland, Bahrain, Denmark & Germany (specific group of only children born from Pakistani parent and grown up in Germany)”

In order for an overseas Pakistani to get their marriage registered the marriage certificate in original (English) should be notarized and attested by the Ministry of Foreign Affairs of the respected country of stay. Secondly, a Non Objection Certificate/Permission from parents attest by the Ministry of the Foreign Affairs in Pakistan is to be submitted (in case both parties are Pakistani nationals). If the marriage is taking place with a foreigner, the original family certificate of the other party is to be submitted. In addition to this an affidavit of eligibility for Marriage Form is to be duly filled and submitted to the Pakistan Embassy or High Commission. Further, present report and certificate of Marriage Form is also to be duly filled and signed by the parties and then submitted to the embassy. Apart from this, copies of passports/CNICs (Original and 1 photocopy of both) is also to be attached in addition to Divorce papers of any previous marriage (*Registration of Marriage / Embassy of Pakistan, Republic of Korea, n.d.*).

Now let's analyze the Common Law of Pakistan that governs the marriages in Pakistan for highlighting the differences between the marriage requirements for a residing Pakistani and an overseas Pakistani. In Pakistan the law guides us to get married in the presence of a government appointed Nikkah Registrar, 2 witnesses, the allocation of amount for Haqq-e-Mehr and the voluntary presence of a Guardian/Wali. This is then announced and the couple is said to be married. A sample Nikah Form by NADRA is attached herewith describing the functions and articles of Nikah.

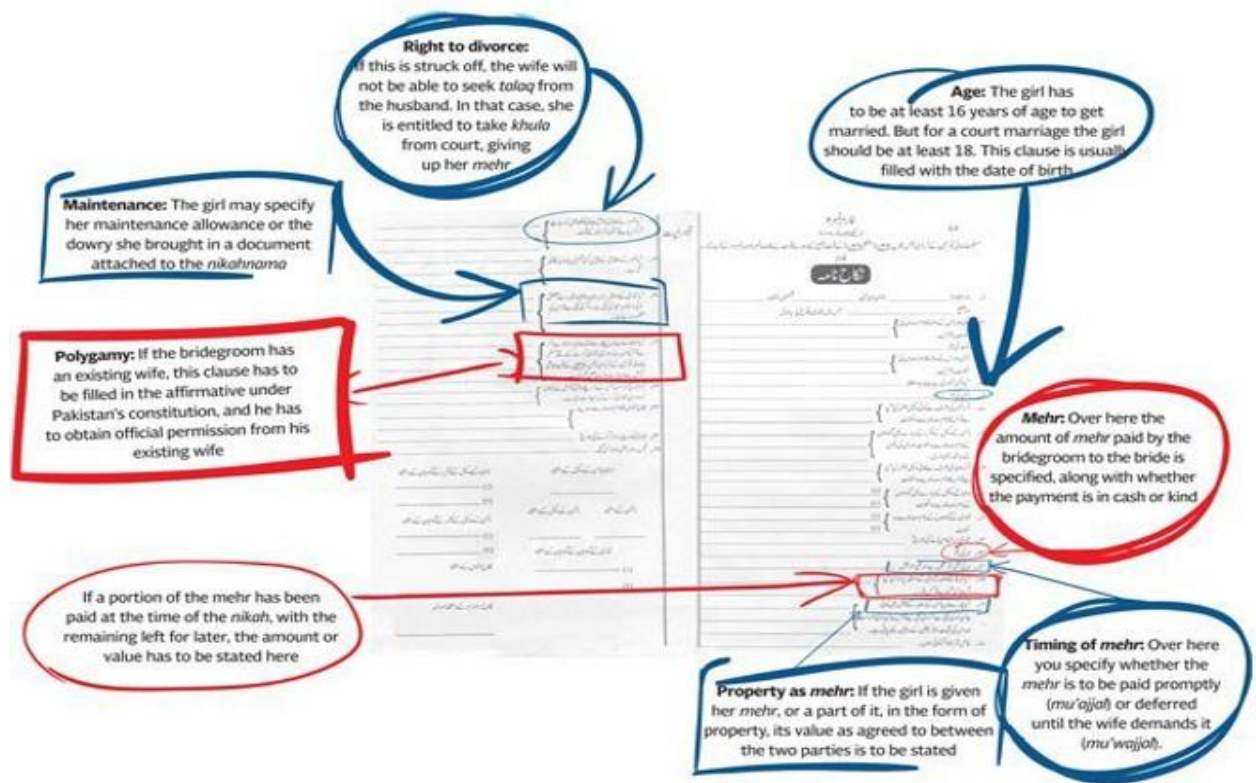


Fig 1

The marriages between Muslims in Pakistan is governed by Muslim Family Laws Ordinance, 1961 along with the modes for the dissolution of Muslim Marriage, maintenance and dower. The common law regards marriage as a civil contract with the following conditions:

1. Parties are legally capable of contracting marriage i.e. are of the age of 18 and above.
2. Mutual consent or agreement is present
3. An actual contracting is done in the form prescribed.

Every Marriage solemnized under Muslim Law shall be registered in accordance with the provisions of the Ordinance and for the purpose of registration of marriages under this ordinance, the Union Council is to issue licenses to not more than 2 Nikah registrars per ward.

Mehr is a mandatory payment in the form on money or possessions paid by the groom to the bride at the time of marriage that becomes her priority, by the law.

Now if we look at the Islamic law to have an insight about what it provides for marriage is that Islamic law focuses on safeguarding the interests of a woman by making the contractual agreement valid so that the authenticity of the relationship cannot be questioned. In Islamic law, two witnesses and any person of good Islamic morals can conduct the Nikah on the receipt and acceptance of Mehr by the woman.

Now if we analyze the three distinct codes of Law, namely the Private International Law, Islamic Law and Common Law. We recognize that the Nikah process is the most simplified in the Islamic Law which is with little variance and minute complexity present in the common law too. However, when it comes to the Private International Law, the process is highly complicated due to the provision of various documents for the registration of marriage in a foreign country or with an overseas Pakistani. In reality, the Nikah has already taken place but in order to prove it the person has to visit different embassies and government offices to get approvals and proofs of marriage that has complicated the process of marriage between the two parties. The common law is very much in line with the Islamic Law that also reaffirms the claim in the article 227 of the constitution that all laws should be in accordance with the principles of Islam including Quran and Sunnah and law shall be enacted that is repugnant to this injunction.

2. DIVORCE

According to the International Divorce Law in Pakistan if a Pakistani national living overseas wishes to seek a divorce he/she must contact the Pakistani embassy or consulate in the country of their stay. An application of divorce is also to be submitted to the office and the copy of such should be sent to the union council of the spouse. An attorney is also to be engaged with having a written power of attorney for the claimant. There is a forum of reconciliation between the two parties under the Muslim Family Laws Ordinance, 1961 (Divorce Procedure for Overseas Pakistanis, n.d.). One can visit the Pakistani mission or his residence to act as an arbitrator to reconcile the marriage. This is also reaffirmed by a High Court ruling that the husband should decide to take this step according to law. The husband can pronounce divorce and the wife can file a suit for a divorce. Furthermore, if the woman is given the right of divorce in the contract of marriage, she can also pronounce divorce. The divorce can either take place by the will of the husband without taking the matter to the court; or by mutual consensus of both husband and wife; and third by the exercise of contractual right of divorce by the wife if the husband does not agree to it. After the ruling of court has been ruled and the divorce has been taken place by the

intervention of law, the documents are then to be submitted to the respective union council for receipt of divorce certificate. The case is to be registered in the court of the place of marriage. If the case is being carried out in Pakistan, the foreign residing party will have to nominate a legal representative to attend the hearings of the court on his/her behalf through a power of attorney. This power of attorney is to be attested by the high commission or embassy at the foreign place of stay and then is to be verified by the Ministry of Foreign Affairs or nearest foreign office in Pakistan (Mumtaz & Associates, n.d.-a).

As per the common law naming Muslim Personal Law and Section 7 of the Muslim Family Law Ordinance the husband pronounces divorce (oral or written) and notifies the union council through in writing along with the address of the wife. This is then followed by a reconciliation council formation within 30 days of the filing of documents to Union council. On consensual agreement the talaq is declared and the 90 days' period of iddat is to be observed before requesting for a divorce certificate. If, however, the woman decides to file divorce in the absence of the husband's consent she would have to go to the family court under the West Pakistan Family Courts Ordinance, on the claim that she can no longer live with her husband in accordance with the limits prescribed by Allah and such a statement on oath is enough to establish her case for khula (divorce by woman). Judicial Khula can also be granted if the husband is very unwilling and the woman cannot prove her claim mentioned above and is willing to forego her financial rights. The family court will rule and send the order to the union council which will then take action on the subject.

The Islamic law however differs both from the Common Law and the Private International law in this regard, because although Halal but divorce is said to be the most disliked of all halal things by the Holy Prophet P.B.U.H. Islamic Law firstly disqualifies the divorce that has 3 consecutive oral divorces and suggest that it is counted as one. So as in the other codes of law, Islamic law allows and expects proper rationality before separation and asks the married individuals to think for 30 days for 3 times in between the divorces in order it to be valid. Secondly, Islam disapproves the divorce and invalidates it if it has taken place during the menses period of the woman, Pakistan's laws do not account for this. Further, the inclusion of the term of pronouncement of divorce in the Nikah is not effective until or unless it is really intended as is mentioned by Hazrat Aisha R.A *'A'isha reported: Allah's Messenger (may peace be upon him) gave us the option (to get divorce) but we did not deem it as divorce* (Book 9, Number 3500: Sahih Muslim). As seen in various cases around our daily lives, the expectation of maintenance remunerations by the husband to the wife are not applicable by the husband after the irrevocable divorce. Furthermore, the time of Iddat is mentioned in Islamic scriptures as 4 months and 10 days whereas the ruling by the court gives only 90 days that's equivalent to 3 months, there is also a month before which allows the Council to reconcile the couple but that cannot be counted as the iddat starts after the divorce.

3. CHILD CUSTODY:

A Child's custody agreement is one of immense important for the parents that have suffered separation. The key elements that form such an agreement include authorities for geographic moves; Access Periods, holidays etc. (Mumtaz & Associates, n.d.-b). Decision making including education, healthcare, religion; Financial Responsibilities and Child support. To explain the Private International Law's stance on Child custody, we would look at the case of Saira v Yasir Mairaj where she had filed for a divorce from her husband and keeping the child's custody however one day the ex-husband asked her that he wanted to take her daughter for a wedding for a day, but when requested return the man simply refused (DAWN.COM, 2008). The daughter was forcefully

taken away from Saira and was later taken to Europe by her ex-husband. Such cases take a lot of time in Pakistani courts due to the scrutinizing of a number of things regarding the case. Justice Majida Rizvi has said upon this case that,

“A case for the custody of child can only be filed in a place where the child is. If the child happens to live outside Pakistan, it is then considered to be beyond the jurisdiction of a Pakistani court to take such a case; if the child is born out of Pakistan and has a foreign nationality, then the law of that country is applied in such a case, the foreign office however can be called upon and asked to intervene if the child is taken forcefully from the legal guardian”.

On the Other hand, Zia Ahmed Awan – Human rights activist states:” *such cases can only be won if it gets enough public attention*” where he completely abolishes the role of law in the process. Lawyer Riffat Mughal however shows a way forward by saying:

“What a mother should do is to file for child custody with the separation case that she has filed. Or if the separation case had been filed earlier and she had not filed for custody, she could try and file a case of deceptively taking away the child and then contact the embassy or the high commission of that country and ask them to help lodging a case with the Police there. During the Process of case proceedings, she can apply for Interim custody under section 12 of the Guardian and Ward Act, this will let her keep the custody of her child till the court decides. She further adds that there have been rare cases of the sort as it gets very expensive to go abroad and contest the case of custody there”.

It has been seen under which law and country the child was born and the marriage had taken place in as then the law of that land is also to be taken into account for a way to bring the child to claimant’s custody. In Habib Ur Rahman vs. Mst. Hina Saeed the father was refused custody as he was going to take the child away from the mother abroad. However, in case the mother of the child is Non-Muslim or if the child is to be taken to a foreign country where the environment is not Islamic conducive the child is not send abroad with the mother and the father is most likely to have the child. Such as in Christine Brass v Dr Javed Iqbal. Whereas in some cases we have seen non-Muslim mothers claiming rights as well where the father is a convict as in Peggy Collin v Muhammad Ishfaq Malik. Divorced or not parents can file for the custody of the child however it is a very complex matter to resolve under the private international law and has countless possibilities based on the variables (Law on the Custody of Children in Pakistan: Past, Present and Future, 2020).

The Child Custody matter in the common law and Islamic Law is such that the child remains under the mother’s custody for an age up to 7 years old for male and till the age of reaching puberty in the case of a girl. However, in rare cases the custody is also given to the Father if the mother has deceased and the maternal grandparents cannot take care of the child proper such as in Fatima Bibi v District and Session Court, Mandi Bahaudin. The Father remains a guardian in spite of the custodian being the mother and the child is not to be moved away from the father as the distance is decided by the court. Further, in cases where father has the resources to go and visit the child to a far area the woman is allowed to move away if the father is able to come and see the child. Such happened in the case of Legal Aid Cell v Sohail Butt. Financial Status is also a very important determinant in the court deciding who to give the custody to however, the father is usually still asked to pay for the child’s expenses as his duty. After the period of custody, the father has a right to ask for custody and it does not automatically revert itself. In Nazeer Begum v Abdul Sattar, the

KHC ruled that despite his legal status as legal guardian the father has to file for transfer of child's custody it will not happen automatically.

Under the Islamic Law a minor has right of choice but in some cases the courts deviate from this principle by considering the minor's choice. According to some opinions, minor female has no right of choice however courts have over stepped on this ruling too by giving the minor women to choose for themselves. In some cases, however, the court has been staunch on these principals as well. In this particular matter the court states that it reserves the right of Ijtihad as stated in *Zohra Begum v Latif Ahmed Munawar*.

4. INHERITANCE:

On April 13, 2021, Special Assistance to PM on Overseas Pakistan and HRD Sayed Zulfikar Bukhari announced a NADRA Portal to resolve all Inheritance disputes for overseas Pakistanis through a simplified process (Desk, 2021). Previously, the legal heirs had to keep visiting the courts for the letter for administration (of immovable property) and Succession Certificates (for Movable property). NADRA facilitation Centres have been setup in UK, UAE, KSA and Qatar so far where an applicant has to go to the high commission or consulate along with the application duly filled and signed by the applicant and perform a Biometric Verification at the consulate. This will allow them to easily get their succession certificates or letters of administration. The procedure is applicant will have to provide the CNIC details and death certificate of the deceased. Followed by details of the legal heirs and Assets details. A verification and consent of legal heirs will be given to the consulate. NADRA will publish an advertisement in the newspaper for larger public notice and upon no appeals received the certificated will be printed and delivered.

The common Law of Pakistan still is more troublesome when it comes to dealing with the inheritance issues as lesser such systems have been deployed in Pakistan in a country of over 220 million. The divisions of wealth of the deceased are done by the Islamic laws and proportions if the will does not say otherwise and the entire matter is expedited instantly. However, the Overseas Pakistanis have an edge when it comes to resolving inheritance issues as compared to the local citizens.

5. MURDER:

Under the Private International Law, a person if held guilty of murder in a country and had fled to another country for survival must be extradited back to the country where he committed the crime in and face the consequences for his actions. However, for this to happen an extradition treaty is a prerequisite for the two states to extradite the convicted back to Pakistan. On the contrary, if the subjected person is only alleged and has not been proven of conviction of crime there have been seen a few recent developments that have contributed to a peace of mind for the overseas Pakistanis. One such case is the case of Muhammad Akhtar, settled in Lancashire UK lodged a complaint that he had been wrongly involved into a murder case that took place in Gujrat in 2012. He claimed that he was in UK at that time. The Overseas Pakistanis Commission, Punjab took notice of this and the Commissioner OPC Afzal Bhatti asked the Gujrat police to conduct a thorough investigation on the matter and so the accused was freed of charge. Afzal Bhatti further stated that in case of any such problem faced by another Pakistani elsewhere can reach out to OPC and the problem will be solved through their efforts. This is a considerable progress made in waiving overseas Pakistanis from wrongful litigations. Another case was of Maya, a 25-year-old

British-Pakistani who was murdered into cold blood at her residence in DHA Lahore. Since there were global restrictions due to COVID19 and her family could not travel back to Pakistan, the police was unable to take any action and was asking the victim's family to appoint a complainant so that they could start the investigation based on a complaint lodged. The police structure fails to address major crime scenes due to a lack of departmental clearance.

However, if we talk about the domestic law, the charges for Murder are governed by Section 302 of the Pakistan Penal Code that either results in life imprisonment or execution. This is also in line with the Islamic Principals as committing murder is one the gravest sins in Islam and are to be answered with capital punishments such as hanging to death. However, if the allegation is false, the alleged is freed with immediate effect with all respect and integrity. In addition to this when it comes to investigation the police and other law enforcements agencies do not show a lot of interest in proving the innocence of a person, rather are focused on nabbing as many criminals as possible. AN initiative from OPC of this kind really does imply that such institutions are starting to play a part in the law enforcement and justice system pertaining to and from Pakistan for the overseas Pakistanis.

LOOPHOLES/ ISSUES FOR OVERSEAS PAKISTANIS:

1. When it comes to marriage the main problem with eh private international law is that it is very much in line with the common law of the state however getting married overseas is a very problematic task to accomplish due to the excessive paperwork required that does not account for the accuracy of the matrimonial procedure but poses an extra effort for the participants to get a legalized status of their marriage. In addition to this the law for overseas Pakistanis accounts less for the Islamic principles that are to be observed, rather it focuses more on the substance of documentation.
2. In the matters of divorce, the Common and Private International Law provides a basis of reconciliation by the both parties through council but that is faulty as it is obvious that any one of the party will be absent. Secondly, the high commission appointed as an arbitrator is a good idea too but that too has failed because of the absence of both partners for an effective outcome. Furthermore, the extra documentation and costs of attestation and provision adds to the costs of both the parties and where the woman comes from a less privileged family and cannot go to the court, the husband can be in a position to exploit the woman for overseas as well as for local Pakistanis.
3. An overseas Pakistani has to contest for the custody of his/her child in the courts of Pakistan and being overseas and in a non-Islamic country it would perhaps get it very difficult for either of the parents to take the child's custody and take him there. Further, there are no proper rules that can be followed or expected in the matter as it differs case to case.
4. NADRA has launched the online portal to issue certificated however, the death certificate is still to be issued manually. In order to get the death certificate and prove the death of an individual their heirs have to go through a troublesome way.
5. There have been countless examples where people have left Pakistan and don't come back as they are alleged for corruptions or frauds or even murders. This is repelling the Overseas Pakistanis from their state and this should definitely not happen. Wrong conviction is worse than punishments for a person who is not guilty but still has to remain in exile.

6. Furthermore, the police structure restricts the police to take a suo-motu action against the crimes, rather they depend on the complaints from the citizens and if no complaint is lodged they cannot go further into an investigation and be it a small crime or a major crime such as murder, the security of the citizens is not ensured.

RECOMMENDATIONS:

1. In our opinion, instead of demanding so many documents the easier way forward to do this is to appoint Nikah Registrar at every embassy of Pakistan around the world and the participants can get married in his presence. The sole documents that would be required would be the passports of the two parties. The nikah can be performed in the presence of a representative of the government who can ensure the marriage has taken into account the Islamic principles and thus is hereby ratified with immediate effect. This will not only ensure transparency and accuracy of the matrimonial act but will also add to the convenience of the participants.
2. In order for the reconciliation effort to be effective, more cost effective and less time consuming, there should be a reconciliation effort by the high commission where the other spouse is present virtually through modern means of communication and the matter can be more effectively resolved rather than growing to a divorce. The laws should be built to save relationships and not provide for ineffective measures that could justify the legal proceeding only.
3. In order for Child Custody issue become a more promising law for the years to come, the social and governmental institutions are to be strengthened as only then will the child be properly evaluated along with the parents and in case of any abuse or negligence in the hands of the parents, the child must be given to the more deserving and proving parent. This is the only way we believe will carve out way for a more certain, solid and effective decision making.
4. Any resident dying abroad is to be visited by a representative by the consulate to see the ground reality clearly and thus it's the government's job to issue the certificates with ease rather than the people running for it.
5. For overseas Pakistanis, separate portals should be made that the police can access too that defines where the person was on a particular date. This portal should be operated by the boarding passes of the air flights to and from Pakistan and can act as a great tool for not only saving them from wrong convictions but can also be used for other purposes such as census, GNP calculations, foreign remittances estimation, anti-money laundering etc.
6. Police should be seeing some reforms that allows them to be autonomous bodies of law enforcement and crime control in the entire country or state. By doing this, the security of the citizens will increase immensely for both the overseas as well as the domestic Pakistanis.

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