FINANCIAL RIGHTS OF WOMAN ON THE DISSOLUTION OF HER MARITAL RELATIONSHIP AND DEATH OF HER HUSBAND IN ISLAMIC LAW AND PAKISTANI LEGAL SYSTEM

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Abstract

This article focuses on financial rights of the wife on the dissolution of her marital tie under Islamic law and Pakistani legal system. It explores the complexed issues involving the provision of dower/*mahr* for the wife, the provision of maintenance in various situations of dissolution of marital relationship, financial support for the children in case of separation, financial stipulations promised by the husband to his wife, and whether a widow can possess either the corpus of the property or receive its benefits upon the death of her husband when he has legally transferred either of the two to his widow? All the above issues are analysed under Islamic law, statutory law where available, and case law in Pakistani legal system. The main findings of this work are that dower is guaranteed to the wife but there are complicated issues where dower is denied and she has to resort to the Court to receive it; that maintenance and lodging till the end of the waiting period (*'iddat*) is always on the husband in case of separation but problems arise in case of separation through divorce or *khul'* where a woman accepts the deal that she will not claim either lodging or maintenance; that promises by husbands to recompense his wife a sum of money in the event of divorce remain unfulfilled because of the ruling of the Supreme Court of Pakistan that Family Courts have no jurisdiction in the matter; that husband can gift either the corpus of his property or the usufruct to his widow if he so wishes; that Courts have persistently ruled that conditions attached to a gift of property to a

woman would be void but the gift would be valid; that Courts have given apparently conflicting decisions on whether deferred dower becomes payable on demand or on dissolution of marriage either by death or divorce. Finally, Courts have developed elaborate principles of Islamic law mainly derived from the Hanafi school of thought, and with few exceptions, have followed these principles consistently. The main recommendations of this work are that the current judicial pronouncements of the august Supreme Court of Pakistan that deferred dower could only be paid to the wife on separation by death or divorce may be overruled through an amendment in legislation and that the issue that the sum of money stipulated by the husband to be paid to his wife in case of divorce as a penalty or compensation or damages is not in the jurisdiction of the Family Court may be overruled through an amendment in the Schedule to the Family Courts Act, 1964 to expand the jurisdiction of the Family Courts. The methodology used in this work is doctrinal.

Keywords: *Financial Rights, Wife, Dower/Mahr, Maintenance, Stipulations, Hiba, Gift, Property, Corpus, Usufruct, manāfi'.*

1. Introduction

In marital relationship it is the obligation of the husband to bear the burden of financial affairs of the wife and the family. The main financial rights of wife include: first, the dower/*mahr* that wife is either paid or promised by her husband; secondly, maintenance throughout the marriage; thirdly, financial stipulations promised by the husband to give a certain amount of money or compensation in case of divorce; and finally, making sure that his widow continues to either own or benefit from his property during the lifetime of the husband and upon his demise. In practice family laws in Pakistan are only partially codified and courts have to apply and interpret them on the basis of *Sharī'at* (*Shari'ah*) as explained below. Thus, judicial decisions are either based on codified family law (which is supposedly based on *Sharī'at*) or uncodified family laws which are based on '*Sharī'at*.'

The main questions explored in this work are mostly according to the Hanafi school of thought and the decisions of the Higher Courts in Pakistan. These questions include: what is meant by *Sharī'at* (which is Urdu for *Shari'ah*) in Pakistani legal system? Are decisions of Pakistani Courts based on *Shari'ah* or Statutory law? What is dower in Islamic law? Is dower a pre-condition for the validity of marriage? What is the importance of prompt and deferred dower? Can a woman refuse herself to the husband if the prompt dower is not paid or is

delayed for some time and the marriage is already consummated? When does the deferred dower become payable? Whether deferred dower becomes payable on demand or on dissolution of marriage either by death or divorce? Is the wife who obtains separation through *khul'* allowed to receive the deferred dower if it is still outstanding? Is the wife entitled to maintenance and lodging when the marital relationship is over through divorce or *khul'*? Can she obtain *khul'* on the condition that she will not be entitled to maintenance or lodging? Whether the amount stipulated in the marriage deed where a man promises to give to his wife, in the event of divorce, judicially enforceable? Can courts impose a penalty on the husband for divorcing his wife without any just cause, especially when she has committed no wrong and wants to keep her relation? Finally, can a husband benefit his wife from the estate or assets left by him upon his death under Islamic law and whether the same is judicially accepted in Pakistan?

These are some of the questions that are examined in this work, however, many related questions are explored along the way. This work also attempts to find the principles of Islamic law elaborated and continuously followed by Courts in Pakistan in the domain of Muslim personal/family law, especially in the issues under consideration. The discussion of the issues under consideration in Islamic law are mainly confined to the issues that have already arisen in courts' cases. The methodology followed in this work is that the main issues are explored briefly under Islamic law, statutory law where available, and case law as decided by the superior Courts in Pakistan. Fair observations are made on some decisions that are considered at odds with Islamic law.

2. The Nature of Family Law in Pakistani Legal System

Pakistan largely follows the common law system with local adjustments partly necessitated by Islamic law, however, it may not be Islamic law in its entirety or pure doctrine rather it is the interpretation by the superior courts. Under the doctrine of precedent, lower courts are bound by the decisions and interpretations of higher courts. Family law is partially codified in the shape of various Acts, Rules, Regulations, and Bylaws. Thus, our family law system is a mixture or hybrid of codified and uncodified laws. However, it is the interpretation by the superior courts of these two areas of law that is considered as law in every particular issue of family law even in subsequent cases. Issues within the family law that are not yet codified by the State are governed by Shariat. Muslim Personal Law Act (MPLA) 1962 provides that:

> "Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (*Sharī'at*) in case where the parties are Muslims."[1]

Section 2 of The Enforcement of Shari'ah Act, 1991 defines the term *Sharī'ah* as "the injunctions of Islam as laid down in *the Holy Qur'ān* and [the] Sunnah."[2] Section 2 is further elucidated by the clause which states that, "While interpreting and explaining the *Shari'ah* the recognized principles of interpretation and explanation of the Holy Qur'an and [the] Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration."[3] Unfortunately, the Act is silent on the scope of the phrase 'prevalent Islamic schools of jurisprudence', therefore, it could be construed either as 'schools that are accepted internationally' or schools that are accepted within the country'. Our courts have yet to apply and interpret this provision. Section 4 of the above Act provides that, (a) "while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions of the Constitution shall be adopted by the Court."[4] As a matter of fact this Act may be called as a paper tiger as judges and lawyers never consider its provisions while interpreting statutes. Instead, they look at case law under the doctrine of precedent.

On the other hand, there are many statutes governing many issues of family law in Pakistan. These include but are not limited to: The Dissolution of Muslim Marriages Act (DMMA), 1939, Muslim Family Law Ordinance (MFLO), 1961, Family Courts Act (FCA), 1964 and so on. All these statutes are amended time again and are subjected to vigorous interpretations by our superior courts.

Generally, a family law case is brought to the Family Court which has jurisdiction in family issues and it has to decide the case within six months. Appeal is allowed to the first appellate court which is

supposed to decide it within four months. There is no further appeal, however, either party may go to the High Court under its writ jurisdiction. Usually, the case is heard by a Single Bench and there might be an Intra-Court Appeal or ICA to a Divisional Bench. In some cases, either party may appeal to the Supreme Court against the decision of the High Court. It is pertinent to note that both the first Appellate Court and the Family Court are exempted to follow the rigorous, time consuming and technical procedural rules while adjudicating family law cases within four months and six months respectively. In practice though it takes longer than the above-mentioned time frame to decide family cases.[5]

3. Financial Rights of Wife: Dower

Pakistani law does not provide statutory definition of dower, however, its meaning, nature, significance and definition of the term, has been explained in many cases by the courts. Dower has many other names in Arabic some of them are used in the Qur'an and others in *aḥādīth* of the Prophet Muhammad *Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam*. It is defined by al-Babarti (786/1384) as "[T]he property which becomes payable by the husband as an effect of the benefits of marriage either through specification or due to the marriage contract."[6] According to Ibn 'Aabidin (d. 1252/1836), dower is "[T]he [property] that becomes payable to the wife because of marriage contract or sexual intercourse."[7]Badruddin al-'Ayni (d. 855/1453) notes in his commentary on *al-Hidayah* that al-Kaki[8] has mentioned several names for *mahr*,[9] three of them are in *the Holy Qur'ān* which are *Nahla* (dower)[10]; *'Ajr* (dower)[11]; and *Faridah* (dower)[12]. *The Holy Qur'ān* also mentions the word *Taul* for dower.[13] Other names used are *mahr*[14], *Sadāq* also *Sidāq*, pl. *suduq* ((bridal) dower)),[15] and '*Uqr*[16]. Dower is an effect of marriage but is neither an element not a condition for marriage, however, it is obligatory. *The Holy Qur'ān* says, "But it is lawful for you to seek out all women except these, offering them your wealth and the protection of wedlock rather than using them for the unfettered satisfaction of lust. And in exchange of what you enjoy by marrying them pay their bridal-due as an obligation."[17] Allah also says in *the Holy Qur'an*, "Give women their bridal-due in good cheer (considering it a duty); but if they willingly remit any part of it, consume it with good pleasure."[18]

Mahr is not a pre-condition for the validity of marriage, however. *The Holy Qur'ān* says, "There is no blame upon you if you divorce your wives before you have touched them or settled a bridal gift

upon them. But even in this case you should make some provision for them: the affluent, according to his means; the straitened, according to his means – a provision in fair manner. That is a duty upon the good-doers."[19] It is never a bride-price. According to Kamal b. Humam (d. 861/1457), "Dower has been ordered to underline the prestige of the marriage contract and to stress its importance … It has not been enjoined as a consideration like a price or a wage, otherwise it would have been set as a prior condition".[20] Nasir argues that dower "is neither an essential nor a condition for the validity or effectiveness of the marriage contract, nor to make it binding, nor is it mentioned as being so in any modern Islamic legislation."[21] Dower is confirmed by one of three things: consummation of marriage, seclusion of the husband and wife, or death of either one of them.[22] However, the issue of dower always surfaces on the dissolution of marriage in anyway as is seen in the cases under consideration. Dower may be named in the marriage contract or through the mutual consent of the parties in which case it is called *mahr al-Musamma* (specified dower) but a marriage is valid without specifying it. *The Holy Qur'ān* says, "or settle a bridal gift upon them, then (give them) half of what you have settled."[23] Since there is no sin on the husband who divorces his wife without fixing her dower and since there cannot be divorce without a *nikāḥ* (marriage contract), therefore, marriage is valid even if dower is not fixed or mentioned.[24]

Mahr al-mithal is the dower fixed for the wife after taking into consideration women of her equal status at the time of marriage. It is payable in situations when it is either not fixed or is unknown or the marriage contract mentions that there shall be no dower or what is named cannot be dower under Islamic law or she was married on the condition that he will serve her for a specified period of time, in all these cases the *mahr* to be payable is called *mahr al-mithal* or standard dower. If the woman died before consummation of marriage and her *mahr* is not fixed, the husband has to pay standard dower. If the husband died before consummation and the dower is not fixed, his estate shall be liable to standard dower. If she is divorced before consummation when the dower is not fixed, no dower shall be paid as she will be entitled to a gift (which shall be up to half of the standard dower).[25] The Hanafi jurists argue that standard dower should be fixed according to the dower of other women in the family of the father of the woman. These women include her sisters, aunts, and her cousins. However, if no woman is found in her father's family, then the dower of a woman who is from another family which is similar in status as her father's family.[26] Wealth, beauty, age, intellect, and spirituality are

taken into consideration for determining standard dower.[27] However, the region, virginity, the specific era, education, and perfectness in behaviour may also be assessed.[28] Both woman should be from the same region and era and that the dower of a woman related to her but living in a different region cannot be considered to determine *mahr al-mithal* because *mahr* varies from region to region and time to time.[29] Any property considered as valuable in Islamic law can be given as dower whether movable or immovable. In addition, *mahr al-mussama* may be entirely or partially prompt (*mu'jjal*) or deferred (*mu'jjal*).[30]

Muslim jurists have disagreed about the minimum quantity of dower. According to the Hanafi school, it should not be less than 10 dirhams[31] or its equivalent property because of the saying of the Prophet Muhammad (*Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam*) who is reported to have said, "Dower shall not be less than 10 Dirham".[32] The Aḥnāf also state that the minimum dower shall not be less than the *Niṣāb*[33] of theft which is one Dinar or 10 Dirham.[34] They consider the *hadīth* which says, "Find even if it be a ring of steel"[35] to be in the nature of the prompt portion of dower. They argue that some of the dower should be paid before the consummation of marriage. To prove this point, they argue that the Prophet (*Ṣal Allah-u-'alaihe wa sallam*) stopped 'Ali b. Abi Talib (*Raḍi Allah 'anhu*) from consummation of marriage with Fatima (*Raḍi Allah 'anhā*) till she was paid some of her dower. However, 'Ali said that he has nothing, on which the Prophet (*Ṣal Allah-u-'alaihe wa sallam*) told him to give her his armour. 'Ali gave her his armour.[36] The Ahnaf opine that in case the *mahr* fixed is less than 10 dirham or its equivalent, the *nikāḥ* is valid but the dower is invalid and should be raised to 10 or more for its validity.[37]

There are many decisions in which judges have tried to elaborate some complicated rules about dower. *Abdul Kadir v Salima*, 1886 described dower, under the Muhammadan Law, as "a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage …".[38] This approach has been criticized. According to Justice Tanzilur Rahman, of the Sindh High Court, dower "is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage, in which case proper dower (*Mahr Mithl*) becomes due.[39] The dower, therefore, is a right which comes into existence with the marriage contract itself except that in case the dower is deferred its enforcement is held in abeyance till

a certain event, i.e. dissolution of marriage by death or divorce, occurs."[40] According to Justice Khattak of the Peshawar High Court, "Under Mohammadan law dower is a mark of respect to the wife."[41]In *Shah Daraz Khan v Mst. Naila*[42] dower was fixed as 30 *tolas*[43] gold jewelry, ten of which was prompt and 20 was deferred but only six *tolās* was delivered by the husband but was taken back and never returned to the wife and thus, the entire amount of dower was outstanding. The marriage was dissolved by the trial Court due to the brutality and ill-treatment by the husband. The wife claimed her entire amount of dower of 30 *tolās* which was contested by the husband who pleaded that the dower was only six *tolās* which has already been paid. The Family Court decreed her suit to the extent of 24 *tolās* of gold as dower. Both parties appealed to the first Appellate Court which partially allowed the appeal to the extent of dower. The ex-husband assailed both the judgments of the lower courts below. The husband alleged that his signature on the *Nikaḥnāmah* or marriage contract is fake, however, an expert proved it to be his signature. The High Court accepted his claim that he has paid six *tolās* of gold jewelry to his wife and held that 24 tolas are still outstanding to the husband. In *Ghazala Sadia v Muhammad Sajjad*,[44] rupees 1,000 was fixed as prompt and 50,000 was fixed as deferred dower. The wife alleged cruelty and although she had been delegated the right to divorce herself but she did not exercise it and, instead obtained separation through *khul'* from the Family Court which ordered her to return the prompt dower. However, the husband was ordered to pay her the deferred amount of 50,000. The District Court dismissed husband's appeal. On a writ petition to the Lahore High Court it was held that the words of section 10(4) of the Family Courts Act, 1964, which says, "[T]he Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for the dissolution of marriage forthwith and shall restore the husband the *Ḥaq Mahr* received by the wife in consideration of marriage at the time of marriage"[45], that the proviso "only talks of the restoration of Ḥaq-ul-Mahr [dower] already received and its restoration [and that] withholding or relinquishment of deferred dower cannot be added to this proviso which the Legislature never intended. Had that been [the] intention of the Legislature, after the word received, the words, or agreed to be received should have followed."[46] The Court also observed that the husband has been cruel to the wife and that he has been the cause of discord between the two. The Court cited *Babar Ismail v Mst. Sheeba Bashir*,[47] a decision of the Sindh High Court and *Mst. Shaista v Sh. Liaquat Ali Sathi*[48], a decision of the Lahore High Court, where it has been held that

the prompt dower if already paid to the wife was to be restored and if it is not yet paid by the husband, it was not to be paid to the wife.[49] However, the last sentence is contradictory to the ruling of the Court in the instant case. The Court also endorsed *Muhammad Kaleem Asif v A. D. J.*[50] in which it was held that the wife is not liable to restore dower or other benefits received by her in case of dissolution of marriage through *khul'*,if she claims that the husband was the cause of discord.[51] The Court concluded that, "[A]s the right of Khula [*khul'*] has accrued to a wife for redressal of her grievance against her husband, the return of whole amount of dower becomes unnecessary and returnable amount may be reduced, in a case when the dissolution of marriage on the basis of Khula [*khul'*] is claimed also due to fault or wrong on the part of the husband."[52] The Court also relied on *Khalid Mehmood v Anees Bibi*.[53]

However, a wife may claim any wrongdoing against her husband but a mere claim or accusation is not sufficient to give such a ruling. The accusation or claim must be proven. The main issue often ignored in *khul'* cases is that all allegations of cruelty and non-maintenance etc., are not investigated by the Court as it takes much more time as evidence has to be recorded and rebutted and witnesses will be examined and cross-examined in a full dress trial whereas in case of proceedings for *khul'*, the case may be decided in one or two hearings without any trial. This shortcut suits the counsels, Family Courts, as well as the husbands but the wives have to return the dower if already received. However, if cruelty is proven the marriage has to be dissolved under the Dissolution of Muslim Marriages Act, 1939 (DMMA) and not under *khul'*. Dissolution of marriage under the DMMA means that the wife will not be returning her dower if paid. Thus, our Courts decide cases instantly but deprive the woman of her dower.[54]

4. Case Law on When Does Deferred Dower become Prompt

While commenting on the importance of deferred dower the Court observed in *Shah Daraz* case discussed above that, "The wisdom behind the classification of prompt and deferred dower is dependable upon the harmonious relation of the parties and particularly protection of right of women in unforeseen circumstances. The deferred dower is a sort of guarantee of a woman against ill-treatment, non-maintenance, desertion or any other abnormality in the matrimonial life including rash and arbitrary divorce."[55] The Court has also reproduced the *ratio* from the Supreme Court decision regarding when should deferred dower becomes payable which had held, "that prompt dower is payable on

demand during the subsistence of the marriage tie whereas the deferred dower is payable on the time stipulated between the parties, but where no time is stipulated, it is payable on dissolution of marriage either by death or divorce. But, the deferred dower does not become "prompt" merely because the wife has demanded it."[56]

The Honourable High Court has therefore held that, "deferred dower is payable on the time stipulated between the parties but where no time is stipulated, deferred dower did not become "Prompt" merely because the wife had demanded the same, rather the same would be payable in the eventuality of dissolution of marriage either by death or divorce."[57] The Court dismissed the petition of the husband. The Honourable Lahore High Court has ruled in *Muhammad Azam v A.D.J.*[58] that the wife was entitled to receive her deferred dower upon demand when her husband remarried. Similarly in *Muhammad Sajjad v A.D.J.*[59] the wife had sought recovery of dower, maintenance and dowery. The Family Court decreed her suit. The first Appellate Court upheld the same. The husband brought writ petition before the LHC. He assailed the decree on the ground that during the subsistence of his marriage he is not supposed to pay the deferred dower. The Court ruled that the view that deferred dower could only be paid on death or divorce is not supported 'by any recognized principle'; that 'deferred dower shall always be treated as prompt if no specified period for the payment of dower is fixed', that, 'the classification of dower as prompt and deferred has no legal sanction behind it…'. The High Court of Azad Jammu & Kashmir has given a similar decision in *Tahir Hanif v Saira Kosar*[60] on this point. In this case the wife filed two suits for recovery of deferred dower and maintenance. The dower was demanded at the time of *Rukhsati* (wedding) and the husband promised to pay it after one year of the marriage. Counsel for the husband relied on *Sadia Usman*'s case but Justice Sardar Abdul Hameed Khan of Shariat Court of Azad Jammu & Kashmir (AJ&K) referred to an earlier decision of the LHC, *Dr Subaira Sultana* case[61] and held that if the time for the payment of deferred dower is not fixed "it will be payable on the eve of dissolution of marriage by death or divorce".[62] Justice Khan argued that the classification of prompt and deferred dower is practiced in society. It is incorporated for the convenience of the parties and does not have any legal sanction behind it. He asserted that deferred dower does not mean that it is waived or postponed until dissolution of marriage. The Court did not interfere in the judgment and decrees passed by the trial Court. It is pertinent to mention that the LHC had held earlier in *Dr Subaira Sultana*[63] case that if the time for the payment of deferred dower is not

fixed 'it will be payable on demand of the wife'. However, there is a conflicting decision of the Supreme Court in *Sadia Usman v M. Usman*[64] in which Sadia's dower was fixed at PKR one million, half of it was prompt and was given as gold ornaments whereas half was deferred. Dispute arose when the husband moved abroad and did not maintain his wife. Sadia filed suit for recovery of deferred dower and maintenance. Husband filed suit for restitution of conjugal rights. The Family Court decreed her suit for recovery of 500,000 and some money for maintenance. Both parties appealed to the first Appellate Court which did not deal with recovery of dower and rather increased the amount of maintenance. Both parties came to the Islamabad High Court in writ petitions and the Court decided that the deferred dower cannot be paid during the subsistence of marriage unless it was agreed between the parties or death of either party or divorce. Sadia appealed against this finding to the august Supreme Court where Chief Justice Iftikhar Muhammad Chaudhry, as he then was, relied upon Abdur Rehman Al-Jaziri's *Kiāab al-Fiqh 'Alā al-Madhāhib al-Arba'ah,* when he ruled that "we are of the opinion that prompt dower is payable on demand during the subsistence of the marriage tie whereas the deferred dower is payable on the time stipulated between the parties, but where no time is stipulated, it is payable on dissolution of marriage either by death or divorce. But the deferred dower does not become "prompt" merely because the wife has demanded it."[65] It is appropriate to mention what exactly is said in the original book of Jaziri. While discussing the opinion within the Hanafi school of thought, Jaziri stated that "[A]nd when dower is specified for her: half of it prompt and half deferred and the time for the deferred is not mentioned, as if he said to her: 'I marry you on 100, 50 prompt and 50 deferred and the time for the deferred [portion] is not specified, so, there is difference of opinion. Some [jurists] argued, that the deferment is void and the entire dower shall be paid instantly; others say that the deferment is legal and it takes place at the time of separation either by death or divorce, and this is the correct view."[66]

The above opinion seems to be available almost in verbatim in 'Alauddin Al-Kasani's (587/1191)[67] book as well as the famous *Fatāwa al-Hindiya*.[68] The only addition in these two main treatises of the Hanafi school of thought in the above text is the sentence, "as is the custom in our land" which is found in both *Badā'i'* and *Fatawa*. Thus, it is through the force of custom, not the sanction of law, that the portion which is deferred becomes payable when the contract ends. The Apex Court has accepted this opinion within the Hanafi school and endorsed

the decision of the IHC. The Sadia Usman's case has been relied upon by the High Courts in many cases.[69] Since this opinion has become a binding precedent, it can only be overruled either by a larger Bench of the Supreme Court or by an amendment in law which would provide the quickest remedy for battered women for payment of their deferred dowers on demand.

5. Legal Effects of Paid/Unpaid Dower:

There are many legal effects depending on whether the dower is prompt fully or partially and when the prompt part is not paid for a specific period of time agreed by the husband and the wife. In case the dower is prompt and is not paid, the woman can refuse herself to the husband even if she has shifted to his house. In addition, the husband cannot legally prevent her from travelling, or going out of the house or from visiting her family. A husband cannot get back if he has given her part of the prompt dower because this was her legal right. It is the same if the dower was fixed but it was not mentioned whether the dower is prompt or deferred because dower is like a financial transaction in which both parties have the same rights.[70] She cannot refuse herself to the husband if the time for payment of dower was fixed but it was not paid according to Abu Hanifah (d. 150/767) and Muhammad b. Hassan al-Shaybani (d. 189/805) but Abu Yusuf (181/798) opines that she has the discretion to prevent herself.[71] If the payment of the prompt dower was delayed for a month, she cannot refuse herself from her husband according to Abu Hanifah and Shaybani because they consider it deferment due to an emergency but Abu Yusuf argues that she can refuse herself. However, in such a case if she did not refuse herself willingly from consummation or seclusion (*khalvat al-Saḥīḥah*), she can still refuse herself till she receives her dower. Similarly, he cannot prevent her from travelling according to Abu Hanifah but according to Abu Yusuf and Shaybani, she cannot refuse herself whether the marriage is consummated or they had met in seclusion.[72]

In our part of the world in most cases half of the dower is prompt and half is deferred as is shown in many cases discussed below. In an earlier case of the subcontinent, the opinions of Abu Yusuf and Shaybani were preferred. In *Abdul Kadir v Salima* (1886) it was held that, "a Muslim wife whose prompt dower had not been paid had no right to refuse herself to her husband if the marriage had earlier been consummated with her consent." It was re-confirmed in *Anis Begam v Muhamamd Istafa Wali Khan* (1933), NS *Rabia Khatoon v Mohd*

Mukhtar Ahmad (1966) which is still the position in India. However, in *Rahim Jan v Muhamamd*, the Lahore High Court ruled according to the opinion of Sahibayn when it said, "I do not find any principle of justice or reason by which the right of the wife to refuse the performance of marital obligations on account of non-payment of prompt dower may come to an end by her once surrendering herself."[73] This opinion was endorsed in *Nur-ud-Din Ahmad v Masuda Khanam* when it held that, "The wife is under the Muhammadan Law entitled to refuse herself to her husband until and unless the prompt dower is paid to her".[74] The same was upheld in *Muhamamdi v Jamil-ud-Din* in which it was ruled that, "Another ground on which she can refuse to go to her husband's house is the non-payment of the prompt dower."[75] This is the position in Pakistan and Bangladesh as far as case law is concerned. This view was confirmed in *Chanani Begum v Muhamamd Shafiq*,[76]*Muhammad Ishaque v Rukhsana Begum*.[77]

6. Amount of Dower on Non-consummation of Marriage

Under Islamic law only half of the dower is payable in case of dissolution of marriage before consummation in case it is specified. However, in case it is not named and the marriage is dissolved, only *mut'ah* is to be paid. Allah says, "There is no blame upon you if you divorce your wives before you have touched them or settled a bridal gift upon them. But even in this case you should make some provision for them: the affluent, according to his means; the straitened, according to his means – a provision in fair manner. That is a duty upon the good-doers. And if you divorce them before you touch them or settle a bridal gift upon them, then (give them) half of what you have settled unless either the women act leniently and forgo their claim, or he in whose hand is the marriage tie acts leniently (and pays the full amount). If you act leniently, it is closer to God-fearing. And forget not to act gracefully with one another, for indeed Allah sees all that you do."[78]Marginani (d. 593/1197) argues that "*mut'ah* is three dresses (that is three parts of a dress) according to the apparel of a woman of her status. These are the shirt, head covering, and the lion cloth."[79] In *Muhammad Akbar v Shazia Bibi*[80] the husband/petitioner had transferred 99 kanals of land as dower for his wife/respondent as dower in 2004 when the marriage was solemnized. The marriage never took place and the wife was divorced. The husband alleged in his suit that the land was fraudulently transferred to the wife. The Family Court decreed husband's suit but the respondent's appeal was accepted by the first Appellate Court. The Lahore High Court dismissed the husband's appeal and upheld the

decision of the first Appellate Court. The husband appealed to the Honourable Supreme Court on the ground that the marriage was never consummated. The Supreme Court ruled that she is entitled to half of the dower because the marriage was not consummated.

7. Maintenance of the Wife

The husband is under a legal obligation to maintain his wife throughout the existence of matrimonial relationship. It is difficult to find case law on maintenance during the marriage, however, problems surface as soon as the marriage is dissolved where the wife always claims maintenance amount till the end of her *'iddat* (waiting period) and permanent allowance. Important issues regarding maintenance of wife are explained under Islamic law first. Allah says in *the Holy Qur'ān*, "(During the waiting period) lodge them according to your means wherever you dwell, and do not harass them to make them miserable. And if they are pregnant, provide for them maintenance until they have delivered their burden. And if they suckle your offspring whom they bore you, then give them due recompense, and graciously settle the question of compensation between yourselves by mutual understanding. But if you experience difficulty (in determining the compensation for suckling) then let another woman suckle the child."[81] Allah the Exalted says in *the Holy Qur'ān* regarding suckling of babies that "(In such a case) it is incumbent upon him who has begotten the child to provide them (i.e. divorced women) their sustenance and clothing in a fair manner. But none shall be burdened with more than he is able to bear; neither shall a mother suffer because of her child nor shall the father be made to suffer because he has begotten him. The same duty towards the suckling mother rests upon the heir as upon him (i.e. the father)."[82] In addition, Allah says, "Whoever has abundant means, let him spend according to his means; and he whose means are straitened, let him spend out of what Allah has given him. Allah does not burden any human being beyond the means that He has bestowed upon him. Possibly Allah will grant ease after hardship."[83] The Prophet Muhammad *Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam* has emphasized on the maintenance of women in his last sermon when he said that, "[A]nd it is incumbent upon you [men] to provide them [your wives] clothing and sustenance in a fair manner."[84] The Prophet (*Ṣal Allah-u-'alaihe wa sallam*) is also reported to have told Hind, the wife of Abu Sufyan, when she complained against her husband, "[T]ake from the property of Abu Sufyan what you need for yourself and your child in a fair manner."[85]

In case of separation between the spouses if the husband divorced her, she is entitled to lodging and maintenance during the *'iddat* period whether the divorce is revocable or irrevocable and whether she is pregnant or not as long as the marriage is consummated.[86] Similarly, when separation is caused without divorce, she is entitled to lodging and maintenance on the above analogy.[87] In case the separation is caused through *khul'* initiated by the husband on the condition that she will not be entitled to maintenance as well as lodging, she will still be entitled to lodging but not maintenance because lodging has the right of God in it, therefore she does not have the right to waive it.[88] However, if she initiated separation through *khul'* on the condition that she will waive off her maintenance, she has the right to do so.[89] This is so because her right to maintenance is already proven and she is allowed to leave it as compensation for *khul'*. When dissolution of marriage is caused by the husband, she is entitled to lodging and maintenance whether it is affected by legal means or illegal ways as if he has sexual intercourse with her daughter from another marriage or mother when the marriage between the husband and wife is already consummated. However, when the dissolution is affected by her through a legal mean or an illegal way such as if she commits apostacy or kissed his father or son [from another marriage], she is not entitled to maintenance but is entitled to lodging on the basis of *Istiḥsān*. However, if we use analogy, she will be entitled to both.[90]

In *Shazia v Muhammad Nasir*[91] the Peshawar High Court awarded maintenance to the wife and her child at the rate of Rs. 2000 per month for the period she prayed for, and the minor child was awarded maintenance at the rate of Rs. 1500 per month for the period the petitioner prayed for till his majority with 10% annual increase. The respondent had also contracted second marriage without the permission of the petitioner. The respondent husband could not prove that his wife had left voluntarily. The Court held that maintenance is neither a gift nor a benefit but an undeniable legal obligation of husband. In *Syed Abu Talib Shah v Bibi Rukhsar Zahra*[92] it was held by the Peshawar High Court that a wife residing away from her husband on the basis of a lawful excuse is entitled to her right of maintenance whereas in *Kashif Akram v Mst. Naila* 2011[93] a wife who had deserted her husband without any lawful reason was held not entitled to past maintenance. In *Khalid Bashir v Shamas-un-Nisa*[94] it was held that a child is to be maintained by the father even though the mother earns livelihood. According to Marghinani, "[T]he maintenance of minor children is the

liability of the father and no one else participates in this with him, just like no one else participates with him in the maintenance of the wife."[95]

As explained above *the Holy Qur'ān* has put this duty on the father.[96] In *Shayan through Mst. Shamim v Nisar Ahmad*[97] the Lahore High Court ruled that a mother cannot waive the maintenance right of a child by entering into an agreement with a father. It was held in *Gakhar Hussain v Surrayya Begum*[98] that a father is required to maintain his unmarried daughter even when she is earning her living. The LHC has held in *Ch. Muhammad Bashir v Ansarun Nisa*[99] that a father is to maintain his unmarried adult daughters. This is so even if an unmarried daughter who refused to marry according to the wishes of her father.[100] Similarly, a divorced daughter, even when living separately, is to be maintained by the father as per the decision in *Manzoor Hussain v Safiya Bibi*[101] by the Lahore High Court. The same was held in *Mian Muhammad Sabir v Uzma Parveen*[102] in which the divorced daughter was living with her divorced mother and not the father. The questions whether an adult son should be maintained by his father depends on the circumstances of his father and the son. In general, a son is maintained till attaining the age of puberty.

8. Financial Stipulations Promised by the Husbands to give a Certain Amount of Money or Compensation in Case of Divorce[103]

This section evaluates selected decisions from 2009 to 2017 on the following specific legal questions, first, whether the amount stipulated in the marriage deed that a man promises to give to his wife in the event of divorce is judicially declared as binding? Secondly, can courts impose a penalty on the husband for divorcing his wife without any just cause, especially when she has committed no wrong and wants to keep her relation? Finally, what are the formulations of Muslim jurists regarding these conditions?[104] In Islamic law only the Hanbali school of thought consider such stipulations as binding whereas the *Jamhūr* (the majority) of jurisprudents of the Shāfiʿī's'[105], Malikis[106] and Hanafis,[107] treat such conditions as invalid. The opinion of the Hanbalis seem very strong, specific and solid,[108] especially the Prophetic saying, "The worthiest of all the conditions to be fulfilled are those that legalized women for you"[109] which is the most important evidence produced by the Hanbalis. However, Courts in Pakistan have not paid any attention to the opinion of Hanbali jurists as far as this issue is concerned.

Both the august Supreme Court and the Lahore High Court have given conflicting judgments on whether the sum of money promised by the husband to recompense the wife in the eventuality of divorce. Unfortunately, both the Honourable Courts have based their decisions on technicalities without articulating the merits of these stipulations. In addition, Courts have not ventured to examine the position of Muslim jurisprudents regarding such terms that are favourable to women. Courts have delved into the issue whether Family Courts have the powers to decide such cases. In *Nasrullah v District Judge*,[110] the main point before the Lahore High Court was whether the sum promised by the appellant to be given to his spouse can be treated as an 'actionable claim' and whether it is a 'property' for the purpose of Item No. 9 of the Schedule to the Family Courts Act, 1964. The LHC answered the question in affirmative and confirmed the findings of the first Appellate Court. However, the decision of LHC in *Muhammad Akram v Mst. Hajra Bibi*[111]is the polar opposite of *Nasrullah* case. In this case another Bench of the same Court reached a different conclusion, that is, the promised sum is not an 'actionable claim' or property under Item No. 9 of the Schedule to section 5, i.e. "personal property and belonging of the wife."[112] The Court gave a new interpretation to the phrase 'personal property' or 'belonging' available in Item No. 9 and declared them as a "residuary provision"[113], which can be used by the ex-partner to get back assets she had acquired during the existence of her wedded relation. The Court declared items of personal use, such as clothes, or jewelry, and gifts she was given. The Court ruled that whatever has not yet become the property of the ex-wife, rather she "has a claim to recover from the husband"[114] is thereby exempted and it cannot be designated as an 'actionable claim' as per section 130 of the Transfer of Property Act, 1882 (TOPA).[115] In the opinion of the Court 'actionable claim', is the one "for which an action will lie, furnishing a legal ground for an action and according to section 3 of the Transfer of Property Act, a claim towards a debt."[116]

The Court ruled that the case does not fall in the jurisdiction of the Family Court.[117] While deciding *SyedMukhtar Hussain Shah v Saba Imtiaz*[118] in the Apex Court, Justice Nisar, as he then was, elaborated his previous position in *Muhammad Akram* case and critically evaluated the decision of the LHC in *Nasrullah* case,[119]explained earlier where such stipulations were declared valid and binding. He added to his earlier arguments that "when in Entry No. 9 'actionable claim' has not been provided by the legislature, it shall be improper and shall impinge upon the legislative intent and the rules of interpretation to add this

expression to the clause/entry."[120] It would have been appropriate to resort to the MPL (Shariat) Act discussed above as the issue was provided for by Codified Family Law. The LHC has taken a different view in *Muhammad Amjad v Azra Bibi*.[121] Surprisingly, all the judgments discussed above did not take into account the decision of the Apex Court in *Muhammad Aslam v Mst. Fateh Khatoon*,[122] in which the amount promised by the ex-husband had been duly awarded.

The crux of what is discussed in this section is that initially few conflicting judgments were given be the LHC but the matter was settled after the latest decision of the Supreme Court, that is, *Syed Mukhtar Hussain Shah*[123]which affirmed the view that cases involving such conditions in favour of women are outside the jurisdiction of Family Courts. In the Punjab the Schedule to the FCA was amended in 2015 by adding the provision, "[A]ny other matter arising out of the *Nikāḥnāmah*"[124] as a further ground for jurisdiction of the Family Courts. This means that the above decision of the Supreme Court in *Syed Mukhtar Hussain Shah*[125]is binding in the rest of the country and Family Courts have no jurisdiction in this issue. However, such amendments are required in the rest of the country to overrule the effect of this decision.

9. Gifting the Corpus or Usufruct of the Property to a Woman: Exploring a Hidden Legal Circumvention to Benefit Helpless Women

Some authors criticize the Islamic law of inheritance. They argue that the one-eighth share of the wife in the estate of her late husband in case he has children is not enough.[126] However, this can be addressed easily by the husband before his death by gifting either the corpus of his property or its usufruct. Should this happen, his estate will not be divided upon his death and that his wife will either be the sole owner or will enjoy its benefits till her death. This procedure is known as gifting the corpus or benefits of the property and is used in situations where the wife is either issueless or it is feared that the children might throw their mother out of the family property and she will have nowhere to go.[127]

Islamic law contemplates a gift as a "transfer of property or benefits thereof to another person for no consideration".[128] Section 122 of the TOPA characterizes it as "the transfer of certain existing moveable or immoveable property made voluntarily and without

consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."[129]

The application of the law of inheritance to all, or some parts of the real property could be delayed by gifting of all or some parts of the estate.[130] There are some conditions attached with *hiba 'umra* (life grant) and *ruqba*.[131]The Prophet Muhammad (*Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam*) legalized *'umra* but did not allow *ruqba*. According to the Hanafi interpretation, the conditions attached to *ruqba* are that the property will revert to the donor if the donee died before him. But if the donor died before the donee, then the property will remain with him or her (the donee). In other words, the one who survives the other will possess the estate. However, the Hanafis consider the gift of *'umra*is an absolute one. There are different forms of *hiba* like *hiba-bil-iwad*and *Hiba-bi-shartul-iwad.*

Hiba-bil-iwad literally means gift-for-gift or gift with something as compensation, a gift for which the donee pays a contribution voluntarily to the donor. Thus, it seems like exchange of gifts by the two. The two gifts are not equal in value. Giving the gift in compensation has enormous legal significance because once the return gift is given, it renders the gifts irrevocable and final. The compensatory gift is only symbolic in value as it is always trivial and insignificant in contrast to the first gift. The Hanafi jurists also declare irrevocable gifts between individuals who are blood relatives within the prohibited degrees as well as gifts between husband and wife. *Hiba-bi-shartul-iwad* literally means gift with a condition for a reward, that is, when the donor asks for a certain thing as a reward. Thus, it is like a barter arrangement.

The South Asian *hiba-bil-iwad* is considered by Lucy as a unique transaction. She argues that it evolved in Hindustan and was very much practiced when the English took over. She refers to this arrangement as 'South Asian *hiba-bil-iwad*.' The British courts treated it as a unique arrangement as it was a circumvention of the law of inheritance. She asserts that the South Asian *hiba-bil-iwad* is different from *hiba-bi-shartul-iwad* as well as *hiba-bil-iwad* which are well known in Islamic law.[132] She argues that "[B]ecause the *'iwad* is an integral part of the bargain from the beginning (rather than a spontaneous after-thought on the part of the donee), the South Asian transaction, to this extent, resembles the *hiba-bi-shartul-iwad*. But it

differs from the *hiba-bi-shartul-iwad* in that there is no correlation in value between the two items exchanged, as in the *hiba-bi'l-'iwad*, the *'iwad* may be (and often is) trivial and the transaction is essentially gratuitous."[133] She states that "The classical *hiba-bi-shartul-iwad* only becomes subject to the law of sale after possession of each component item has been delivered."[134] Islamic "law makes a fundamental distinction between the substance of a thing, the corpus, and the use, profits, or benefits of that thing, the usufruct. Ownership of the corpus of property and the right to use/enjoy/appropriate the usufruct of the property are separate and distinct aspects of a thing, and are capable of being transferred independently, as long as the *inter vivos* transfer involving the usufruct occurs first to different persons."[135] Under *'ariyat* the benefits of the property are given whereas the corpus is not given.[136] When an *'ariyat* is made for life time of the donee, it is called *'umra*.

It is fitting to note that the jurisprudence developed in Pakistan has reputed any customary or non-Islamic transactions of *'umra* or gift of usufruct and they have been judging every such transaction as per the tenets of Islamic law. Our Courts seem to have given different interpretations to the gift of usufruct and the gift of corpus. According to this interpretation, if a gift is intended to be usufruct only the condition of reversion of such property would be valid but if a gift of corpus is given then condition violative of the transfer of corpus is declared invalid.

In *Mst. Khan Bibi v Safia Begum*[137]the main issue before the Lahore High Court was whether a 'life grant' in favor of wife (respondent) was a gift of usufruct till her death and the property would revert to heirs of the donor or the donor himself or whether it be treated as *'umra* gift thereby the respondent widow be considered as the owner of the contested house and the stipulation of reversion be declared as void. The stipulation in the deed stated that "After the death of the wife, the whole house will revert to the donor or his heirs in its entirety."[138] The deceased had left two houses one of which was not contested but the second was given to his wife till her death. The case was brought by one of the two sisters of the deceased husband who was survived by his mother, widow, and two sisters. The trial Court denied the claim of the sister and ruled in favour of the widow. The Honourable Lahore High Court rejected the decision of the trial Court and held that "[I]n these circumstances, it cannot be said that Mst. Ghulam Safia took the property as an absolute owner. The ownership of the corpus of the house in question was kept by deceased Abdur Raheem and only

usufruct was gifted to the wife for her enjoyment during her lifetime."[139] The Court took notice of the death of Mst. Ghulam Safia during the pendency of the case and ruled that "the life interest created by Abdur Raheem in her favour has come to an end."[140] The Court reverted the house to the husband and ordered it to be open for distribution amongst his legal heirs.

In *Said Akbar v Mst. Kakai*[141] a deed regarding land of 200 kanals was executed in favour of Mst. Totia Begum by her brother on the condition to marry the appellant. Upon the death of Mst. Totia Begum the appellant asked the Civil Court to issue a declaration making him the only owner of the land in question after the demise of his wife to set aside the mutation of inheritance for providing to Mst. Kakai ½ of the estate. He argued that Mst. Totia Khan had only a life interest in the said estate as he was the genuine grantee of the property in question. The trial Court agreed with the assertions of the appellant and ruled that since the donee was prohibited under the deed to alienate the property or create any encumbrance, therefore, she only had a life interest and that Mst. Kakaihas no right to any share in the property. On appeal the District Judge endorsed the decision of the trial Court. Mst. Kakai appealed to the High Court but she died during the pendency of the case. The High Court ruled that the instrument was a gift of corpus and not the benefits of the property in favour of Mst. Totia Begum and that the condition of prohibition of any mortgage or sale or alienation during her lifetime was void under Islamic law. After considering the terms of the deed and relevant case law the Honourable Supreme Court ruled that "we have no doubt in our mind that the gift in favour of Mst. Totia Begum was of the corpus and was not merely of the usufruct for her life: rather it constituted her to be full owner of the property and the prohibition against any transfer or mortgage of the property by her during lifetime, being in defeasance of her rights under the gift the well settled principle of law became void."[142] The Court opined that the gift was meant to convince the woman to marry the appellant and was thus a precondition for the validity of the gift. The Apex Court referred to *Nawazish Ali v Ali Raza Khan*[143] in which the Privy Council had established that "over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant."[144] The appeal was, therefore, dismissed.

In *Farid v Mst. Noor Bibi*[145] the main question deliberated upon before the Lahore High Court was that whether a land measuring 52 kanals and 10 marlas gifted to the wife could be revoked by the donor husband once it is completed in favour of the respondent. The husband gifted land to his wife upon marriage and the gift deed contained the stipulation that the land is given to her تا حین حیاتی یا نکاح ثانی (for life or remarriage). The husband soon divorced the wife and sued to have the gift deed cancelled arguing that it was given for her maintenance and that he is no more responsible to maintain her. The ex-wife contended that the grant was a gift which was complete in all respects and could not be revoked. The trial Court declared the condition as void and the gift as complete and the learned District Judge endorsed the same. The Lahore High Court argued that the phrase, that is, for life or remarriage "is a typical phrase with regard to the limited estate of a female under custom."[146] The Court ruled that "the general rule of custom for the creation of such an estate is that in the absence of sons and descendants in the male line, the widows take the land on a life interest"[147] and that "this right to hold the estate for life originated in her undoubted right to maintenance."[148] The Court reasoned that "the gift in favour of the respondent is complete and absolute and the condition being void" and that "she has acquired heritable title in the land in dispute."[149] The Court dismissed the case with costs.

In *Abdul Hameed v Muhammad Mohiyuddin*[150]the main question before the larger Bench of the Honourable Supreme Court was whether a gift by the husband to his wife for life could be construed as a complete gift of immovable property, the condition of usufruct being void. The deceased husband had three wives, Mst. Karam Noor being one of them and the two other wives had already died. The husband had duly mutated one of his immovable properties in the name of Mst. Karam Noor. She died on 24 April 1985 and the plaintiffs got their share in the disputed property. It is at this point that the respondents challenged the order of mutation before the relevant Assistant Commissioner and the relevant Tehsildar treated Mst. Karam Noor as the exclusive owner of the disputed property which order was challenged before the trial Court but the same was dismissed. The trial Court considered the deed as '*Tamlīk*'(ownership) which he treated as a gift and ruled that any condition thereby is void. The same was endorsed by the first Appellate Court and a Single Judge of the Lahore High Court held that the gift was valid and the condition was void. In appeal before the Supreme Court the Counsel for the appellants argued

that since the land was given to the donee for her maintenance during her lifetime which means she has interest in the usufruct of the land but not the land itself. He stressed on the words *guzārah* (maintenance) and *ta heenhayat* (till she lives) in the mutation record. He pointed out that if the intention was to make her exclusive owner the donor would not use these words and phrases.[151] He, however, agreed that if the corpus of property is gifted then attaching any condition contrary to the absolute ownership to the donee is treated as void.[152] The Court unnecessarily delved into almost all *ahādīth* literature about *'umara*; reproduced formulations of Muslim jurists from secondary sources; and various English translations of many treatises of Islamic law of the Hanafi school of thought about '*umara'*, '*ariyat'* and related terms in Islamic law were quoted. The judgement also scanned the history of Islamization in Pakistan and its possible impact on the legal system without deriving any important conclusion for the case in hand. The Court concluded that the gift of the husband was *'umara* and was a complete gift of property under Islamic law[153] and the condition attached to it was void.[154] This case shows how close family members try to deprive women of any gift given to them by their husbands as the case was dismissed by five different forums, that is, the Tehsildar, the trial Court, the first Appellate Court, the High Court and, finally a larger Bench of the Supreme Court but the respondents were persistent in their baseless claim.

In *Mst. Raj Bibi v Province of Punjab*[155] Mr. Habib Ullah Shah had duly gifted 146 kanals and one marla of land to his wife, Mst. Bhirawan Bibi. Upon the death of Mr. Habib Ullah his legal heirs got mutation of inheritance in their favour in 1968. The widow challenged this mutation in the Court of Collector who accepted her appeal and declared her the full owner of the land. The legal heirs appealed to Additional Commissioner who accepted the appeal and declared Mst. Bhirawan as limited owner of the land in dispute. The widow challenged the decision in the Civil Court which was vehemently contested by the respondents. The Civil Court dismissed the case and ruled against her. In addition, her appeal was also dismissed by the first Appellate Court. Thereby a civil revision was filed in the Lahore High Court on 25 April 1999 which was allowed. The same order was challenged by the respondents before the Supreme Court which remanded the same back to the High Court. The Court declared the gift as *'umara*[156] arguing that the document had fulfilled all the ingredients of a gift; that the case is identical to *Abdul Hameed v Muhammad Mohyuddin*[157], discussed above, thereby similar cases shall be decided

similarly. The Court accepted the revision petition and set aside the judgments/decrees of the Courts below and decreed the suit of Mst. Bhirawan.

In *Haji Muhammad Yaqoob v Muhammad Riaz Khan*[158] the main question before a Single Bench of Honourable Peshawar High Court was that whether a gift in lieu of dower was *Hiba-bil-iwad*; whether physical delivery of possession would not be necessary to complete the gift; and whether any condition attached to the gift would make it a gift of corpus or usufruct. As per the facts of the case Fateh Muhammad Khan, grandfather of the petitioners, had transferred the land in dispute to his daughter-in-law, Mst. Mehboob Sultana (step mother of the petitioners) through a registered dower deed (Kabinnama). It was, however, stipulated that she could use the property for her life or her second marriage, but she had no right to mortgage or sell it and that the property would devolve upon her male children after her death. However, the revenue record had shown Mst. Mehboob Sultana as full owner of the property and that she died issueless. Her husband had two sons from his second wife. The petitioners brought a suit asking the Court to set aside the mutation on the basis that a father-in-law could not give dower to his daughter-in-law; that according to the deed document, Mst. Mehboob Sultana had limited ownership and not full ownership; and that the mutations were the result of fraud and collusion. The Civil Court decreed the suit in favour of the petitioners. The same was, however, appealed to the first Appellate Court which was accepted and a revision petition was brought before the High Court. His Lordship, Mr. Yahya Afridi produced many verses of *the Holy Qur'ān* regarding the place and importance of dower; highlighted many *aḥādīth* of the Prophet Muhammad (*Rasūlullah Khātam un Nabiyyīn Ṣallallahu 'alaihi wa 'alā Ālihi wa Aṣḥābihi wa Ṣallam*) regarding gifting the corpus or interest in property; delved into the formulations of Muslim jurists about gifting the corpus or interest in property; and examined leading cases on the subject to conclude that the august Supreme Court has already ruled that "in cases of Hiba-bil-iwaz [*hiba-bil-iwaḍ*] in lieu of dower and/or marriage, physical delivery of possession would not be necessary so as to complete the gift."[159] The Supreme Court had already ruled in *Murid Hussain v Ghulam Ahmad*[160] that "questions of acceptance of such a gift or proof of delivery of possession were not relevant."[161] The Court highlighted another aspect of a gift given to a bride by stating that "the sanctity attributed to the said transfer had been held and placed in at a much higher legal pedestal than a gift made to any other person."[162] The Court concluded that the

transfer to Mst. Mehboob Sultana was valid, binding and lawful and that "the stipulation of her enjoying such benefits during her life time would be void"; that "the stipulation of male lineage to inherit, would surely constitute the clear intention of the donor to pass on complete and absolute corpus of the disputed property to Mst. Mehboob Sultana."[163]The Court endorsed the decision of the first Appellate Court and dismissed the revision petition. It can be seen that in the vast majority of cases the closest family members who would otherwise inherit in the absence of the gift to the wife try their best to exhaust all venues and many of them reach even the Apex Court, however, the High Courts as well as the Supreme Court follow the letter and spirit of Islamic law in this regard which is favourable to helpless and battered women.

10. Conclusion

Under Islamic law as well as Pakistani family law wife is entitled to dower which may be prompt or deferred. Unfortunately, judicial interpretation is divided on the issue whether a deferred dower becomes prompt when demanded by the wife or whether it is only given upon the dissolution of marriage through divorce or death. The current interpretation of this issue by the august Supreme Court in *Sadia Usman* case[164]may be removed by the State through an amendment in the Muslim Family Law Ordinance, 1961 (MFLO). This is the only way to overrule the decision of the Supreme Court on this issue and bind husbands towards their obligations. Secondly, maintaining the wife is the responsibility of the husband under Islamic law as well as Pakistani law. Courts have given conflicting decisions on the issue when it is stipulated in a marriage contract that the husband has to pay a certain amount as damages or penalty or compensation. Once again, the decision of the Supreme Court in *Syed Mukhtar Hussain Shah*[165]may easily be overruled by an amendment in the Schedule of the FCA, 1964throughout the country under which Family Courts could be given jurisdictions to decide issues where a husband stipulates that he will pay a certain amount of money as penalty or compensation or damages. The Province of the Punjab has already amended the law where Family Courts have got jurisdiction in such matters. This means that the above decision of the Supreme Court is binding in the rest of the country where Family Courts have no jurisdiction in this issue. This interpretation is not only against the Injunctions of Islamic law but is also against the standards of justice, fairness, and equity in addition to the denial of financial right to battered women. Finally, under Islamic

law as well as case law a husband can gift the corpus of the property or the benefits of the same (usufruct) to his wife and that Courts have by and large accepted such gifts as valid and binding. In the majority of reported cases where husbands have gifted the properties with conditions such as 'till her life' or 'for her maintenance' or 'the property to be given to her children upon her death', the Courts have declared the gifts accompanied by such stipulations as the gift of the corpus of property and have ruled such conditions as void and without any legal effect. Thus, where husbands have given rights in properties to their wives, Courts have endorsed the same and have given interpretation that favour women. In the majority of cases discussed above, Courts have established elaborate principles of Islamic law as per the Hanafi school and have continuously followed these principles.

References

[1] See, Section 2 of Muslim Personal Law Act (MPLA) 1962 available at <http://punjablaws.gov.pk/laws/135.html> (last accessed 18 April 2021).

[2] Act X of 1991 available online at <http://www.pakistani.org/pakistan/legislation/1991/actXof1991.html> (last accessed 12 November 2020).

[3] Ibid.

[4] Ibid.

[5] See, Muhammad Munir, "Fast-track Procedure and Slow-track Results: Time Frame of Family Law Case Disposals in Pakistan", *LUMS Law Journal*, 8, no. 1, (2021): 43-60, also available at <https://sahsol.lums.edu.pk/sites/default/files/fast-track_procedure.pdf> (las visited 6 February 2022).

[6] Muhammad Akmaluddin al-Babarti, *al-'Ainayahsharh al-Hidayah* (Beirut: Dar al-Fikr, n.d.), 3:316.

[7] Muhammad Amin ibn. 'Aabidin, *Radd al-Muhtar 'Ala al-Durr al-Mukhtar* [of Haskafi] (Beirut: Dar al-Fikr, 3rd. edn. 1992), 3:101.

[8] He is Muhammad b. Muhammad al-Khjandi but is famous with the name Qawamuddin al-Kaki (d. 749 A.H.). He is the author of *Mi'raj al-Dirayah fi sharh al-Hidayah*, and *Jāmi' al-Asrār fi sharḥ al-Manar*. See, Muhammad 'Abdul Hayy al-Laknawai, *Al-Fawā'id al-Bahiyah fi Tarājim al-Hanafiyah*, ed. Ahmad al-Zu'bi (Beirut: Dar al-Arqam, 1998), 186.

[9] Mahmud b. Muhammad Badruddin al-'Ayni, *al-Binayahsharh al-Hidāayah*, ed., Ayman Salih Sha'ban (Beirut: Dar al-Kutub al-'Ilmiyah, 2000), 5:131.

[10] Qur'an, 4:4.

[11] Qur'an, 4:24, 25, 5:25, 33:50, 60:10.

[12] Qur'an, 2:236, 237, 4:24

[13] Qur'an 4:25.

[14] The word *mahr* is used in the *hadīth* in which the Prophet is reported to have said, "So if he had sex with her, she is entitled to *mahr* …". Abud Dawud Suliman b. al-Asha'th, *Al-Sunnan*, Kitab al-Nikah, Bab fi al-Wali, hadith no. 2085.

[15] Hans Wehr, *A Dictionary of Modern Written Arabic*, ed., J. Milton Cowan (Beirut: Librairie Du Liban, 1974, rep. 1980), 509

[16] Which is indemnity for illicit sexual intercourse with a woman slave. See, ibid., at 629.
[17]Qur'an, 4:24.
[18] Qur'an, 4:4.
[19] Qur'an, 2:236.
[20]Kamaluddin b. Humam, *SharhFathulQadeer 'Ala al-Hidayah*, ed. 'AbdurRazzaq al-Mahdi (Beirut: Dar al-Kutub al-'Ilmiyah, 2003), 3:305.
[21] Jamal J. Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation*, (Leiden: Brill, 2009), 87. Also available at <https://brill.com/view/book/9789004182196/BP000006.xml> (last accessed 28 April 2021).
[22] 'Alauddin Abu Bakr al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, ed., Muhammad 'Adnan Derveesh (Beirut: Dar Ihya' al-Turath al-'Arabi, 2000), 2: 584.
[23] Qur'an, 2:237.
[24]Kasani, *Bada'i'* 2:559.
[25] Ibid.
[26] See, Muhammad Abu Zahrah, *Al-Ahwal al-Shakhsiyah* (Cairo: Dar al-Fikr al-'Arabi 2005), 182.
[27] Fakhruddin 'Ali b. Uthman al-Zaila'iy, *Tabi'īn al-Haqa'iqsharhKanzul al-Daqa'iq* (Cairo: al-matba'a al-Kubra, 1313 A.H.), 2:154. Also see, Wahbah al-Zuhaili, *Al-Fiqh al-IslamiwaAdillatuhu* (Damascus: Dar al-Fikr, 3rdedn. 1989), 7:266.
[28] Al-DhuSuliman al-Dhu, *Ahkam al-Mahr fi al-Fiqh al-Islami* unpublished Masters dissertation in Comparative Fiqh submitted to the Faculty of Shari'ah& Law at Al-Azhar University, Egypt, 1978, 86.
[29]Shahbuddin al-Shalabi, *Hashiyat al-Shalabi 'ala Hamish Tabi'īn al-Haqa'q li al-Zaila'iy* (Cairo: al-matba'a al-Amiriyah, 1313 A.H.), 2:154.
[30] See, Salah Muhammad Abul Haj, *Al-Khra'it al-Zihniyah fi al-Ziwajwa al-Talaq 'Inda al-Hanafiyah* ('Amman: MarkazAnwarul 'Ulamalidirasat, 2020), 30.
[31]Burhanuddin al-Marghinani, *Al-Hidayah*, transl. Imran A. K. Nyazee (Bristol: Amal Press, 2006), 1: 507. Kasani, *Bada'i'*, 2: 561. Also see, Kasani, *Badā'i'*, 2: 561. Dirham is a silver coin and is equal to 35 grams of silver or one Dinar of gold of five grams. See, Abul Haj, *Al-Khra'it*, 30.
[32] See, Abul Hasan Ali al-Dar Qutni, *Sunan al-Darqutni*, Bab al-mahr, 3: 245.
[33]*Niṣāb* is the minimum amount of property which if stolen would make the accused liable to the cutting of his hand if proven guilty. In Pakistan the minimum *niṣāb* for theft as per section 6 of the Enforcement of *Hudud* Ordinance VI of 1979 is 4.457 grams of gold.
[34]Marghinani, *Al-Hidayah*, 1: 508.
[35] Muhammad b. Isma'il al-Bukhari, *Al-Jāmi' al-Saḥīḥ*, KitabFaza'il al-Qur'ān, hadīth no. 5030.
[36] Muhammad b. 'Ali al-Shawkani, *Nail al-AwtarsharhMuntaqa al-Akhbar* (Cairo: Matba'a Mustafa al-Babi al-Halabi, n.d.), 6: 195.
[37]Kasani, *Badā'i'*, 2: 562.
[38]*Abdul Qadir v Salima* (1886) ILR 8 All 149, para. 12.
[39] The Court has thus alluded to the two types of dower, i.e. prompt (*mu'jjal*) and deferred (*mu'jjal*).
[40]*Anwarul Hassan Siddiqui v Family Judge*, PLD 1980 Kar. 477, at 483.
[41]*Zarin Qaisha v Arbab Wali Mohd*, PLD 1976 Pesh. 128, para. 4.
[42] 2015 MILD 73 [Pesh.]. Also available online at <https://cite.pakcaselaw.com/mld-peshawar-high-court/2015/73/> (last accessed 28 April 2021).
[43] One *tolā* equals 11.663 grams.
[44]2012 YLR 2841 Lahore.

[45] Section 10(4) of the Family Courts Act, 1964.
[46]2012 YLR 2841 Lahore, para. 9.
[47] 2006 CLC 1662.
[48] PLD 2006 Lahore 158.
[49] *Ibid*., para. 8.
[50] PLD 2009 Lahore 484.
[51] *Ibid.*
[52]2012 YLR 2841 Lahore, para. 9.
[53] PLD 2007 Lahore 626.
[54] For details of the various aspects of *khul'* in Islamic law and Pakistani legal system, see, Muhammad Munir, "The Law of Khul' in Islamic Law and the Legal System of Pakistan'*LUMS Law Journal*, 2, no. 2 (2015):33-63; and Muhammad Munir, "Challenging State Authority or Running a Parallel Judicial System?: 'Ulama versus the Judiciary in Pakistan", *LUMS Law Journal*, 4, no. 1 (2017): 1-28; Muhammad Munir, "*Islami Shariat awr Pakistani Qanun mei Khul' Ki Haysiyatt: Rasool Akram Salallahu 'Aliyhi Wassalm ki Sunnat ya 'Adalati Ijtihad? (Khul' Between Islamic and Pakistani Law: Sunnah of The Prophet (PBUH) or Judicial Ijtihad?)*, Shariah Academy, International Islamic University, Islamabad, 2017; and Muhammad Munir, "One Step Forward, Two Steps Back: The Unending Twist and Turn Regarding the Law of *Khul'* and its Exposition by the Superior Courts in Pakistan", *Manchester Journal of Transnational Islamic Law & Practice*, 17, no. 1 (2021): 133-149.
[55] *Ibid*., at para. 9.
[56] *Ibid*., para. 10.
[57] 2015 MILD 73, para. 11.
[58] PLJ 2006 Lah. 927.
[59] PLD 2015 Lah. 405.
[60] 2016 YLR 440.
[61] 2000 CLC1384.
[62] 2016 YLR 440, para. 17.
[63] 2000 CLC 1384.
[64] 2009 SCMR 1458.
[65] 2009 SCMR 1458, para. 16. *Per* C.J., Iftikhar Muhammad Chaudhry for the Full Bench.
[66] Abdur Rehman Al-Jaziri, *Kitab Al-Fiqh 'Ala al-Madhahib al-Arba'ah*, (Beirut: Dar al-Kutub al-Ilmiyah, 2nd edn. 2003), 4:139.
[67] 'Alauddin Abu Bakr al-Kasani, *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'i'*, ed., Muhammad 'Adnan Derveesh (Beirut: Dar Ihya' al-Turath al-'Arabi, 2000), 2: 580.
[68]*Fatāwa 'Ālamgiriya*, (Quetta: Maktaba Rashidiya, n.d.), 1:318.
[69] See for example, *Syed Sajjad Hussain v Judge Family Court*, 2019 CLC 1462.
[70] Kasani, *Badā'i'*, 2:580.
[71] *Ibid.*
[72] *Ibid*., 2:251.
[73] PLD 1955 Lah, 122, *per* Justice Kaikaus who adopted the view of Abu Hanifah.
[74] PLD 1957 Dacca 242, *per* Justice (Rahman J).
[75] PLD 1960 (W.P.) Kar. 663.
[76] 1985 MLD 310.
[77] PLD 1988 Kar. 625.
[78] *The Holy Qur'ān*, 2:236, 237.
[79] Burhanuddin al-Marghinani, *Al-Hidayah*, transl. Imran A. K. Nyazee (Bristol: Amal Press, 2006), 1:509.
[80] PLD 2014 SC 693.
[81] *The Holy Qur'ān*, 65:6.

[82] *The Holy Qur'ān*, 2:233.
[83] *The Holy Qur'ān*, 65:7.
[84] Abu Dawud, *Sunan*, *hadith* no. 1908, and Ahmad b. Hanbal, *Al-Musnad*, 3:320.
[85] Bukhari, *Al-Jami'*, kitab al-Nafaqat, *hadith* no. 5364. Also see, Muslim b. al-Hajjaj al-Nayshapuri, *Sahih Muslim*, kitab al-Aqdiyah, *hadith* no. 1714.
[86] Kasani, *Badā'i'*, 3:419.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91]2014 YLR 1563 (Pesh).
[92]2012 CLC 1272 Pesh.
[93]MLD 571 Karachi.
[94]2015 MLD 11 (Lah).
[95] Marghinani, *Al-Hidayah*, 2:95.
[96] *The Holy Qur'ān*, 2:233.
[97]2010 MLD 695 (Lah).
[98]PLD 2013 Lah 464.
[99]2012 MLD 1394 (Lah).
[100]*Muhammad Ali v Judge Family Court, Depalpur*, 2010 YLR 520 (Lah).
[101]PLD 2015 Lah 683.
[102]PLD 2012 Lah 154.
[103] This section is an adaptation of Muhammad Munir, "Multiplying Zeroes: (In)Validity of Promises in Marriage Contracts under Pakistani Case Law", *LUMS Law Journal* 6, no. 1 (2019): 1-14. Also available online at <https://sahsol.lums.edu.pk/law-journal/multiplying-zeroes-invalidity-promises-marriage-contracts-under-pakistani-case-law> (last accessed 28 April 2021).
[104] See, *ibid.*
[105] Abu Zakariya al-Nawawi, *Kitab al-Majmu'sharh al-Muhadhab*, (Cairo: Dar al-Kutub al-Islamiyah, 1982), 16: 250.
[106] Ibn Rushd Abu Walid, *Bidayat al-Mujtahid*, (Makkah: Maktab Nazar, 1995), 2:59.
[107] See, 'Abdullah b. Ahmad b. Mahmoomd al-Nasafi, *Al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq along with Manhatul Khaliq 'Ala Al-Bahr al-Ra'iq*, ed., Zakariya 'Umayrat, (Beirut: Dar al-kutub al-'Ilmiyah, 1997), 4:98 and Neil B.E. Baillie, *A Digest of Moohummudan Law*, (London: 2nd edn., 1875 repr. Lahore, 1965), 1:76.
[108] Muhammad Munir, "Stipulations in a Muslim Marriage Contract with Special Reference to *Talaq al-Tafwid* Provisions in Pakistani Law", *Yearbook of Islamic and Middle Eastern Law* 12, (2005-2006): 235-262 at 237-241. Also available online at <https://brill.com/view/journals/yimo/12/1/article-p235_14.xml?language=en> (last accessed 28 April 2021).
[109] Muhammad b. Isma'il al-Bukhari, *Sahih*, *hadith* no. 2721; Sulayman al-Sijistani, *Sunan*, *hadith* no. 2139. With slightly different words it is also reported by Ahmad b. al-Husain al-Baihaqi, *Sunan al-Kubra*, chapter on *nikah* (Beirut: Dar al-Kutub al-'Ilmiyah, 2003), 7: 405; Ibn Abi Shaybah, *Mussanaf*, ed., Kamal Yusuf al-Hoot, (Riyadh: Maktabat al-Rushd, 1409 AH), 3: 499. For details of stipulations in a Muslim marriage contract, see, Munir, "Stipulations in a Muslim Marriage," 237-241.

[110] PLD 2004 Lah 588.
[111] PLD 2007 Lah 515.
[112] *Ibid*, 517.
[113] *Ibid.*
[114] *Ibid.*

[115] *Ibid*.
[116] *Ibid*.
[117] For details see, Munir, "Multiplying Zeroes," 3.
[118] PLD 2011 SC 260.
[119] PLD 2004 Lah 588.
[120] *Ibid*.
[121] 2010 YLR [Lahore] 423.
[122] 1969 SCMR 818.
[123] PLD 2011 SC 260.
[124] See, The Family Courts Act, 1964 as amended up-to-date at <http://www.punjablaws.gov.pk/index1.html> (last visited 13 February 2022). The new amendment was added by the Family Courts (Amendment) Act 2015 (XI of 2015).
[125] PLD 2011 SC 260.
[126] J.N.D. Anderson, *Islamic Law in the Modern World*, (New York: New York University Press, 1959), 78-80 and his "Recent Reforms in the Islamic Law of Inheritance," *International and Comparative Law Quarterly* 14, no. 2 (1965): 350, 354.
[127] It is also known as '*ariyya* which is gratuitous loan, or the transfer of the benefits of property. For details, see, 'Ala'uddin b. Ahmad Al-Kasani, *Badā'i' Al-Sanā'i' fi Tartīb al-Sharā'i'*, (Beirut: Dar al-Kutub al-'Ilmiyah, 1984), 4:118; 'Ali b. Muhammad Al-Mawardi, *Al-Hawi al-Kabir fi fiqh al-Imam Al-Shafi'i'*, ed., 'Ali Muhammad Mu'awad and 'Adil Ahmad 'Abdul Mawjud, (Beirut: Dar al-Kutub al-'Ilmiyah, 1999), 7:114; Muhamamd b. Ahmad b. Muhammad 'Alaysh, *Manh al-Jalil Sharh Mukhtasar Khalil*, (Beirut: Dar al-Fikr, 1989), 7:35.
[128] Syed Ameer Ali, *Mahommedean Law*, (Lahore: Law Publishing Company, n.d.), 1:34.
[129] Transfer of Property Act 1882 (Act IV of 1882) available online <http://punjablaws.gov.pk/laws/8c.html> (last accessed 14 November 2020).
[130] Lucy Carroll, "Life Interest and Inter-generational Transfer of Property: Avoiding the Law of Succession", *Islamic Law and Society* 8, no. 2 (2001): 245 at 247.
[131] *Ruqba*(رقبي) under Islamic law is a donation with the proviso that it shall either revert to the donor after the donee's death or become the property of the donee upon death of the donor. Wehr, *A Dictionary*, 353.
[132] Carroll, "Life Interest," 249.
[133] *Ibid*., p. 250-251.
[134] *Ibid*., at 251.
[135] *Ibid*. at 265.
[136] *Ibid*. at 266.
[137] PLD 1969 Lahore 338.
[138] *Ibid*., para. 16.
[139] *Ibid*., para. 16. *Per* Shameem Hussain Qadri, J. for the Divisional Bench.
[140] *Ibid*.
[141] PLD 1975 SC 377.
[142] *Ibid*. Also available at <https://cite.pakcaselaw.com/pld-supreme-court/1975/377/> (last accessed 25 April 2021). *Per* Muhammad Gul, J. for the Full Bench.
[143] (1948) 75 IA 62.
[144] *Ibid*. Also available online at <https://cite.pakcaselaw.com/pld-privy-council/1948/23/> (last accessed 25 April 2021).
[145] PLD 1970 Lahore 502.
[146] *Ibid*., para. 9. *Per* Muhammad Afzal Zullah, J. for the Single Bench.
[147] *Ibid*.
[148] *Ibid*.
[149] *Ibid*., para. 10.

[150] PLD 1997 SC 730.
[151] *Ibid*., para. 7.
[152] *Ibid*.
[153] *Ibid*., para. 39.
[154] *Ibid*., para. 44. The decision was authored by Khalil-ur-Rehman JJ., for the five Members Bench.
[155] 2015 YLR 1500. It was decided by a Single Bench.
[156] *Ibid*., para. 12
[157] PLD 1997 SC 730.
[158] 2016 YLR 2492.
[159]*Mst. Kaneez Bibi v Sher Muhammad*, PLD 1991 SC 466.
[160]PLD 1984 SC 392.
[161] *Ibid*.
[162] 2016 YLR 2492, para. 16.
[163] *Ibid*. para. 24.
[164] 2009 SCMR 1458.
[165] PLD 2011 SC 260.