

THE RIGHTS OF WOMEN AND THE ROLE OF SUPERIOR JUDICIARY IN PAKISTAN WITH SPECIAL REFERENCE TO FAMILY LAW CASES FROM 2004-2008

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Abstract

Granting and protection of the rights of women in the domain of family law remains one of the most important areas of legislation in Pakistan. The role of judiciary is vital to ensure that the rights of women are protected because decisions of the superior judiciary are binding on the lower courts under the doctrine of precedent. This work focuses on cases decided by the superior courts in Pakistan over the period of five years to know the various remedies sought by helpless women in Pakistan. This article finds that legislation in the area of family law protects women to a greater degree and that the superior judiciary has given many pro-women decisions. These areas include, capacity of an adult Muslim girl to marry without the consent of her guardian; the nature of Muslim marriage; obligation of the husband to maintain his wife and children; obligation of the husband to pay dower; exercising the right of puberty by a girl upon attaining majority; custody of minors; and stipulations to benefit women. In all these areas the superior judiciary has given very bold decisions favouring women. On the question of *khul'*, despite the fact that our courts have gone the extra mile and have ruled according to the Maliki school of thought, however, they are yet to apply the true law of *khul'* in letter and spirit. There is a ray of hope as two High Courts have given courageous decisions regarding *khul'*. This work critically evaluates all the cases of the period under review and gives suggestions for further refinement.

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I. INTRODUCTION

ONE of the most contentious and crucial area of the Pakistani legal system is the law reforms intended to benefit women. Discrimination against women seems to be happening routinely in the society at large. But a deeper look into the State legislation as well as its interpretation by the Superior Courts in Pakistan reveals a different trend. So the questions are: Is legislation in the sphere of family law enough to protect women? What is the attitude of our courts, especially the Superior Courts in Pakistan, in providing protection to desperate women? This article seeks to answer these and other related questions by surveying some pieces of legislation in the sphere of family law and its interpretation by the various High Courts as well as the Supreme Court. The work briefly gives the position of women in the sphere of family law from classical Islamic law. Moreover, the article also brings into focus various 'pro-women's decisions' to highlight the fact that our Superior Courts have done an excellent job in protecting women. However, in areas of family law where our Courts have not yet given any rulings to provide relief to Muslim women such as post-divorce maintenance, Indian legislation and case law is cited in addition to legislation in other Muslim countries. Necessary comments have also been added to cases where the decisions were found to be without important principles of law. It is concluded that in the first place, legislation in Pakistan is 'pro-women'. Secondly, in the majority of cases Superior Courts have provided a 'pro-women interpretation' to protect women.

II. STATE LEGISLATION IN THE AREA OF FAMILY LAW

For an understanding of the many cases below it is necessary to give a brief introduction of the important legislation in the field of family law. State legislation in the area of family law in the British controlled sub-continent was pro-women from the beginning. This is evident from the passing of the Dissolution of Muslim Marriages Act (DMMA), 1939. The real architect of this Act is Moulana Ashraf 'Ali Thanawi (1863 – 1943). The DMMA was the first legislation that introduced Maliki doctrines to provide much needed relief to otherwise helpless women. The Act was a great departure from the

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traditional Hanafi doctrine of dissolution of marriage on conversion of women from Islam to Christianity¹ and women separating from their husbands in cases where they suffered harm from them. The Act has a very interesting background. In 1913 Moulana Thanawi had issued a *fatwa* stating that the marriage of Muslim (Hanafi) woman is automatically dissolved if she converts to Christianity. Courts in – what was then India – would order a couple in a case where the wife had announced her conversion to Christianity to have their marriage dissolved. However, when the Moulana gave the *fatwa* according to the Hanafi doctrine – confirming the automatic dissolution of marriage, a wave of such conversions from Islam to Christianity began throughout India. The Moulana, however, reconsidered his earlier opinion with the help of four groups of *muftis* – three groups from India and one group from Madina and subsequently he amended his earlier view and issued another *fatwa*² in 1933 stating that the conversion of a Muslim woman to Christianity would not automatically dissolve her marriage. Furthermore, he proposed many other solutions to meet the problems of Muslim wives' right to dissolution of marriage, stating that the Maliki school of thought ought to be adopted in this instance. He also proposed conditional *talaq al-tafwid* – delegating the right of divorce to the wife, as a way out of her marriage for a Muslim woman. This proposition is explained in his classic work *al-Hilat al-Najiza li'l-Halilat al-'Ajiza* [A Successful Legal Device for the Helpless Wife].³ In 1936, the Moulana asked Qadi Muhammad Ahmad Kazmi, a lawyer and a member of the Indian Parliament from Meerut, UP, to present a bill in the central legislature for this reform. The statement of objects and reasons appended to the bill stated:

There is no provision in the Hanafi code of Muslim Law enabling a married Muslim [woman] to obtain a decree from

¹ Section 4 of the Act.

² In fact he asked his prominent disciple – Moulana Mufti Muhammad Shaf'i (then Chief Mufi at Dar al-Uloom Deoband) to write the new *fatwa* on his behalf.

³ See *Al-Hilat al-Najiza Jadeed*, Khurshid Hassan Qasmi, ed., Al-Faisal Nashiran-i-Kutub, Lahore, 1996.

the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists however have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafii or Hanbali law." Acting on this principle the ulemas have issued *fatwas* to the effect that in cases enumerated in clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage ... As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for to relieve the sufferings of countless Muslim women.⁴

The bill was passed, with some amendments, as the Dissolution of Muslim Marriages Act (DMMA), 1939 after immense debates and discussions. The 1939 Act was the first major law initiated by '*ulama* headed by Moulana Thanawi and it incorporated various protective devices for Muslim women adopted from the Maliki school of thought.⁵

Section 2 of the DMMA, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on eight grounds. They are:

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;⁶

⁴ The Gazette of India, April 25, 1936, Part V, p. 154.

⁵ See Khalid Masud, "Apostasy and Judicial Separation in British India", in *Islamic Legal Interpretation: Muftis and their Fatwas*, eds., Khalid Masud, David Powers & Brinkley Messick, Harvard University Press, 1996, reprinted Oxford University Press, Karachi, 2005, pp. 193-203. Khalid Masood states that the second *fatwa* took place in 1931, but this is wrong because the original date in Hijri calendar was 1352 A. H. which coincides with 1933 A.D. See Thanawi, *Al-Hilat*, p. 195. Also see Barbara M. Metcalf, *Perfecting Women: Maulana Ashraf 'Ali Thanawi's Bihisthi Zewar*, University of California Press, California, 1990.

⁶ In Pakistan, the Muslim Family Laws Ordinance 1961 inserted clause (iia) after the original clause (ii) of the DMMA 1939. The new clause adds a new ground for the

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- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years;⁷ provided that the marriage has not been consummated;⁸
- (viii) that the husband treats her with cruelty;
- (ix) on any other ground which is recognized as valid for the dissolution of marriage under Muslim law.

dissolution of marriage. Taking another wife in contravention of [s. 6] the FMLO 1961.

⁷ The clause about the “option of puberty” is against the classical law because in the Act the age of puberty has been fixed at 15 but in classical law it may be as low as 9. Moreover, the option of puberty under the Act, can be exercised only before the girl completes the age of 18 years, but the classical law contains no such restriction. The earliest law on the issue of age is the Child Marriage Restraint Act 1929 which laid down minimum ages for the marriage of boys and girls as 18 and 14 years respectively. This Act is still in operation in India, where the age for a female is raised to 15 years by the 1949 amendment. It was amended again in 1978 which rose the minimum ages to 18 and 21 years for girls and boys respectively. In Pakistan, the 1929 Act was amended by s. 12 (1) (a) of the Muslim Family Laws Ordinance 1961 and the minimum ages were raised to 16 and 18 years old for females and males respectively. In Bangladesh, the minimum ages are 18 and 21 years old for females and males respectively according to the Child Marriage Restraint (Amendment) Ordinance 1984.

⁸ In Pakistan, The Protection of Women (Criminal Laws Amendment) Act, 2006 added one other ground for the Dissolution of Muslim Marriages Act 1939 in section 2, after clause (vii) namely, “(viii) *lian*.” Thus, in Pakistan, the total number of grounds for the dissolution of marriage is ten under the DMMA 1939. Previously, *li’an* was dealt with by s. 14 of the Offence of *Qazaf* (Enforcement of *Hadd*) Ordinance, 1979.

The Act is progressive legislation in the field of family law and is based on legal principles formulated mostly by the Maliki school of thought. However, the most widely used ground for the dissolution of marriage in Pakistan currently is *khul'*, which is not mentioned in the DMMA, 1939, as amended, until now. Under Section 9 (1B) of the Family Courts Act, 1964 as amended in 2002,⁹ a defendant wife has a right to have her marriage dissolved on the basis of *khul'*.¹⁰ As we shall see below, women in Pakistan have been using the 'liberal pro-women interpretation' of *khul'* provisions fully.

The most important legislative changes in the sphere of family law were introduced in Pakistan after its independence. These changes culminated in the Muslim Family Laws Ordinance (MFLO) 1961. The background of the MFLO is quite interesting. In 1955, Muhammad Ali, Prime Minister of Pakistan while still legally married to his first wife, married again. The All Pakistan Women's Association (APWA) strongly protested against this act of the Prime Minister, forcing the Prime Minister to constitute a commission to suggest necessary reforms regarding marriage, divorce, custody of children and inheritance. There was no general consensus between the seven member commission, regarding the recommendations, with Moulana Ihtisham ul Haq Thanawi disagreeing with the other six members. The resulting law is a checkerboard statute and is probably the most controversial legislation in the domain of family law. Six members of the commission wanted a full prohibition of polygamy stating that justice between two wives was not possible whereas the religious member argued that justice and fairness could only be known after a man has two

⁹ By Family Courts (Amendment) Ordinance, 2002, Ordinance No. LV of 2002. For the text see *Gazette of Pakistan Extraordinary*, Part-I, 1st October, 2002.

¹⁰ Section 9 (1B) says, "A defendant wife may, in her written statement to a suit [by her husband] for restoration of conjugal rights, make a claim for dissolution of marriage, including *khul'a* which shall be deemed as a plaint and no separate suit shall lie for it."

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wives. Section 6 of the MFLO only restricts polygamy but does not prohibit it.¹¹

One of the most controversial and contested legislation in Pakistan is Section 7 of the Muslim Family Laws Ordinance (MFLO), 1961 regarding *talaq*. According to the procedure laid down in Section 7 if a husband announces *talaq in any form whatsoever* he shall give a written notice of the same to the Chairman of the Union Council.¹² After receiving the notice the Chairman has to constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties.¹³ *Talaq* (given by the husband) shall be effective on the expiration of ninety days from the day on which notice is delivered to the Chairman.¹⁴ The wife, whose marriage has been terminated according to the above procedure, can remarry the same husband, without an intervening marriage with a third person

¹¹ The Federal Shariat Court has ruled in *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1 that Section 6 of the FMLO 1961 is not repugnant to the injunctions of Islam. However, in *Jesmin Sultana v. Mohammad Elias*, 17 BLD (1997) 4, the High Court Division of Bangladesh Supreme Court has held that since section 6 of the FMLO 1961 does not altogether prohibit polygamy, it is against the principle of Islamic law. Polygamy has been altogether prohibited in Turkey, Turkish Cyprus and Tunisia and among the Druzes of Lebanon and of Syria and the Ismaili Khoja community of East Africa. Turkey has prohibited it in 1926, Tunisia in 1956 whereas the Turkish Cyprus reproduced the Turkish law in verbatim in 1951.

¹² Section 7(1) of the MFLO.

¹³ *Ibid* Section 7(4).

¹⁴ *Ibid* Section 7(3).

(commonly known as *halala*)¹⁵, unless her marriage (with the same man) is being terminated for the third time.¹⁶

The most debated and recurring question that arises as a result of this section is what would be the effect of the failure of the husband to notify the Chairman after pronouncing *talaq*? In the landmark judgment of *Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf*,¹⁷ the Supreme Court decided that where the husband did not give notice of *talaq* to the Chairman, he would be deemed to have revoked the *talaq*.¹⁸ It is important to note that this comment made by S. A. Rahman J, was not the issue in the case. This is why it should be considered as *obiter dicta*. However, this *dicta* was applied repeatedly in many cases as if it was an important *ratio decidendi*. It was applied in *State v. Mst. Tauqir Fatima*¹⁹; *Abdul Aziz v. Rezia Khatoon*²⁰; *Abdul Mannan v. Safuran Nessa*²¹; *Ghulam Fatima (Mst) v. Abdul Qayyum and others*²²; *Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui*²³ and many other subsequent cases. However, it was distinguished in *Noor Khan v. Haq Nawaz*²⁴

¹⁵ For the purpose of *halala* the woman has to marry someone else and consummate this marriage. Once the marriage is over because of the death of the husband or through divorce by him or *khul'* or any other way, then she is free to marry anyone including her former husband. As a matter of sympathy with his former wife the former husband may come to her rescue. However, if the marriage with the second husband is intended to terminate after it is consummated so that the first husband should marry her again, then it is a mockery of God's law and an evil which is not allowed. For a very authoritative discussion on *halala* see Tahir Mahmood, "*Halala: A Misunderstood Concept of Muslim Law*", II:4 *Islamic and Comparatively Law Quarterly*, December (1982) 300-301; and his "No More Talaq, Talaq, Talaq – Juristic Restoration of the True Islamic Law on Divorce" *Islamic and Comparative Law Review*, XII: 1(Summer 1992) 6-8.

¹⁶ Section 7(6) of MFLO.

¹⁷ PLD 1963 SC 51.

¹⁸ *Per* S. A. Rahman at 74–75.

¹⁹ PLD 1964 (W.P.) Karachi 306.

²⁰ 21 DLR (1969) 733.

²¹ 1970 SCMR 845.

²² PLD 1981 SC 460.

²³ 1984 SCMR 583.

²⁴ PLD 1982 FSC 265.

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and *Chuhar v. Mst. Ghulam Fatima*²⁵ because of the particular circumstances of these two cases.

The most recent decision of the Supreme Court on the subject of notice being served to the Chairman is *Kaneez Fatima (Mst) v. Wali Muhammad*,²⁶ in which it was held that provisions of Section 7 have to be observed even where the parties had arrived at a settlement for dissolution of marriage. As to the observations made in *Gardezi* case (discussed above), the Court observed that "failure to send notice of Talaq to the Chairman of the Union Council does not by itself lead to the conclusion that Talaq has been revoked. It may only be ineffective but not revoked".²⁷

In Pakistan one of the most recurring problems regarding *talaq* is triple *talaq (talaq al-bidi)*. According to the Hanafi, Shafi'i and Maliki schools of thought triple *talaq* is valid and effective.²⁸ As the majority of the people of Pakistan follow the Hanafi school of thought, they consider triple *talaq* valid and effective. Moreover, a *talaq* pronounced under compulsion, duress, undue influence and intoxication, or even as a mere joke is valid and effective according to Ahnaf.²⁹ However, Taqiuddin ibn Taymiyyah and his disciple Ibn al-Qaim of the Hanbali school of thought argue that triple *talaq* should be

²⁵ PLD 1984 Lahore 235.

²⁶ PLD 1993 SC 901.

²⁷ At page 916.

²⁸ Burhan al-Din al-Farghani al-Marghinani, *Al-Hidayah*, trans. with Introduction, Commentary and Notes, Imran A. K. Nyazee, Amal Press, Bristol, 2006, vol. 1, p. 560; Muwafaquddin ibn Qudamah al-Maqdasi, *Al-Mughni fi Fiqh Imam al-Sunnah Ahmad ibn Hanbal al-Shaybani*, Dar al-Fikr al-Arabi, Beirut, 1985, vol. 8, p. 243; and Imam Malik ibn Anus, as narrated by Abdussalam b Saeed b Habib (Sahnun) *Al-Mudawwanah al-Kubra*, Matb'a al-Sa'ada, Cairo, 1905, vol. 5, p. 279. This view is based on two ahadith reported by Abu Dawud, *Sunan*, Kitab al-Talaq, Bab fi Talaq al-Sunnah, hadith no. 2179; and Imam Nasa'i, *Kitab al-Talaq*, Bab al-mutallaqate thalathan la-nafaqah laha, hadith no. 1180. For a very good discussion about the view that many great Hanafi jurists did not consider triple *talaq* in one setting as three (if three were not intended) see Moulana Ifthikhar Tabassum No'mani, "Mas'ala-e-Talaq-e-Salatha awr Fuqhah-e-Ummat", *Al-Shari'ah* 17:6 (June 2006) 24-35 and Tahir Mahmood, "No more '*Talaq, Talaq, Talaq*' – Juristic Restoration of the True Islamic Law of Divorce", *ICLR XXI*: 1 (1992) 1-12.

²⁹ Marghinani, *Ibid.*, vol. 1, pp. 565-566.

considered three only if the person intended it to be three otherwise they shall be considered as one.³⁰

All Family laws, especially The Muslim Family Laws Ordinance, 1961 were jealously guarded by the military ruler – General Zia, against the jurisdiction of the Shariat Benches and then the Federal Shariat Court, although he had started what was a superficial process of Islamization in Pakistan, making sure he kept all family laws outside the jurisdiction of the newly constituted Shariat Benches in the High Courts. This exclusion of family laws was retained when the Shariat Benches were replaced by a Federal Shariat Court under Article 302 of the Constitution. In *Federation of Pakistan v. Mst. Farishta*,³¹ the Supreme Court ruled that the Muslim Family Law Ordinance 1961 (hereafter MFLO) is a personal law for the Muslims and its scrutiny is outside the jurisdiction

³⁰ Taqiuddin ibn Taymiyyah, *Majmu' al-Fatawa al-Kubra*, Dar al-Kutub al-Ilmiyah, Beirut, 1987, vol. 33, p. 73. Their view is based on the famous *hadith* in which Rukanah ibn 'Abd-i-Yazid divorced his wife three times in one setting on which the Prophet asked him whether he meant one *talaq*. When he replied that he had meant one *talaq*, the Prophet allowed him to take his wife back. See Abu Dawud, *Sunan*, Kitab al-Talaq, Bab fi al-Battah, *hadith* no. 2206. It is reported that 'Abdullah ibn 'Abbas said that triple divorce in one setting was treated as one at the times of the Prophet, Abu Bakr and early period of 'Umar ibn al-Khattab. 'Umar decreed that if any person divorced his wife three times in one setting, his divorce would be irrevocable and take effect instantaneously. It is important to note that throughout most of the Muslim world today, reforms have been promulgated in the law of personal status which provide that a triple *talaq* shall take effect only as a single *talaq*. Such countries include Egypt (Art. 3 Act No. 25/1929), Iraq (Art. 37/2), Sudan (Art. 3, Sharia Circular No. 41//1935), Syria (Art. 92), Morocco (Art. 51), and Kuwait (Art. 109). All these legislations include an identical provision: "A repudiation in which a number is implied whether verbally or by a gesture shall be counted as one pronouncement." There is a similar provision in the Jordanian Code of Personal Status 1976 (Art. 60) and Yemen (Art. 63 of the Family Law of 1978). These legislations are gone one step further than the *hadith* of Rukanah because these legislations do not mention whether a husband who pronounced three *talaq* in one setting intended three or one, instead even if a husband intended three *talaq* and pronounced three in the same setting, they will still be counted as one. This is against the letter and spirit of the above *hadith* and against the firm stand of Ibn Taymiyyah and Ibn al-Qiam discussed above. Authors who strongly support that three repudiations shall be counted as one have completely ignored this aspect of the modern legislations.

³¹ PLD 1981 SC 120 [Shariat Appellate Bench].

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of the Federal Shariat Court.³² However, in *Dr. Mahmoodur-Rahman Faisal v. Government of Pakistan*,³³ the Shariat Bench of the Supreme Court held that the FSC has the jurisdiction to decide cases of Muslim Personal Law and that the MFLO is within its jurisdiction.³⁴ It was after this ruling of the Supreme Court that in *Allah Rakha v. Federation of Pakistan*³⁵ the FSC ruled that subsections (3) and (5) of section 7³⁶ of the MFLO are against the injunctions of Islam.

Another notable provision of the MFLO 1961 is Section 9 which provides for maintenance of a wife. If a husband fails to maintain his wife, she can apply to the Chairman who shall constitute an Arbitration Council, which shall issue a certificate specifying the amount to be paid by the husband to the wife. Section 9 of the MFLO 1961 is further strengthened by Section 17 A of the Family Courts Act 1964 as amended in 2002.³⁷ Under the latter a Family Court can pass an interim order for maintenance at any stage of the proceedings in a suit for maintenance. Below we shall see that Section 9 has widely been used by helpless women.

³² The expression ‘Muslim Personal Law’, which was not defined in the Constitution, was defined by the Supreme Court in *Farishtha* case as “that portion of the Civil law of Pakistan which is exclusively applied or which authorizes application of certain specified law to Muslim residents of this country as a special and personal law for them.”

³³ PLD 1994 SC 607.

³⁴ The Supreme Court defined ‘Muslim Personal Law’ used in Article 203-B (c) of the Constitution as “the personal law of each sect of Muslims based on the interpretation of the Qur’an and the *Sunnah* by that sect. It follows that a law which a particular sect of the Muslims consider as its personal law based on its own interpretation of the Qur’an and the *Sunnah* is excluded from the jurisdiction of the Federal Shariat Court and all other codified or statute laws which apply to the general body of Muslims will not be immune from its scrutiny.” *Ibid.*, at 620.

³⁵ PLD 2000 FSC 1.

³⁶ Under section 7 (3) of the MFLO 1961 *talaq* pronounced under section 1 is effective 90 days after the receipt of the notice by the Chairman. The FSC also held in *Allah Rakha* case that section 4 of the Ordinance (regarding the share of the grand child) is also against the injunctions of Islam.

³⁷ By Family Courts (Amendment) Ordinance, 2002, Ordinance No. LV of 2002. For the text see Gazette of Pakistan Extraordinary, Part-I, 1st October, 2002.

Apart from legislation, the Superior Courts in Pakistan have given pro-women decisions that have helped desperate women. The most notable decision so far is the *Balqis Fatima* case,³⁸ which was the first case in the subcontinent in which a High Court granted *khul'* to a Muslim woman. *Balqis Fatima's* case was later endorsed by the *Khurshid Bibi* case,³⁹ in which the August Supreme Court has expounded the true law of *khul'* in Islam. This decision is the best example of judge-made law in this country.⁴⁰ Another such decision is *Zohra Begum v. Latif Ahmad*⁴¹ regarding the custody of a child in which, the then West Pakistan High Court asserted its right to resort to *ijtehad*. Other historic 'pro-women decisions' are *Abdul Hafiz v. Asma Jehanghir*,⁴² regarding capacity and many other decisions regarding restoration of conjugal rights. All these cases are explained in detail below.

In Pakistan, the Enforcement of Shari'ah Act, 1991, section 2 mentions that '*Shari'ah*' means the injunctions of Islam as laid down in the Holy Qur'an and [the] *Sunnah*. The explanation provided to section 2 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.⁴³

Professor Tahir Mahmood argues that it is unclear what is meant by the word "prevalent." But since the word 'prevalent' is followed by 'Islamic schools of jurisprudence' this should mean the Hanafi, Maliki, Shafii, Hambali, Jaffari, and Zahiri schools of thought. However, since 1991, it has been difficult to find any

³⁸ *Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566.

³⁹ *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 970. For a comprehensive analysis of *khul'* cases in Pakistan till 1995 see Lucy Carroll, "Qur'an 2:229: "A Charter Granted to the Wife"? Judicial *Khul'* in Pakistan", *Islamic Law and Society* 3 (1996) 91-126.

⁴⁰ Classical Islamic law on *khul'* is explained further below.

⁴¹ PLD 1965 (WP) Lahore 695.

⁴² PLD 1997 Lahore 302.

⁴³ See section 2 of the Shari'ah Enforcement Act, 1991 (Act X of 1991).

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decisions of the Higher Courts of Pakistan in which they have resorted to any non-Hanafi Sunni schools of thought. Our Superior Courts are yet to realize this freedom available to them.

III. ANALYSIS OF FAMILY LAW CASES FROM 2004–2008⁴⁴

Most of the selected cases of the five years period are regarding the maintenance of children and wives, custody of children, capacity, recovery of dowry articles, *khul'*, divorce and effect of failure to give notice of *talaq* to the Chairman of the Union Council under Section 7 of the MFLO, 1961. Most of the cases are decided by the Lahore High Court; very few by the Peshawar and the Karachi High Courts but none by the Baluchistan High Court. There are many Supreme Court cases and some cases by the Azad Jammu & Kashmir Superior Courts. Fakhar-u-Nisa Khokhar J (as she then was) of the Lahore High Court has decided more cases than any other judge of the same court.⁴⁵

After studying all the cases, it is evident that a typical family law case is initiated in the Family Court in accordance with the Family Courts Act, 1964, and an appeal is made to the District Court⁴⁶ (practically the Additional and Session Judge) which may remand, confirm, reverse or modify the decision of

⁴⁴ Case law from 2004-2006 is taken from the Pakistan Law Journal (PLJ) with corresponding references from other reporters. However, cases of 2007 and 2008 are taken from a variety of other reporters.

⁴⁵ There are nine cases reported in PLJ decided by her ladyship during the three years period.

⁴⁶ Under section 14 of the Family Courts Act, 1964.

the trial court. The aggrieved party or parties, as the case may be, may approach the High Court under Article 199 of the Constitution, 1973 by invoking its constitutional jurisdiction. The High Court rarely allows appeal against its decisions in such cases. The majority of such cases are decided by a Single Bench of the High Court. In many cases parties are asked by the High Court to decide their factual matters in the appropriate forum. Below selected cases are reviewed and summarized but comments have been added to the most important and frequently occurring cases such as divorce, failure to give notice of *talaq* to the Chairman under Section 7 of the MFLO, and *khul'*. Post-divorce maintenance to the ex-wife is discussed at length because this concept is not well known in Pakistan. Selected cases are explained under various headings.

1. **DOWER**⁴⁷

In *Muhammad Azam* case⁴⁸ the question before the Lahore High Court was when does a deferred dower become prompt? The issue was whether the wife was entitled to receive her deferred dower upon demand when her husband remarried or whether she was only entitled to it when she died or on dissolution of her marriage? The trial court held that she was not entitled to the deferred dower till her death or dissolution of her marriage. The Additional District Judge disagreed with this decision of the trial court and ruled that she should be given the same whenever she demands especially when the husband has remarried. In a writ petition the High Court held that the decision of the ADJ was right and that of the trial court was wrong.⁴⁹ In *Abdullah* case⁵⁰ the Lahore High Court ruled that a subsequent agreement to enhance dower from rupees 500 to 100,000 was binding on

⁴⁷ For a very good presentation of dower in classical Islamic law, especially the *Fatawa 'Alamgiri*, see Mona Siddiqui, "Mahr: Legal Obligation or Rightful Demand?", *Journal of Islamic Studies* 6:1 (1995) pp. 14-24.

⁴⁸ *Muhammad Azam v. A. D. J., etc*, PLJ 2006 Lahore 927.

⁴⁹ At page 928.

⁵⁰ *Abdullah v. Naila Aslam*, NLR 2007 Civil 362.

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the husband. In *Rifat Nawaz* case⁵¹ the Peshawar High Court held that a father in law could give dower in favour of his daughter in law.

2. CAPACITY: IS THE CONSENT OF GUARDIAN NECESSARY FOR THE VALIDITY OF *NIKAH*?⁵²

One of the most noticeable decisions of the Supreme Court has been *Hafiz Abdul Waheed v. Mrs. Asma Jehangir*⁵³ (also known as the Saima Waheed case). The decision had already been the hottest topic in legal⁵⁴ as well as social circles and has attracted appreciation as well as condemnation from many people.⁵⁵ Saima Waheed, an adult, fourth year college student of Lahore, came from a rich family and married a college lecturer on her own free will without the consent and knowledge of her parents. Although the Lahore High Court had already held, by a majority of two to one, that the consent of the *Wali* is not necessary for the validity of her *nikah* her father still appealed to the Supreme Court. The Supreme Court combined this case with another similar [but unnoticed] case, *Muhammad Iqbal v. S. H. O.*, in which a single judge of the Lahore High

⁵¹ *Maj. Rifat Nawaz v. Mst. Tahira*, 2008 CLC 803.

⁵² According to Ahnaf the consent of the *wali* (guardian) is not essential for the validity of *nikah*. Marghinani asserts that a “*wali* cannot force a virgin (lady), who is major, to marry.” Marghinani, *Al-Hidayah*, 1: 492. However, Imam Shafi‘i treats the issue of a virgin (who is major) on the analogy of a minor girl. But the Ahnaf maintain that “she is a freewoman addressed directly by the communication from the Lawgiver, therefore, no one has authority over her to compel her.” Marghinani, *Al-Hidayah*, 1:492.

⁵³ PLD 2004 SC 219. This case is not reported in the PLJ.

⁵⁴ See Martin Lau, “Pakistan—*Abdul Waheed v. Asma Jehangir* (the Saima Waheed Case)”, in *Yearbook of Islamic and Middle Eastern Law* 3 (1996) 518-531 and Shaheen Sardar Ali, “Is an Adult Muslim Woman *Sui Juris*? Some Reflections on the Concept of “Consent in Marriage” without a *Wali* (with Particular Reference to the *Saima Waheed* Case)”, *Yearbook of Islamic and Middle Eastern Law* 3 (1996) 156-174.

⁵⁵ It was the most important Family Law case of the 90s when it was decided by a three member bench of the Lahore High Court. In their majority decision two judges considered that her *nikah* was valid without the consent of her father while Justice Ihsan-ul-Haq did not agree with this view. See PLD 1997 Lahore 302.

Court ruled that since the *Wali* (guardian) of the girl did not consent to the marriage, the *nikah* was invalid.

The reason given by one of the two judges of the High Court in the *Saima Waheed's* case was that the judgments of the Federal Shariat Court in the field of family law were binding on the High Court. Since the former had already established that the consent of the *Wali* is not necessary for the validity of *nikah*, the High Court had to uphold the decision. Justice Karamat Nazir Bhandari, speaking for the Full bench of the Supreme Court, observed that "The repeated pronouncements of Federal Shariat Court are required to be followed by the High Court, and by all Courts subordinate to a High Court by virtue of Article 203GG".⁵⁶ The Federal Shariat Court had ruled in *Muhammad Imtiaz v. The State*⁵⁷, *Arif Hussain and Azra Parveen v. The State*⁵⁸, *Muhammad Ramzan v. The State*⁵⁹ and *Muhammad Yaqoob v. The State*⁶⁰, that the consent of the *wali* is not necessary for the validity of *nikah*. Yet if the decisions of the Federal Shariat Court were unacceptable to the petitioner's counsel then what about the Supreme Court's decision in *Mauj Ali v. Syed Safdar Hussain Shah*⁶¹? Shouldn't that decision be binding on the High Court? In this case it was held that a Muslim girl attaining puberty is competent to marry of her own free-will. The Court declined to give her custody to her father.

Owing to the overwhelming pronouncements of our Superior Courts it can easily be concluded that in disputes between a father and his daughter regarding the consent of the former for the validity of the *nikah* of the latter, the Higher Courts have ruled in favour of the daughter. This 'pro-women interpretation' by our superior judiciary is warmly welcomed.

⁵⁶ At page 230.

⁵⁷ PLD 1981 FSC 308.

⁵⁸ PLD 1982 FSC 42.

⁵⁹ PLD 1984 FSC 93.

⁶⁰ 1985 PCr. LJ 1064.

⁶¹ 1970 SCMR 437.

3. CAN A MINOR REPUDIATE HER MARRIAGE UPON ATTAINING OF PUBERTY?⁶²

In *Muhammad Nawaz* case⁶³, the above caption was the main question for the Court. The respondent was given in marriage by her father when she was 5/6 years old. She married another man upon attaining puberty. It was held that the law does not prescribe any particular form of the procedure for repudiation of marriage, and entering into marriage with someone else upon attaining puberty is sufficient proof of repudiating her first marriage.⁶⁴ In the second case of *Irfan Faiz*,⁶⁵ the petitioner had married the sister of his former wife only three days after he divorced his wife and wanted the High Court to legalize it through a constitutional petition. It was held that the husband's second marriage was not allowed and his petition was dismissed because he had not come to the court with clean hands.⁶⁶ These two cases are peculiar example of pro-women interpretation of statutes by the superior judiciary.

4. CAN SPECIAL DAMAGES BE AWARDED FOR THE BREACH OF A MARRIAGE CONTRACT?

This was the most important question the Court had to answer in *Shahida Parveen* case.⁶⁷ The brief facts of the case are that the petitioner had married the respondent on 7th February, 1997 but the marriage was not consummated and she filed a suit for dissolution of marriage on the basis of *khul'*. In her written plaint she alleged that her husband was a professional dancer. The respondent claimed rupees 2.4 million as damages for defamation and rupees 0.8 million as special damages for his expenses on the marriage. The trial court awarded him one million rupees, that is, 0.8 million as

⁶² According to Ahnaf a minor girl can repudiate her marriage upon attaining of puberty. See Marghinani, *Al-Hidayah*, 1: 497-98.

⁶³ *Muhammad Nawaz v. A. D. J.*, PLJ 2006 Lahore 818.

⁶⁴ At page 817.

⁶⁵ *Mst. Irfana Faiz v. State*, PLJ 2006 Lahore 183.

⁶⁶ At page 184.

⁶⁷ *Shahida Parveen v. Samiullah Malik*, PLJ 2006 Lahore 1215.

damages for defamation and 0.2 million as special damages. The High court reduced the damages to 0.1 million for defamation but refused to award anything as special damages. Justice Mian Saqib Nisar, speaking for the Divisional Bench, observed that although marriage is in the nature of a civil contract⁶⁸ it shall not be equated with the ordinary contracts because such a contract has its genesis in the social norms of the Muslim society. There is, therefore, no concept of a breach of marriage contract and the provisions of the law of contract shall not be attracted. Consequently, any expenses of either party because of the marriage ceremonies, except dower, dowry etc, cannot be recovered through the process of law.⁶⁹

5. **KHUL': WHEN THE GOING GETS TOUGH, THE TOUGH GET GOING**

In *Zohran Bi* case⁷⁰ two real sisters were married to two real brothers. Both sisters had sought dissolution of marriage on the grounds of cruelty and failure of the husbands to maintain them. The trial court granted them *khul'*⁷¹ whereas the appellate court reversed the decision ordering the restoration of conjugal rights. On appeal the AJK Supreme Court held that if *khul'* is not granted to both sisters, it would amount to forcing them to live a hateful life. Syed Manzoor Hussain Gilani J, speaking for the Court, stated that matrimonial relations are based on trust, love, affection, good-will and sacrifice for each other, if these are lacking, "it is a forced union, not spouseism".⁷² Highlighting the true law of *khul'* he further stated:

⁶⁸ For details whether marriage is a civil contract or not see my "Marriage in Islam: Civil Contract or a Sacrosanct?", *Hamdard Islamicus* XXXI (January-March 2008) 77-84.

⁶⁹ At page 1222.

⁷⁰ *Zohra Bi v. Muhammad Saleem and others*, PLJ 2005 SC (AJ & K) 171; also reported as 2005 YLR 896.

⁷¹ According to Ibn Rushd, *khul'* "is (a transaction in which) compensation is paid by the wife for obtaining her divorce." See Muhammad ibn Ahmad ibn Rushd, *Bidayat Al-Mujtahid*, trans. Imran A. K. Nyazee, Garnet Publishing Ltd., Reading, 1996, vol. II, p.79

⁷² At page 174.

The principle of *Khul'a* is based on the fact that if a woman has decided not to live with her husband for any reason and there is no chance of reconciliation or her retrieving from the position, then it is left to the conscience of the Court to dissolve the marriage through *Khul'a* and in case of non-dissolution under such circumstances the spouses cannot live within the bounds ordained by Almighty Allah.⁷³

In the instant case his Lordship concluded that dissolution of marriage on the basis of *khul'* must be ordered because attempts for reconciliation had been exhausted by the elders and litigation had further created bitterness between the parties.

In *Naseem Akhtar* case⁷⁴ the wife was thrown out of her house by her husband three years earlier and was not maintained. The couple had five children from their marriage. The wife filed a suit for *khul'* on 6. 12. 2000 and the husband filed a suit for restoration of conjugal rights on 3. 4. 2001. Both the trial court as well as the court of first appeal refused the wife's suit. She filed a writ petition in the High Court which met the same fate. Thereafter she appealed to the Supreme Court. The wife's argument was that because of the hatred and aversion between the two she could not stay with her husband. Justice Javid Iqbal, arrived at a very 'pro-women' but true interpretation of the law, when he ruled that "no yardstick could be fixed to define or determine the *factum* of hatred which would be inferred on the basis of circumstances of each case *specially the statement of wife* [italics supplied]. It hardly needs any elaboration that emotion of love and hatred cannot be adjudged on rational basis and the only aspect which requires consideration in such-like would be as to whether husband and wife can live together in order to⁷⁵ perform their matrimonial obligations and not the solid proof qua hatred or

⁷³ At page 175.

⁷⁴ *Mst. Naseem Akhtar v. Muhammad Rafiq*, PLJ 2005 SC 1325; also reported as PLD 2005 SC 293.

⁷⁵ The original text in PLJ at page 1327 is "in order 'in' perform" which seems to be a typing mistake. The text in the PLD is correct. See PLD 2005 SC 293 at 295. Editing of cases reported in the PLJ seems poor as compared to the PLD reporter.

aversion."⁷⁶ His Lordship relied on *Amanullah v. District Judge, Juranwala*⁷⁷ and concluded that "hatred and aversion neither can be prescribed nor confined within the limited sphere and no mechanism has been evolved so far to express "hatred and aversion" precisely and in a definite manner".⁷⁸ His Lordship went on to observe that the mere filing of the suit by the wife for the dissolution of her marriage was demonstrative of the fact that she "does not want to live with her husband which indicates the degree of hatred and aversion".⁷⁹ The wife's appeal was allowed.

In *Ahmad Hassan* case⁸⁰ the issue was whether the written statement of the wife in response to a suit for restoration of conjugal rights could be treated as a plaint for dissolution of marriage. The High Court, at page 1027, answered it in the affirmative stating that no separate suit for the dissolution of marriage was needed because of the new amendment to the West Pakistan Family Courts Act, 1964 [that is, the amendment in 2002 mentioned above].

In *Sofia Rasool* case⁸¹ the High Court ruled that if the wife has not asked for *khul'* in a suit or in her written statement then the court should not grant the same. The trial court had granted *khul'* to the wife in the same without her demand.

⁷⁶ At page 1327 of PLJ and pages 295-6 PLD *ibid*.

⁷⁷ 1996 PSC 59; also reported as 1996 SCMR 411. The observation of the Court in this case is worth quoting in full. It stated that "... when the contesting respondent stated that she had developed hatred towards the petitioner her assertion could not be rejected summarily; [in PLJ there is a comma. In PLD there is a semi colon after summarily] it may also be mentioned that the relationship between the husband and the wife is of a very intimate nature. It may also be too embarrassing for either of them to disclose to the Court what has transpired between them in the privacy of their home. That being so, *there can hardly be any standard for assessing the substance in the wife's assertion that she has developed hatred for her husband*" [italics supplied]. PLD 2005 SC 293 at 296.

⁷⁸ At page 1327 in PLJ and at page 296 in PLD *ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ahmad Hassan v. Judge Family Court, Sadiqabad*, PLJ 2006 Lahore 1025

⁸¹ *Mst. Sofia Rasool v. Miss Abhor Gull*, PLJ 2005 Lahore 855; also reported as 2004 CLC 1932.

In two similar cases, that is, *Ikramullah Khan*⁸² and *Muhammad Rizwan*,⁸³ the Lahore High Court ruled in 2007 that in case of *khul'* the wife must return the benefits, especially the dower she received from her husband. In *Ikram Ullah Khan* case, Syed Zahid Hussain, J relied on *Khurshid Bibi* case⁸⁴ in which the Supreme Court observed that in case of separation by *khul'*, if the husband insists, "it is legally permissible for him to demand something more than the dower."⁸⁵ Carroll argues that the assumption adopted in judicial *khul'* cases is that since the wife failed to establish one of the specified fault-based grounds available under the Dissolution of Muslim Marriages Act 1939, the husband stands exonerated of any fault or blame.⁸⁶ This assumption is however untenable. Moreover, the Courts have totally ignored the 'reciprocal benefits' which the husband may have received from the marriage. It is in this background that the Lahore and the Peshawar High Courts have each given one refreshing judgment in the period under consideration. These decisions have added a new but positive dimension to the law of *khul'* in Pakistan. In *Khalid Mahmood* case⁸⁷ the Lahore High Court ruled that if the wife was forced by the husband to seek *khul'* the Court can reduce the amount of compensation; "can dissolve the marriage on the basis of *khul'* even without any compensation, when i[t] finds that *khul'* is being claimed due to the fault, on the part of the husband."⁸⁸ The same point was asserted in many other cases.⁸⁹ The Court stated that the condition on the wife to restore to husband the dower received by her at the time of marriage, if she is seeking dissolution of marriage on the basis of *khul'* only. It should be noted that

⁸² *Ikram Ullah Khan v. Maliha Khan*, PLD 2007 Lahore 423.

⁸³ *Muhammad Razwan Yousaf v. Additional District Judge*, 2007 CLC 1712.

⁸⁴ *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 97.

⁸⁵ *Ibid.*, at p. 121; *per* S.A. Rahman, J.

⁸⁶ Lucy Carroll, p. 124.

⁸⁷ *Khalid Mahmood v. Anees Bibi*, PLD 2007 Lahore 626.

⁸⁸ *Ibid.*, p. 632; *per* Syed Hamid Ali Shah, J.

⁸⁹ Such as *Mst. Parveen v. Muhammad Ali*, PLD 1981 Lahore 116; *Mst. Zahida Bi v. Muhammad Masood* 1987 CLC 57; *Mst. Shagufta Jabeen v. Sarwar Bi*, PLD 1990 Karachi 239 and *Dilshad v. Mst. Musarat Nazir*, PLD 1991 SC 779.

'fault on the part of the husband' could be one of the grounds under the DMMA, under which the marriage must be dissolved while the wife has to keep her dower and other benefits. Unfortunately, *khul'* is claimed as an alternative remedy should the wife fail in her primary claim for divorce on one or more of the grounds available under the DMMA. Moreover, in many instances our Courts agree that one or more of the grounds, such as cruelty, non-maintenance etc are proved, yet they dissolve the marriage on the basis of *khul'* rather than under the DMMA. This means that the wife is asked to return her dower. Such examples include, *Abdul Majid*,⁹⁰ *Muhammad Sadiq*,⁹¹ *Bashiran Bibi*,⁹² and *Bibi Anwar* cases.⁹³ In these cases the battered wives sought dissolution of their marriages on the bases of cruelty, non-maintenance, misappropriation of their properties, habitual assault and even impotency in one case and despite the fact that the grounds under the DMMA were proven, yet the Courts dissolved the marriages on the bases of *khul'*.

The second refreshing judgment is *Haseeb Ahmad v. Mst. Shaista*⁹⁴ in which the Peshawar High Court has given a new interpretation to section 10 (4) of the West Pakistan Family Court Act 1964 – the proviso on *khul'*. The relevant portion of section 10(4) provides:

If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for the recording of the evidence. [Provided that notwithstanding any decision or judgment of any Court or Tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage].

The Court ruled that this proviso can only refer to *khul'*, however, in a situation when the wife does not accept dissolution of marriage on the basis of *khul'* and emphasizes her entitlement to dissolution of marriage on the basis of cruelty or any other legal admissible ground, along with the recovery of or

⁹⁰ *Abdul Majid v. Rizia Bibi*, PLD 1975 Lahore 766.

⁹¹ *Muhammad Sadiq v. Mst. Aisha*, PLD 1975 615.

⁹² *Bashiran Bibi v. Bashir Ahmad*, PLD Lahore 376.

⁹³ *Bibi Anwar Khatoon v. Gulab Shah*, PLD 1988 Karachi 602.

⁹⁴ PLJ 2008 Peshawar 205.

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retention of received dower. "In that eventuality, should a Family Court, after failure of pre-trial reconciliation proceedings, be left with no other option but to dissolve the marriage in terms of *khul'* only"?⁹⁵ The Court held that dissolution of marriage on the basis of *khul'* when other grounds exist would make *khul'* a 'mechanical process' and will deprive the wife of all other grounds of dissolution of marriage, other than *khul'*, which cannot be the purpose behind the legislation.⁹⁶ The Court held that the word 'shall' used in the above proviso "is directory in nature and not at all mandatory."⁹⁷ This is indeed a very welcomed interpretation of the current law on *khul'*.

In the last case on this point the Supreme Court has granted leave to appeal in *Dr. Nosheen Qamar v. Shah Zaman Khattak*.⁹⁸ The grounds for appeal are very interesting in our discussion of the granting of *khul'* without asking the wife to return her dower to the husband. One of the grounds given by the Supreme Court to accept the appeal is to see whether the principle that 'if the husband has forced the woman to accept the *khul'*, a *talaq* will take place without any liability to pay the indemnity' is attracted in this case or not.⁹⁹ However, we have to keep our eyes open as the case was pending till the writing of this essay.¹⁰⁰

It is hoped that the Supreme Court of Pakistan, which has taken pride in putting the law of *khul'* in the correct perspective in *Khurshid Bibi* case¹⁰¹ will favour battered

⁹⁵ *Ibid.*, at p. 207.

⁹⁶ The original text which seems somewhat confusing says: "we cannot imagine that the proviso has been legislated to indirectly deprive women, of their all legally recognized grounds of dissolution of marriage, excepting *khul'*." *Ibid.*

⁹⁷ *Ibid*; per Syed Yahya Zahid Gillani, J for the Divisional Bench.

⁹⁸ 2007 SCJ 103.

⁹⁹ *Ibid.*, at p. 107.

¹⁰⁰ It was pending till the 17th of February 2009.

¹⁰¹ *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 970. The *Khurshid Bibi* case overruled the Privy Council's famous decision of *Moonshe Buzloor Ruheem v. Shamsunnissa*. The Privy Council had distorted the concept of *khul'*, which is unfortunately still the judicially recognized law in India. However, Maulana Taqi Usmani – who is also a retired judge of the Shariat Appellate Bench of the Supreme Court of Pakistan, has poured a scathing attack on the Supreme Court for its decision

women by not asking them to return their dowers and other benefits when they are forced by husbands to ask for *khul'*.

Khul' is parallel to *talaq*. The former is a divorce desired by and effected at the instance of the wife whereas the later is divorce desired by and effected at instance of the husband. To have a *khul'* is, like a man's right to *talaq*, an unconditional right of the wife.¹⁰² The husband may agree to her demand with or without condition. He may ask the wife to return the dower. The Qur'an advises men never to seek return of what they have given to their wives.¹⁰³ Under no circumstances can the husband say 'no' to the wife's decision and compel her to continue in marriage. The *qazi* has no discretion in the matter and has to give effect to the *khul'* if the wife demands. Maulana Maududi has put it this way:

Wife's right to *khul'* is parallel to the man's right of *talaq*. Like the latter the former too is unconditional. It is indeed a mockery of the Shariat that we regard *khul'* as something depending either on the consent of the husband or on the verdict of the *qazi*. The law of Islam is not responsible for the way Muslim women are being denied their right in this respect.¹⁰⁴

Most of the *fuqaha* allow the permissibility of *khul'* on the basis of the Qur'anic verse 2:229 which says:

And it is not lawful for you to take back anything of what you have ever given to your wives unless both [partners] have cause to fear that they may not be able to keep within the bounds set by God: hence, if you have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself.¹⁰⁵

in *Khurshid Bibi* case discussed above. See his "Islam Mai *Khul'* ki Haqiqat", in *Fiqhi Maqalat*, Maiman Islamic Publishers, Karachi, 1996, pp. 137–194. This is the most sustained attack on any decision of the Supreme Court by no other than a man of very high caliber and one of its retired judges. It is high time that someone from the legal fraternity should defend the Supreme Court's landmark decision on *khul'*.

¹⁰² See Tahir Mahmood, *Muslim Law of India*, Butterworth, Delhi, 2002, p. 98.

¹⁰³ 4: 21.

¹⁰⁴ Syed 'Abul 'Ala Maududi, *Huquq-uz-Zaujain*, 9th ed., Lahore, (Urdu) 1964, pp. 61, 71–79. *Khul'* will be thoroughly explained in my forthcoming article "Khul': When the Going gets tough the tough gets going".

¹⁰⁵ The translation of the Holy Qur'an in this work is taken from The Message of the Qur'an by Muhammad Asad unless otherwise indicated. See Muhammad Asad, *The*

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The Arabic word '*tum*' (you) in the verse is addressed to the *Hukkam* (the government) and not to the husband and the wife. It is reported by 'Abdullah ibn 'Abbas that "the wife of Thabit ibn Qays came up to the Prophet (God's peace and blessings be upon him) and said, 'O Messenger of Allah, I do not find anything wrong with him from the religious and moral points of view, but I detest disbelief after entering the fold of Islam.' The Messenger of Allah said to (Thabit), 'Accept the orchard and divorce her through a single repudiation' ". According to Taqi Usmani, the Prophet in this *hadith* merely gave his opinion as a social leader to Sabith and Jamila which was not binding and was not acting in his judicial capacity.¹⁰⁶ Even if this is accepted, then should we accept the opinion of the Prophet or a Mufti? Moreover, it would mean that in all other cases decided by the Prophet he only gave his opinion as a leader and that all such decisions are not binding. This is a very dangerous preposition and would reduce the scope of *hadith* drastically.

It is to be remembered that the majority of Muslim jurists do not agree that a judge can grant *khul'*. The majority (*jamhor*) maintains that *khul'* transacted by a woman possessing discretion (a *rashida*) upon herself is valid. However, Al-Hasan and Ibn Sirin argue that *khul'* is not permitted except with the permission of the sultan (that is, through a court).¹⁰⁷ The legislation and case law in Pakistan, as discussed above, seems to follow the view of

Message of the Qur'an, Dar al-Andalus, Wiltshire, 1984, repr. 1997. An updated version of the same is also available on the web at

<http://www.geocities.com/masad02/> (last accessed 22/05/2009).

¹⁰⁶ Mufti M. Taqi 'Usmani, "Islam mae *khul'* ki haqiqat", in *Fiqhi Maqalat*, Maiman Islamic Publishers, Karachi, 1996, vol. 2, p. 175.

¹⁰⁷ Ibn Rushd, *Bidayat Al-Mujtahid*, 2:82. There is disagreement among jurists whether *khul'* amounts irrevocable *talaq* or not. Those who consider *khul'* to be a divorce deem it irrevocable, like Abu Hanifah and Malik. Imam Shafi'i argues that *khul'* should be treated as divorce if the husband intends it be divorce otherwise it is *fasakh* (rescission). Ibn Rushd, *Bidayat*, 2: 82. According to Imam Abu Hanifah repudiation of wife by the husband is essential in case of *khul'*, for Imam Malik it is not.

Al-Hasan and Ibn Sirin regarding *khul'* as they call it judicial *khul'*. It may be argued that although *khul'* is valid without judicial pronouncement however the procedural requirement of judicial pronouncement is required in order to make it effective and this is only to sanction the separation. In the absence of such pronouncement uncertainty will exist as to the matrimonial relationship and this would be the woman, who given her vulnerable social position be in an adverse state. This view is supported both by the above stated *hadith* and Justice Javid Iqbal's decision in *Naseem Akhtar* case.¹⁰⁸

6. CAN THERE BE DIVORCE ON THE BASIS OF CUSTOM FOR THE HINDU COMMUNITY?

This was the question before the Karachi High Court in *Jagsi* case¹⁰⁹. The issue was that the respondent sought dissolution of her marriage on the basis of cruelty and for non provision of maintenance. She asked for dissolution of marriage claiming that this was allowed by custom practiced by the Menghawar Hindu community to which she belonged. Her husband contested the suit on the ground that the Hindu community was not subjected to the Family Court's jurisdiction under the Family Courts Act, 1964. It was held at page 114 that the institution of divorce existed by way of custom. In the view of the High Court, such custom has the force of personal law of the Hindu Menghawar community and that the Family Courts under the Family Courts Act, 1964 can adjudicate upon the matter pertaining to divorce claimed on the strength of customs.

7. TALAQ: THE MOST DETESTABLE IN THE SIGHT OF GOD:

In *Gulnaz Rasheed* case¹¹⁰ the *dicta* of the case is of great importance. The Court observed at page 309 that failure to give

¹⁰⁸ *Mst. Naseem Akhtar v. Muhammad Rafiq*, PLJ 2005 SC 1325; also reported as PLD 2005 SC 293.

¹⁰⁹ *Jagsi v. Shr. Marwan and others*, PLJ 2005 Karachi 111; also reported as PLD 2005 Karachi 334.

¹¹⁰ *Gulnaz Rasheed v. Station House Officer*, PLJ 2005 Lahore 306; also reported as 2004 YLR 2316.

notice of *talaq* to the Chairman under S. 7 (1) of the Muslim Family Laws Ordinance, 1961 (MFLO) would amount to revocation of *talaq*. Surprisingly the Court has not noticed *Kneez Fatima v. Wali Muhammad* PLD 1993 SC 901, which overruled this *dicta* of Gardezi case PLD 1963 SC 51 as discussed above.

In *Um-a-Tameem alias Samina Bibi & another v. S. H. O. Police Station Tandlianwala Distt. Faisalabad & two others* PLJ 2004 Lahore 1535,¹¹¹ the petitioner had been divorced before the consummation of her marriage with the respondent (husband) who had given a written deed to this effect. The lady married Muhammad Harris three years after the alleged *talaq* of which no notice had been given to the Chairman Union Council under Section 7 of the MFLO. The respondent had registered an FIR against the lady and her husband alleging that she had been abducted for the purpose of *zina*. The lady filed a petition seeking quashment of the FIR.¹¹² It was held at page 1537 that the fact that notice of *talaq* was not sent to the Chairman Union Council would not render the *talaq* ineffective. Since this case was about the exception to the general rule, the most relevant cases that should have been cited were: *Noor Khan v. Haq Nawaz*, PLD 1982 FSC 265 and *Chuhar v. Mst. Ghulam Fatima* PLD 1984 Lahore 235. The counsel, however, ignored both of them.

In *Lt. Iffat Kazmi and another v. Shuja Akbar Shah* (PLD 2005 SC 345 (This case is not reported in PLJ), the petitioner (wife) took the plea that since the divorce deed having been sent in writing from UK., was not valid because under Shi'a Law a divorce must be pronounced orally, using specific words, in the presence of the wife as well as two witnesses. Sardar Muhammad Raza Khan J, speaking for the court, relied on *Mirza Qamar Raza*¹¹³ and *Mst. Mariam Bano Begum's* case (1984 CLC 1961) and held at page 398 that "under exceptional circumstances that might prevail

¹¹¹ Reported as 2004 YLR 1791 as well.

¹¹² Counsel for the petitioner cited two cases (1) *Allah Dad v. Mukhtar and another* and (2) *Muhammad Hanif and others v. Mukarram Khan and others* [The former is a Supreme Court case and the later is a Lahore High Court case] without full citations.

¹¹³ PLD 1988 Karachi 169.

differently in different cases a 'Talaq' pronounced in the absence of wife and conveyed to her in writing is a valid 'Talaq' under Shi'a Law". The court upheld the decision of the three lower courts that the petitioner stood divorced by her husband.¹¹⁴

After a thorough analysis of the important decisions regarding Section 7 of the MFLO, it can be concluded that the Higher Courts in this country give relief (under Section 7) to women but not to men. This is evident from the cases regarding maintenance claimed by the wife when the procedure under Section 7 is not complied with and she has not remarried someone else. This can also be seen in *Manzoor Ahmad v. Nargis Mirza etc*¹¹⁵, in which the Supreme Court gave benefit of non-compliance with Section 7 by the husband, to the respondent (wife). It is also clear that courts have not given the benefits of Section 7 to the husbands when, after the divorce, the wife has remarried someone else and the husband claims that since he has not followed the procedure prescribed in the said section, therefore, she is not divorced and is committing *zina*. Thus when a husband does not approach the Court with clean hands he should not get the remedy he seeks because no one shall benefit from his own wrong. Our Courts have rightly given Section 7 a 'pro-woman interpretation'. This is very much logical as well as the omission of not notifying the Chairman of local council is on the part of man. Ideally such person should have been penalized by trying to benefit from his own mischief and causing frivolous and vexatious litigation. The Superior Courts should have taken this initiative under the powers vested in them by various procedural enactments in the absence of specific legislative remedy.

¹¹⁴ The Supreme Court approved *Mirza Qamar Raza v. Tahira Begum*, PLD 1988, Kar 169. In this case the pronouncement of *talaq* by a Shi'a Muslim, in presence of witnesses that was sent to his wife through post, was accepted to be a valid *talaq*. It was in this case that Tanzil-ur-Rahman J., declared Section 7 of the MFLO, 1961 to be repugnant to the injunctions of Islam and raised Article 2-A to be a supra-constitutional provision. His views have been rejected in subsequent cases by the Supreme Court. See *Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595.

¹¹⁵ PLJ 2004 SC 541; Also reported as PLD 2004 SC 147.

8. CUSTODY OF MINOR(S):

In *Mehtab Mirza* case¹¹⁶ was about the custody of a minor. The Court observed that in determining the question of custody of a minor, the paramount consideration is his/her welfare.¹¹⁷

There was a similar observation of the court in *Kaneez Akhtar*¹¹⁸, *Asif Ali*¹¹⁹ and *Iftikhar Ali*¹²⁰ cases. The Court ruled that welfare of the minor was the most important factor regarding his custody and that the father of the child would have to maintain him even if he was in his mother's custody.¹²¹

Another case regarding the custody of a minor is *Mehmood Akhtar*¹²² in which the marriage was dissolved and the husband agreed to maintain the baby girl who had to be in the custody of her mother. It was also agreed that if the mother married again the minor would be returned to her father but if the father failed to maintain her he would not claim her custody. Upon the failure of her father to maintain the daughter, she filed, through her mother, suit for recovery of her maintenance allowance. The trial court decreed the suit. The father filed a suit for custody of the minor. That suit was dismissed by the trial court. On appeal the ADJ reversed the decision of the trial court giving the custody to the father because the mother had contracted a second marriage. The High Court set aside the decision of the ADJ in a writ petition. The father appealed to the Supreme Court. It was held at page 36 that the right of the father to get custody of his child was subject to the welfare of the child. The conclusion which may be drawn is that it is the welfare of the minor which is the

¹¹⁶ *Mehtab Mirza v. Mst. Shazia Mansoor*, PLJ 2005 Lahore 1562; reported as 2005 MLD 256 as well.

¹¹⁷ At page 1566.

¹¹⁸ *Mst. Kaneez Akhtar v. Abdul Qadoos*, PLJ 2005 Lahore 1356; also reported as 2005 MLD 828.

¹¹⁹ *Asif Ali v. Mst. Tehmina Naseem*, PLJ 2008 Karachi 62.

¹²⁰ *Iftikhar Ali v. Fozia Bibi Awan*, 2008 CLC 1146.

¹²¹ *Mst. Kaneez Akhtar v. Abdul Qadoos*, PLJ 2005 Lahore 1356 at page 1359.

¹²² *Mehmood Akhtar v. District Judge Attock*, PLJ 2005 SC 33; also reported as 2004 SCMR 1839.

paramount consideration for determining the question of custody.

In *Yasmin Bibi* case¹²³ the High Court relied on *Firdous Iqbal* case¹²⁴ and ruled at page 8 that the rules of personal law would be subservient to the welfare of the minor.

The most important authority on the custody of a minor is *Zohra Begum Latif Ahmad*.¹²⁵ It was ruled in this case by the High Court that it possesses the powers of *ijtihad*¹²⁶. The court accordingly differed from the rules regarding the custody of the minor as given in textbooks and on which there was unanimity and adopted a course conducive to the welfare of the minor.

9. MAINTENANCE OF WIFE AND CHILDREN:

In *Abdullah* case¹²⁷ the father of the two children died and their mother lived for sometime with their grandfather who, subsequently, threw her out and refused to maintain the minors. The grandfather had given rupees 50,000 to the mother for maintaining the two minors. He was, however, a very rich man owning 21 acres of land and had a personal annual income of around 3–4 hundred thousand rupees. It was held at page 11 that since the grandfather had the means to maintain the minor, he was therefore, bound to do his duty. The High Court agreed with the appellate court's decision of reversing the decision of the trial court.

In the case of *Arif Sana*¹²⁸ the petitioner was married to Respondent no. 3 and two daughters were born after which the marriage was dissolved. The wife claimed maintenance for herself and her two daughters. The trial court, *vide ex-parte*,

¹²³ *Yasmin Bibi Mst. v. Mehmood Akhtar*, PLJ 2004 Lahore 6; also reported as 2004 YLR 616.

¹²⁴ *Firdaus Iqbal v. Shafa'at Ali and others*, 2000 SCMR 838.

¹²⁵ PLD 1965 (WP) Lahore 695.

¹²⁶ It can be defined as the effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue.

¹²⁷ *Abdullah v. Jawaria Aslam*, PLJ 2004 Lahore 9; also reported as 2004 YLR 616.

¹²⁸ *Arif Sana Bajwa v. ADJ*, PLJ 2004 Lahore 710; reported as 2004 MLD 794 as well.

ordered the petitioner to pay interim maintenance to Mst. Samina Sarwar. The petitioner filed an application for recalling of *ex-parte* order but the trial court rejected the application. Later on the suit was decreed in favour of the wife. The husband's appeal against the decree was accepted by the first appellate court but directed the petitioner to pay the interim maintenance as ordered by the trial court. The husband, in a writ petition, challenged the order of interim maintenance arguing that the Family Court is not empowered by the Family Courts Act, 1964 to order interim maintenance. The High Court rejected this argument and observed at page 712, "[I]t is settled principle of law that if a Court or Tribunal has the authority to pass a final order it can also pass an interim order unless the power to do so is expressly or impliedly excluded". The writ petition was therefore dismissed.

In *Muhammad Akram* case¹²⁹ the Lahore High Court held that a fresh suit for the enhancement of the maintenance allowance of children was maintainable.

In *Masood Sadiq* case¹³⁰ the Lahore High Court ruled that provisions of West Pakistan Family Court Act 1964 regarding the maintenance of children are also applicable to the Christian community in Pakistan.

In a typical maintenance case the husband wants two things: to be totally exonerated from paying any maintenance and reduce the same to be enough only for survival of the wife. The wife in such cases always complains that the amount is less and should be increased.

In *Arif Mahmood Mian v. Mst. Tanvir Fatima and 2 others*¹³¹ the divorced wife had claimed maintenance which was awarded by the Arbitration Council *vide ex-parte* against the husband at the rate of rupees 10,000 *per mensem*. The petitioner took the plea that since the wife had claimed maintenance after she had been divorced; therefore, being an

¹²⁹ *Muhammad Akram v. Additional District Judge*, PLD 2008 Lahore 560.

¹³⁰ *Masood Sadiq v. Mst. Shazia*, PLD 2008 Lahore 398.

¹³¹ PLJ 2004 Lahore 892; PLD 2004 Lahore 316 is the second citation.

ex-wife, she had no right to claim maintenance. He also challenged that the amount was too high and she should be given something to guard against starvation and consequent vagrancy and that nothing more than food, clothing and bedding should be given as maintenance. The counsel cited a previous decision of the Supreme Court, reported as *Muhammad Najeeb v. Mst. Talat Shanaz*¹³² in which it was held that although Section 9 of the MFLO refers to 'husband' and 'wife', but when the application was given for maintenance by an ex-wife regarding the period when the wedlock was intact and also for the *Iddat* period, it would be made by the so called divorced wife and would be covered by the word 'wife' as contained in Section 9.¹³³ Mohammad Ghani, J., observed that the obligation to maintain the wife commenced simultaneously with the creation of matrimonial tie and was an obligation and not *ex gratis* grant, and therefore, it could be enforced with regard to past period of married life, if the wife did not claim it during that period.¹³⁴ In the view of the Court, maintenance can be claimed till the time *talaq* becomes effective as well as during the *iddat* period. The Court also observed at page 896 that maintenance should not be a bare minimum sustenance allowance but a convenient provision in consonance with what the husband could afford and also according to the needs of the wife. However, the Court refused to award any maintenance after the expiry of the *Iddat* period.

The Supreme Court has also commented on the quantum of maintenance in *Lt. Iffat Kazmi and another v. Shuja Akbar Shah and others* discussed above, in which Justice Sardar Muhammad Raza Khan stated, regarding the quantum of maintenance, that "it is important to notice as to what is the financial status of the husband as well as the wife".¹³⁵ In this case the amount of maintenance was decreed at the rate of rupees 25,000 per month. This amount was reduced by the court of appeal to rupees 15,000 per month and, in a writ

¹³² 1989 SCMR 119; 1989 SCMR 119.

¹³³ At page 896.

¹³⁴ *Ibid.*

¹³⁵ at page 398.

petition, by the High Court to rupees 10,000 per month. The Supreme Court raised it to rupees 15,000 per month once again. Thus the financial status of the husband and the wife are taken into consideration to decide the quantum of maintenance in each case.

In *Muhammad Aslam v. Muhammad Usman and 4 others*¹³⁶ the wife was divorced and was accompanied by minors including an infant baby. She claimed maintenance for herself and for the minors and the court awarded them maintenance at the rate of rupees 5,000 each per month. The husband contended that his salary was rupees 15,000 and the quantum of maintenance was unreasonable. The High Court reduced maintenance for the children to rupees 3,000 per month and for the ex-wife to rupees 1,000 per month during breast-feeding of the baby. While commenting on the issue of post-divorce maintenance the Court observed at page 1079 that equity and natural justice demand that the wife who is neglected throughout by her husband and divorced at his whims and caprice and is left alone at the mercy of cruel circumstances in a male dominated society without any source of income should be maintained by the divorcing husband who has acted without justification. In support of her view Mrs. Fakhar-un-Nisa Kokahar J (as she then was) cited verse 2: 241 and mentioned the liberal provision—Section 125 of the Indian Code of Criminal Procedure and the controversial Muslim Women (Protection of Rights on Divorce) Act, 1986. She also quoted the Indian case of *Muhammad Ahmad Khan v. Shah Bano Begum*¹³⁷ and other Indian cases that gave post-divorce maintenance to divorced women. She recommended on page 1080 that the legislature in Pakistan should look into this aspect of the matrimonial life and should make amendments to Section 9 of the MFLO. She, however, did not take full notice of the repercussions of the *Shah Bano*, case which we explain below.

¹³⁶ PLJ 2004 Lahore 1075; Also see 2004 CLC 473 as another citation.

¹³⁷ AIR 1990 Andra Pradesh 225.

The judge should have noticed the political storm that followed when the Supreme Court gave the decision reported as *Mohammad Ahmad Khan v. Shah Bano Begum*.¹³⁸ Muslims protested very strongly as they sensed religion in danger. The Chief Justice of India, Chandrarchud C.J., – who was a Hindu, tried to give a new interpretation of the Holy Qura'n. He ruled that the former husband must maintain his ex-wife till her death or remarriage.

The Chief Justice observed that Section 125, as an element of general law, overrides the personal law if there are any conflicts between the two.¹³⁹ He concluded, at page 951, after discussing the views of several specialist authors, that there was no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance to a divorced wife. Thus post-divorce was made attractive than maintenance within the marriage. It should be noted, however, that Indian law, extended in 1973 the definition of wife (for the purposes of maintenance) to include a wife who is divorced or who has obtained divorce from her husband, till her death or remarriage.¹⁴⁰

What provoked the Muslims was the Chief Justice's interpretation of the Qur'anic verses 2: 241-242 when he remarked:

These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Qur'an.¹⁴¹

The decision of the Supreme Court was widely condemned by academics such as the influential Professor Tahir Mahmood, who wrote, that a "Sharia verses Cr.PC war is

¹³⁸ AIR 1985 SC 945.

¹³⁹ At page 949.

¹⁴⁰ Explanation to Section 125 (1) of the Indian Code of Criminal Procedure.

¹⁴¹ At page 952.

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being fought in the judicial corridors of this country".¹⁴² The country-wide protest forced the Indian Government to pass new legislation in this regard. This resulted in the Muslim Women (Protection of Rights on Divorce) Act, 1986. Section 3 (1) of the Act says that a divorced woman shall be entitled to "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by the former husband". The Act also makes provision of maintenance for a divorced woman from the State's *wakf* board. After the Muslim Women Act, 1986 was passed; the Supreme Court realized its effects in *Tamil Nadu Wakf Board v. Syed Fatima*¹⁴³, when it observed:

The Parliament enacted the Act to undo the effect of a constitution bench decision of this Court in *Mohammad Ahmad Khan v. Shah Bano Begum* because the said decision was opposed by a sizable section of the Muslim community.

However, the new legislation is itself ambiguous as it puts too much emphasis on 'fair provision and maintenance', furthermore, it was using two terms: 'provision' and 'maintenance' which are interpreted as something over and above the maintenance to be paid during the *iddat* period. In *Danial Latifi v. Union of India*¹⁴⁴, the Indian Supreme Court, in a surprising decision, confirmed the ambiguity of Section 3 by observing that the 1986 Act "actually codifies the very rationale" of the *Shah Bano* case. It categorically stated:

When a constitution bench of this Court analyzed Suras [verses] 241-242 of chapter II of the Holy Quran and other relevant textual material, we do not think it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein.

The Court did not look into its own decision given in the *Syed Fatima* case discussed above. The *Shah Bano* case is, therefore, still considered a good authority.

¹⁴² See Tahir Mahmood, *Personal Laws in Crisis*, Metropolitan New Delhi, 1986, p. 82.

¹⁴³ AIR 1996 SC 2433.

¹⁴⁴ (2001) 7 SCC 740.

Let us now have a look at verse 2: 241 which says: "And for the divorced women [there shall be] an honourable present according to the custom, being an obligation on the God-fearing". The Qur'an left the amount of *mata'a* to custom. Muslim jurists differ regarding the *mata'a* – literally the gift is obligatory (*wajib*) or only permissible (*mandub*). For the Hanafi jurists *mata'a* is desirable for every divorcee after consummation. There is also disagreement on the quantum of *mata'a*. Some say it should be a suit; others talk of a servant or suits or some maintenance.¹⁴⁵ However, there is not a single Muslim jurist who has even thought of maintaining an ex-wife till her death or remarriage.

There is interesting legislation in other Muslim countries which provide compensation to a wife in case of arbitrary repudiation by the husband and, furthermore, while determining the amount of such compensation, law takes into account the needs of the divorced wife to maintain her.

The Syrian Article 117 of Decree No. 59/1953, as amended under Article 16 of Act No. 34/1975 provides compensation enough to maintain an ex-wife for three years if the judge finds that the husband has repudiated her arbitrarily without any reasonable cause, and that the wife will suffer misery and hardship therefrom. The judge has to take into account the means of the husband as well.

In Jordan, Article 134 of the Provisional Law No. 61/1976 provides such a wife compensation to be the equivalent of one year's maintenance against arbitrary and unjust divorce. The Egyptian legislator steers a middle course between the Syrian and Jordanian law in terms of the amount due. Article 18 added to Act No. 25/1929 under Act No. 100/1985 gives her compensation enough to maintain her for two years in case she is divorced without a reasonable cause. It must be remembered that this compensation is over and above the *iddat* period in all the three countries mentioned.

¹⁴⁵ For detailed discussion see Mohammad Ibn A. Al-Qurtubi, *Ahkam-ul-Quran*, vol. 2, p. 150 and Mufti M. Shaf'i, *Ma'arif al-Qur'an*, (English translation) vol. 1, pp. 613–615.

The Tunisian law is the most generous in this regard. Article 31 under Act No. 7/1981 provides that the injured spouse shall be granted damages for any material or moral injury inflicted as a result of divorce at the request of either party. A woman shall receive damages for any material injury in the form of a monthly allowance, to run after the *iddat* period, to secure for her the same standards of living she was accustomed to during her marriage. Such an allowance may continue till her death or re-marriage or till her social or economic status changes. The Kuwaiti law, in Article 165, provides such wife compensation enough for one year maintenance.

The Pakistani legislature should take notice of these liberal provisions enacted in other Muslim countries instead of looking at the vague and controversial Indian legislation, which was politicized as well, if it wants to safeguard and protect women against arbitrary divorce.

10. STIPULATIONS IN A MUSLIM MARRIAGE CONTRACT:¹⁴⁶

In *Nasrullah v. District Judge*¹⁴⁷ the husband imposed upon himself the restriction that if he divorced his wife without a just cause then he would have to pay rupees two hundred thousand to his wife. He divorced his wife accusing her to be a woman of bad character. However, he could not prove his allegation and rather admitted that the above amount was the dower. The court declared that the wife had the right to bring in a suit to claim the said amount. In *Haseeb Ahmad* case¹⁴⁸ the Peshawar High Court upheld that stipulation that the husband will pay his wife rupees 5,000 per month in case of separation as interim maintenance allowance.

11. LI'A'N:

¹⁴⁶ For a detailed study of this topic see my “Stipulations in a Muslim Marriage Contract with Special reference to Talaq Al-Tafwid Provisions in Pakistan”, in *YIMEL* 12 (2005-2006) 235-262.

¹⁴⁷ PLJ 2005 961; also reported as PLD CLC 1545.

¹⁴⁸ *Haseeb Ahmad v. Mst. Shaista*, PLJ 2008 Peshawar 205.

In *Muhammad Safdar Satti v. Mst. Aasia khatoon*¹⁴⁹ the brief facts of the case were that the appellant (husband) divorced his wife accusing her of immoral activities and giving birth to an illegitimate child. The wife in turn filed a complaint of *Qazaf* against her husband. The husband asked the court that proceedings for *lia'n* be initiated against his wife. The issues for the court to decide were: (1) if the charge of *zina* is leveled against the wife by her husband along with the divorce, does it come under Section 14 of the *Qazaf* Ordinance for undertaking the proceeding of *lia'n*; (2) if the proceeding of *lia'n* is not applicable in the above situation, can the husband be tried for the offence of *Qazaf*? It was held at page 576 that since the marriage between the appellant and the respondent had been dissolved therefore proceedings of *lia'n* would not be appropriate. [The complaint of the wife for *Qazaf* was pending for trial before the trial court].

12. RECOVERY OF DOWRY ARTICLES:

In *Mirza Shahid Baig v. Mst. Lubna Riaz and 2 others*,¹⁵⁰ the marriage was dissolved through Family Court on 20. 10. 1999 and the ex-wife filed a suit for recovery of dowry articles or in lieu thereof a decree for rupees 350,000 against her former husband. The Family Court awarded her rupees 288,000 and the Additional District Judge, Lahore reduced it to rupees 250,000. One of the main arguments of the petitioner's counsel was that both lower courts had erred in law because the agreement between the parties was in violation of Section 3 of the Bridal Gift Restriction Act, 1976 which stated that no one is allowed to pay dowry more than rupees 5,000, and this fact was not considered by the lower courts. He further argued that the impugned order was not in accordance with the provisions of Qanun-e-Shahadat, 1984 as the lower courts had accepted the documents produced by the Respondent No. 1 without cross-examination of the witnesses. It was held that all the provisions of CPC and Qanun-e-Shahadat were not made applicable to the

¹⁴⁹ PLJ 2005 SC 572 [Shariat Appellate Jurisdiction]; also reported as 2005 SCMR 507.

¹⁵⁰ PLJ 2005 Lahore 934; also reported as 2004 CLC 1545.

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trials before the Family Courts. The Court relied on *Muhammad Azam v. Muhammad Iqbal and others*¹⁵¹ and many other authorities and concluded that special law excluded the general law. The Court dismissed the petition.¹⁵²

IV. CONCLUSION

The foregoing analysis of State's legislation in the sphere of family law and case law of the five years period clearly reveals that both: legislation as well as its interpretation done by courts in Pakistan, especially by the Higher Courts, has been 'pro-women'. However, they have fallen short of devising mechanism to curtail frivolous and vexatious litigation initiated by their former husbands. It is true that our society is patriarchal but the Superior Courts have always interpreted laws to provide much needed relief to helpless women. This is evident from the position taken by the Supreme Court regarding *khul'* discussed above since 1967 (*Khurshid Bibi* case); the relief provided to women as a result of the failure of husbands to give notice of *talaq* to the Chairman under Section 7 of the MFLO (there are many cases on this point); and declaring the marriage of adult Muslim girls, without the consent of her parent/guardian, as valid (*Saima Waheed* case). The credit for all these pro-women decisions goes to our Superior Courts. The decisions of the Lahore and Peshawar High Courts for not asking women to return their dowers and other benefits when the reason for asking for *khul'* lies with the husbands have added a new dimension to the law of *khul'* in Pakistan. It is hoped that the Supreme Court will continue to endorse such decisions in order to protect the hapless women of Pakistan. Given the increase in number of seats fixed for women legislators in Parliament, one should also be optimistic that the legislature will also play its role to enact laws which may protect and promote the welfare of women in society although no significant law was enacted by the

¹⁵¹ PLD 1984 SC 95.

¹⁵² 54 authorities were cited in this case. Since the introduction of online reporting, especially www.pakistanlawcite.com, some judgments are loaded with all those authorities that are available on the website, regarding a single point, without stating which one is exactly on the same point.

previous Parliament apart from passing the controversial Protection of Women Act, 2006.¹⁵³

¹⁵³ For details analysis of the Women Act see this author's "Is Zina bil-jabr Hadd, Ta'zir, or Siyasa Offence: A Re-appraisal of the Protection of Women Act, 2006 in Pakistan", *YIMEL* 14 (2007-2008) forthcoming.