

FAMILY LAW REPORT ON WOMEN'S MARRIAGE RIGHTS IN PAKISTAN



Family Law Report on Women's Marriage Rights in Pakistan

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1. PREFACE

This Family Law Report (the “**Report**”) examines the marriage rights of Muslim women under the laws of Pakistan pertaining to divorce, custody, maintenance and property. Section 2 of this Report summarizes relevant marriage laws, and associated amendments, from 1947 to the present day.

The remaining sections of the Report review case law from the Superior Courts of Pakistan from 1947 to the present. This review summarizes and analyses the courts’ jurisprudence in relation to the laws listed in Section 2 of the Report. Included in the review are common themes of analysis and reoccurring views held by the Courts. In order to avoid repetition, the analysis of these generic areas is clubbed with the recommendations.

To note, the discussion around rights of Muslim women in Pakistan invariably involves interpretation of Muslim personal laws, i.e., set of principles/guidelines of different schools of thought in Islam. It would not be incorrect to say that the Family Laws in Pakistan are predominantly an application of these personal laws. The Report attempts to cover various aspects of these personal laws but has avoided discussing the merits of these principles in detail so that it may not come out as a critique on a particular belief system. The recommendations contained in this Report essentially deal with the legal loopholes in the system which can be remedied if the said recommendations are incorporated.

2. LEGAL FRAMEWORK

In Pakistan, family law is largely governed by religious personal laws and laws are applied to individuals according to their personal beliefs.¹ Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962 provides that the Muslim personal law (Shariat) shall apply to Muslims.² Accordingly, Muslim women's marriage rights are to be governed and regulated in accordance with the Muslim personal law. This section of the Report presents an overview of the legal framework on family laws in Pakistan, with focus on select family law issues pertaining to women's marriage rights, including marriage, divorce, custody, maintenance and property.

The Constitution of Islamic Republic of Pakistan 1973 is the supreme law of the country and provides the overarching framework for the rule of law and its enforcement. All laws, ordinances, judicial decisions, government policies and rules derive their law-making authority from the Constitution. Chapter 1 of Part II contains a set of Fundamental Rights that are relevant to marriage rights, including the rights to life (Article 9), dignity (Article 14) and equality (Article 25). Chapter 2 of Part II lays down the Principles of Policy and sets out principles of policy for each organ and authority of the state to act in accordance with these principles. This includes the protection of marriage and family life (Article 35). In addition, Article 227 of the Constitution requires all provisions of the law to be in conformity with injunctions of Islam.

Pakistan has a federal system of government and the Constitution assigns legislative authority on a number of legal issues to the provinces and the federation. Following the 18th Amendment to the Constitution,³ issues, such as marriage and divorce, have been devolved to the provinces. A combination of federal and provincial laws governs dissolution of marriages in Pakistan. The Report focuses on the key laws governing family law issues in Pakistan. These include the following:

- i) Muslim Family Laws Ordinance 1961,
- ii) Punjab Muslim Family Laws (Amendment) Act 2015,

¹ "Muslim personal law" has been defined by the Supreme Court Shariat Appellate Bench in *Federation of Pakistan v Farishta*, PLD 1981 Supreme Court 120, as 'codified or legislated law which is being applied to Muslim residents of Pakistan or as with the denomination "Muslim" which governs their persons as such and as distinct from general law of the land which applies to everybody.'

² Section 2, West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 provides: "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 (Shariat) in case where the parties are Muslims."

³ The Constitution (Eighteenth Amendment) Act, 2010. Prior to the 18th Amendment to the Constitution of Pakistan, the distribution of legislative matters fell within the Federal Legislative and Concurrent Legislative List in the Fourth Schedule of the Constitution of Pakistan. The matters listed in the Federal Legislative List fell within the domain of the National Parliament, while the matters referred to in the Concurrent Legislative List were to be considered by both the Parliament and the Provincial Assemblies. The 18th Amendment deleted the latter i.e., the Concurrent List. After the 18th Amendment, the legislative matters contained in the revised Federal List are to be solely legislated upon by the Parliament, while all areas not contained in the Federal List now fall within the exclusive powers of the Provincial Assemblies.

- iii) West Pakistan Rules under the Muslim Family Laws Ordinance 1961,
- iv) Family Courts Act 1964,
- v) West Pakistan Family Court Rules,
- vi) Dowry and Bridal Gifts (Restriction) Act 1976,
- vii) Dissolution of Muslim Marriages Act 1939,
- viii) Child Marriage Restraint Act 1929,
- ix) Sindh Child Marriages Restraint Act, 2013,
- x) Punjab Child Marriage Restraint (Amendment) Act 2015, and
- xi) Guardians and Wards Act, 1890.

Some main elements of the above pieces of legislation are discussed below.

Muslim Family Laws Ordinance, 1961 (“MFLO”)

The MFLO codifies Muslim personal law in Pakistan and regulates several matters pertaining to Muslim personal law,⁴ including registration of marriage,⁵ dissolution of marriage,⁶ maintenance,⁷ and dower.⁸ Key provisions of the MFLO include:

Registration of Marriage

The MFLO 1961 requires mandatory registration of all marriages performed under Muslim personal law.⁹

The Punjab Muslim Family Laws (Amendment) Act 2015, (“PMLA”) inserts Section 5 (2A) in MFLO, making it *mandatory* for *Nikah* Registrars of any other person solemnizing a marriage to accurately fill all columns of the *nikahnama*. In addition, the PMLA imposes stricter penalties for a violation of Section 5 (3) of the MFLO (non-reporting of solemnization of marriage by persons other than *Nikah* Registrar).

Dissolution of Marriage

Sections 7 and 8 of the MFLO 1961 defines the process, requirements, and punishments for non-compliance for different forms of dissolution of marriage.

⁴ The MFLO, as amended over time, continues to apply to all provinces and the Islamabad Capital Territory, with the exception that in 2015, the province of Punjab adopted the same with certain amendments, through the Punjab Muslim Family Laws (Amendment) Act 2015.

⁵ Section 5, MFLO 1961.

⁶ Sections 7 and 8, MFLO 1961.

⁷ Section 9, MFLO 1961.

⁸ Section 10, MFLO 1961.

⁹Section 5 of the MFLO 1961 provides: “Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance’.

Dower

As per MFLO, dower is a right of the wife and a mandatory condition of marriage which requires specific details to be mentioned in the *nikahnama*.¹⁰ There are two types of dower: prompt and deferred. The former is where the dower is paid at the time of the *nikah*, while the latter is where a time period of future date is specified for the payment of dower. Section 10 of the MFLO also provides that where the mode of payment for dower is not specified in the *nikahnama*, “*the entire amount of the dower shall be presumed to be payable on demand.*”

Maintenance

According to Section 9 of the MFLO, the wife is entitled to maintenance by the husband during their marriage. Where there are more than one wives, the husband is required to maintain them equitably. Failure to provide maintenance may be notified to the Chairman of the Union Council, who will constitute an Arbitration Council to issue a certificate, specifying an amount to be paid as maintenance.¹¹

The Dissolution of Muslim Marriages Act, 1939 (“DMMA”)

The DMMA governs the wife’s right to fault-based divorce without the need to surrender her dower based on various grounds set forth in Section 2. These include desertion by the husband, failure to maintain the wife, cruelty, etc. Overtime, various amendments have been made to DMMA.

The Dowry and Bridal Gifts (Restriction) Act, 1976 (“DBGA”)

The DBGA provides which restrictions are imposed on dowry, bridal gifts, presents, and all matters ancillary to them. The DBGA, as amended over time, continues to apply to all of Pakistan.

Restriction on Amount for Dowry/Bride Gifts

Section 3(1A) of the Act provides that the dowry and presents given to the bride by her parents should not exceed five thousand rupees (Rs. 5,000). Section 3 (2) also states that any dowry, bridal gifts, or presents may be given six months before or after initiating a *nikah* or six months after the marriage has been consummated (*rukhsati*).

Assigning Dowry as Property of the Wife

Section 5 provides that a wife has an absolute right to her dowry and any bridal gifts she receives, and that any property rights cannot be restricted, controlled, or limited.

¹⁰ Substitution of Column No. 15 for Form II (nikahnama) appended to the West Pakistan Rules under the Muslim Family Laws Ordinance 1961, through Statutory Regulatory Order, dated 29.04.2014 – Column No. 15 was amended in which specific details of dower were to be specifically mentioned.

¹¹ Section 9 (1) MFLO 1961 reads as: “*If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.*”

Evidence of dowry and bridal gifts

Section 7 requires that at the time of *nikah* or consummation (*rukhsati*), the parties' parents must display all dowry items, bridal gifts, and presents given or received to ensure that the guests can view them at that time. Section 8 provides that the father of the groom or a person who arranged the marriage is responsible for submitting an affidavit to the Registrar listing all marriage expenses including dowry, bridal gifts, and that presents were within the prescribed limits of the DGBA.

At the same time, it places a duty on the *Nikah* Registrar to submit the list to the Deputy Commissioner within 15 days of receipt of the list. In addition, according to Section 8A of the DGBA, any individual, who is an attendee of a marriage ceremony, can file a complaint to the Deputy Commissioner that the marriage ceremony was held in contravention of the DGBA.

Punishment for non-compliance

Section 9 states that the failure to comply with DGBA can result in up to six months imprisonment or a fine of up to ten thousand rupees, or both.¹²

The Child Marriage Restraint Act, 1929 (“CMRA”)

The CMRA aims to restrain the solemnization of child marriages. The CMRA is a federal law, which became a provincial subject following the 18th Amendment.¹³ The Punjab province promulgated the Punjab Child Marriage Restraint Act 2015 (“PCMRA”), and the Sindh province enacted the Sindh Child Marriage Restraint Act 2013 (SCMRA) to regulate child marriages within their respective provinces.

Punishment for violation

Sections 4, 5 and 6 of CMRA provides the punishment for all individuals involved in a child marriage, including the male adult marrying a child, the person solemnizing,¹⁴ and the parent or guardian.¹⁵

In Punjab, the PCMRA increased the punishment persons involved in a child marriage.¹⁶ Sindh goes a step further in imposing stricter punishments for the same.¹⁷

Cognizance, trial and conclusion of case

According to Section 9 of the CMRA, a Family Court may only act upon the complaint of

¹² In addition to the punishments prescribed by Section 9, any dowry, bridal gifts, or presents given or accepted in contravention of the Act shall be forfeited to the Federal Government and used to marry impoverished girls.

¹³ The CMRA, as amended over time, continues to apply to the provinces of Khyber Pakhtunkhwa, Balochistan and the Islamabad Capital Territory.

¹⁴ Section 5 CMRA 1929 also states: “...unless he proves that he had reason to believe that the marriage was not a child marriage.”

¹⁵ Section 6(2) goes further in stating that it “shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.”

¹⁶ Sections 4, 5 & 6 PCMRA 2015.

¹⁷ Sections 3, 4 & 5 SCMRA 2013.

a respective Union Council. In the absence of a Union Council, another authority appointed by the provincial government may prescribe a complaint on its behalf.

In addition to this, in Punjab, the PCMRA expands the definition of “Union Council” to include not only Union Council but also Municipal Committee, Cantonment Board, a Union Administration or, in case of absence of any of these local governments in a local area, any other comparable body constituted under any law relating to the local governments or local authorities.¹⁸ Moreover, according to Section 9 (2) of PCMRA, a Family Court exercising the powers of a Judicial Magistrate of the first class shall conduct trial of an offence under the Act.

In Sindh, Section 8 of the SCMRA recognizes child marriage as a cognizable, non-bailable and non-compoundable offence. Section 9 states that only first-class judicial magistrates have jurisdiction to take cognizance of child marriage cases under the Act.¹⁹ After taking cognizance of a case, the Court must proceed with and conclude proceedings within ninety days.

Power to issue injunction prohibiting child marriage

Section 12 of the CMRA confers the Court with injunctive authority if it is satisfied from information laid before it through a complaint or other means that a child marriage has been arranged or is about to be solemnized. In Sindh, the power to order injunctions prohibiting child marriages are laid down in Section 7 of the SCMRA.

The Guardians and Wards Act, 1890 (“GWA”)

The GWA regulates matters related to custody and guardianship of minors.²⁰ The GWA is an umbrella legislation that provides procedural code and lays down certain rights and obligations of the guardian and custodian supplementing personal laws governing the issues. The provisions of GWA are read with the provisions of FCA since all issues relating to guardianship would be triable in the Family Court as well.²¹

According to Section 4(2), a “guardian” is defined as a “person having the care of a minor or his property, or of both his person and property.” As per Section 4(1), a “minor” is a “person who, under the provisions of the Majority Act 1875, is to be deemed not to have attained his majority”.

Section 7 of the GWA states that a Court has the power and authority to declare or appoint a guardian of the person and/or property of the minor. In doing so, the Court must keep in view the welfare of the minor. In addition, Section 17 (2) lays down other factors while appointing the guardian, including the minor’s age, sex and religion; the character and capacity of the proposed guardian and nearness of kin to the minor; any wishes of the deceased parent; the proposed guardian’s previous or existing relations with the minor or his property; and the minor’s preference if the Court is of the view that the minor is old enough to make an intelligent preference.

¹⁸ Section 2(e), PCMRA.

¹⁹ Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure 1898.

²⁰ The GWA, as amended over time, continues to apply to all of Pakistan.

²¹ 2017 CLC 1747.

3. MARRIAGE

This section of the Report discusses the core ingredients of a Muslim marriage contract and its regulation by existing laws in Pakistan, with a focus on the rights of women.

The Islamic concept of marriage or the *nikah* has been described as a contract between a man and a woman “for the legalization of intercourse and procreation of children.”²² Marriage under Pakistani law is regarded as a legally binding contract (*nikahnama*), which comes into effect on the basis of an offer by one party and acceptance by the other.²³ The parties are free to negotiate the terms and conditions of the *nikahnama*, although social norms restrict the ability of the parties to negotiate, especially of women. The *nikahnama* also grants rights and obligations for both the wife and husband as parties to the contract.

Requirements of a Valid Marriage Contract

There are 4 key requirements to form a valid marriage contract. These are:

- Offer and acceptance
- Consent
- Two witnesses²⁴
- Dower/*haq mahar*

If these four conditions are not met, the marriage is considered invalid, void (*batil*)²⁵ or irregular (*fasid*).²⁶

²² David Pearl & Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998) 139.

²³ See for example *Saleem Ahmed v. the Government of Pakistan*, PLD 2014 Federal Shariat Court 43. The Federal Shariat Court held that under Islamic Law, marriage is not a sacrament but a civil contract that creates mutual rights and obligations between the husband and the wife.

²⁴ As per Muslim Family Law, the general rule is that there must be either two males or one male and two females as witnesses to the marriage. Witnessing of the marriage is an essential element of a valid Muslim marriage contract; except in the Shia sect. According to the majority of Sunni jurists, a marriage conducted in the absence of witnesses is irregular (*Fasid*).

²⁵ Void or *Batil* marriage is not a marriage at all, and there does not exist any rights or obligation between the husband and wife because there is a permanent irregularity preventing the relationship from being valid under any circumstance. Any offspring from such a union are also illegitimate. See Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (2008 edn, Imran Law Book House, Lahore). There are certain prohibited degrees of relationships with whom marriage is void: consanguinity, affinity, fosterage. See also, *Sani Gul v. Civil Judge III Swat*, 2000 CLC 1228; *Zulfiqar Ali v the State*, 2012 YLR 847.

²⁶ An irregular or *Fasid* marriage, like a void marriage, is not a valid marriage due to an irregularity of a temporary nature which may be legalized in certain ways. Thus, an irregular marriage is not unlawful itself but is so due to an accidental circumstance. Categories of irregular marriages include marriage contracted without witnesses, marriage contracted with a woman undergoing *iddat*, marriage contract with a fifth person, marriage with two women at the same time. who are so related to one another that if either of them had been a male, they could not have lawfully intermarried, e.g., two sisters or aunt and niece. An irregular marriage does not have any legal effects before consummation. If an irregular marriage is consummated, the following consequences shall arise: the wife is entitled to dower, specified or proper, whichever is less; the wife is bound to observe *iddat* upon termination of marriage; the offspring shall be considered legitimate; and mutual rights to inheritance between the parties shall not arise. (See Mulla, note 25, 452. See also, *Muhammad Sher vs. ASJ District Khushab*, 2016 CLC 717; *Iftikhar Nazir Ahmad Khan and Others v Ghulam Kibria and Others*, PLD 1968 Lahore 587.

Rights of Women in the Marriage Contract

As mentioned above, the *nikahnama* is treated as a contract under Pakistani law and confers essential rights and obligations to the wife and husband. If included, permissible provisions add certainty to the *nikahnama* and render rights enforceable in courts. Key rights of the wife in the *nikahnama* include consent, dower, maintenance, delegated right to divorce, restrictions on the husband's right to divorce, and special conditions. These are outlined below and detailed in subsequent sections of the Report.

Age of the Bride: The Pakistani family law criminalizes child marriage and prescribes a minimum age for the marriage of the bride, i.e., 16 in Punjab, KPK and Balochistan provinces, and 18 in Sindh and ICT. The age of the bride is entered in Column No. 6 of the *nikahnama*.²⁷ Further discussion of the minimum age for marriage and the Superior Courts' interpretation of the restrictions contained in CMRA and SCMRA included below.

Dower: Columns No. 13-15 of the *nikahnama* pertain to the specified dower to be given to the wife. Column No. 13 requires the total amount of specified dower to be stated. Where the total specified dower is to be divided into prompt and deferred dower, Column No. 14 requires such mode of payment to be detailed along with its value/breakdown. Column No. 15 requires the form of payment of the dower to be detailed: (i) the cash amount; and (ii) property, whether movable or immovable along with its value. Dower is exclusively the right of the wife. The types, classification and mode of payment of dower is discussed in Section 4 below.

Delegated Right to Divorce: Column No. 18 allows for the delegation of the right of divorce, under which the husband may delegate his right to pronounce *talaq* to his wife. The delegation must be recorded in clear terms (a "yes" or a "no").²⁸ The right may be subjected to any conditions. This is discussed in Section 5.

Curtailment on the Husband's Right to *Talaq*: Column No. 19 allows the wife to restrict and/or curtail the right of the husband to pronounce *talaq*. However, the right of the husband to *talaq* is absolute and the Lahore High Court in *Muhammad Sajjad v Additional District Judge, Jalalpur Pirwala, District Multan and Others*²⁹ has restricted the application of Column No.19.

Maintenance: Column No. 20 requires the parties to give brief details of the contents of any document drawn up at the time of marriage in relation to maintenance. In this regard, the Lahore High Court in *Mst. Shehnaz Mai v Ghulam Abbas and Others* has held that where the parties had agreed to maintenance in the said Column No. 20, the amount so agreed is receivable by the wife as her maintenance allowance.³⁰ The right to maintenance is discussed in Section 7.

Polygamy: According to Section 6 of the MFLO, a man must acquire the approval of the

²⁷ In *Tahira Bibi vs. Station House Officer*, 2020 PLD Lahore 811, the Lahore High Court held that the *Nikah* Registrar is to satisfy himself of the age of the parties by referring to documents such as the CNIC and birth certificates of the parties, and not merely rely on self-declaration of the parties.

²⁸ *Ali Abbas Khan vs. Palwasha Khan*, 2010 YLR 1632.

²⁹ *Muhammad Sajjad vs. Additional District Judge*, 2022 CLC 729.

³⁰ *Mst. Shehnaz Mai v Ghulam Abbas and Others*, 2018 CLCN 104.

Arbitration Council (based on the first wife's consent) to contract another marriage. Column No. 21 and 22 include details of whether such consent has been acquired and of the communication of the Arbitration Council pursuant to which the same has been granted. If this approval is not obtained, the marriage is not invalidated, but it gives the wife grounds for divorce.

Special Conditions: Under Column No. 17 of the *nikahnama*, the bride is at liberty to detail any special conditions to their marriage contract, including the right to work, education, division of household and financial responsibilities, etc. However, the nature of these special conditions has to be within the limits of Islamic law.³¹

It is worth noting that only the Punjab province makes it mandatory for all Columns of the *nikahnama* to be accurately filled, with the aim that the above mentioned rights can be secured for women in a *nikahnama*.³² In the absence of mandatory provisions requiring the same in other provinces, certainty of contract and complete protection of these rights are not guaranteed to women in these provinces.

Capacity

Since marriage is a contract under Pakistani law, both parties must have legal capacity to enter into a contract of marriage. This raises the issue of consent. For a valid marriage contract, free and informed consent of both parties is essential. Forced or coerced marriage is not only invalid³³ but also illegal.³⁴ Moreover, according to the Federal Shariat Court in *Muhammad Aslam v. the State*, courts are to interpret "free consent" for marriage expansively by taking into account factors such as the ability to exercise free choice; legal capacity and the capability to use that capacity; sane, as well as mature mind, availability of assistance of *wali/wakil*, etc.³⁵

Despite the recognition of free and informed consent under Pakistani law, the consent of the woman remained a controversial issue in terms of whether a woman is required to obtain the consent of her guardian/*wali*, until it was resolved in *Hafiz Abdul Waheed vs. Asma Jahangir*.³⁶ In this case, the Supreme Court relied on a number of previous decisions of the Federal Shariat Court and its own decision in an earlier case and held that consent of the *wali* is not required for a *sui juris*³⁷ Muslim woman to enter into a valid marriage of her will. So while adult Muslim women are free to enter marriage

³¹ Mulla, note 25, 509.

³² Section 5(2A) MFLO, 1961 as amended by the Punjab Muslim Family Laws (Amendment) Act 2015.

³³ *Matloob Hussain v. Mst. Shahida and Two Others*, PLD 2006 Supreme Court 489.

³⁴ *Issa Khan v Mst. Raza*, 1991 SCMR 2454; Section 498B of Pakistan Penal Code, 1860.

³⁵ *Muhammad Aslam v. the State*, 2012 PCrLJ 11.

³⁶ *Hafiz Abdul Waheed vs. Asma Jahangir*, PLD 2004 SC 219 ("6. In *Muhammad Imtiaz and another v. The State* (PLD 1981 FSC 308), *Arif Hussain and Azra Perveen v. The State* (PLD 1982 FSC 42), *Muhammad Ramzan v. The State* (PLD 1984 FSC 93) and *Muhammad Yaqoob and another v. The State and 3 others* (1985 PCrLJ 1064), the Federal Shariat Court has been consistently taking the view that a *sui juris* Muslim girl can contract marriage of her own accord and the consent of her *Wali* or other relations is not requisite to the validity of marriage. Earlier in *Mauj Ali v. Syed Safdar Hussain Shah and another* (1970 SCMR 437), this Court had held that a Muslim girl attaining puberty is competent to marry of her own free-will and on this ground her custody was declined to her father and the order of the High Court permitting her to go and live with the husband was, maintained. In PLD 1982 FSC 42 and PLD 1984 FSC 93 the Federal Shariat Court has even held that subject to other facts' of a given case, an admission by a couple that they were married, would constitute sufficient proof of marriage.")

³⁷ Having full legal capacity.

without the consent of a *wali*, questions persisted as to the validity of restrictions on minor Muslim girls to marry.

While the provincial courts for a time diverged in their interpretation of whether a girl who had attained puberty but remained below the marriageable age prescribed in the CMRA could be restricted from marrying under the injunctions of Islam, the Federal Shariat Court settled the matter with the 2022 ruling in *Farooq Omer Bhoja vs. The State through Ministry of Law and Justice through Secretary of Islamabad*. The FSC ruled that both attainment of puberty and possession of sound judgment are necessary to establish capacity to contract a marriage.³⁸ This overruled previous cases such as *Allah Nawaz vs. Station House Officer Mahmood Kot, District Muzaffargarh*, where the Lahore High Court held that a girl of between 14-15 years of age had “*all physical characteristics of having attained puberty*” and therefore could consent to a valid marriage, even without her guardian’s consent.³⁹ The court implicitly recognised a Muslim woman under the age of eighteen to be *sui juris* for entering into a marriage. While the ruling in the *Allah Nawaz* case contravened the CMRA provision barring marriage of a girl below the age of 16, the FSC in *Farooq Omer Bhoja* held that the CMRA was to prevail over any interpretation of age given under the Muslim personal law.

The FSC further explained that since the legislature was competent to prescribe a minimum age for marriage to avoid the damaging effects of child marriages, the prescription of a minimum age by the state is in line with Shariah.⁴⁰

In addition, in *Abdul Razaq vs. the State*, 2022 PCr.LJ 953, the Islamabad High Court was of the view that the discrepancy in the law setting the minimum age of marriage should be removed.⁴¹ The Court decided that the minimum age of consent for marriage should be 18. The Court also reiterated the duty of the state mentioned in the *Bhoja* case to curb acts that have a detrimental impact on the society or its segments, i.e., women, and urged the federal government to declare a uniform age across the country. Moreover, in *Mumtaz Bibi vs. Qasim and Others*, the Islamabad High Court was of the view that a female child below the age of 18 cannot be deemed competent to freely provide her consent “*merely because she manifests the physical symptoms of having attained puberty*”⁴² and further “*the test for legal agency and competence of a female child is her biological age and not her state of physical and biological growth.*”⁴³ Similarly, in *Ali Azhar vs. The Province of Sindh and others*, the Federal Shariat Court held that SCMRA, which sets 18 as the minimum age for marriage for both women and men is valid and within the confines of Shariah.⁴⁴

Hence, recent judgements have expanded the scope of determining capacity and consent of women in terms of their ability to form a sound judgement, understanding the nature and consequences of their marriage contracts, as well as their rights and duties arising out of it. At the same time, they have set the minimum standard i.e., the

³⁸ *Farooq Omer Bhoja v. the State through the Ministry of Law and Justice through Secretary Islamabad*, PLD 2022 Federal Shariat Court PLD 1.

³⁹ *Allah Nawaz vs. Station House Officer Mahmood Kot*, PLD 2013 Lah. 243.

⁴⁰ *Ibid.*

⁴¹ *Abdul Razaq vs. the State*, 2022 PCr.LJ 953.

⁴² *Mumtaz Bibi v Qasim*, 2022 PLD Islamabad 228.

⁴³ *Ibid.*

⁴⁴ *Ali Azhar vs. The Province of Sindh and others*, Shariat Petition No.05-1 of 2022.

minimum age set in CMRA and SCMRA in relation to issues of capacity. However, the gaps in the law in terms of the discrepancy in ages set differently for girls across the country still remain.

Child Marriage

As noted above, the CMRA criminalizes child marriage across Pakistan. This is adopted in all provinces, except Sindh, which passed the SCMRA to make 18 years the legal age of marriage for both males and females, and remains the only province to have done so by way of legislation. However, despite criminalizing child marriage, legislation on child marriage remains silent on the validity of child marriage. In ICT, the age of marriage has also been set to 18, with the Islamabad High Court holding in the *Mumtaz Bibi* case that marriage of anyone under 18 years of age is unlawful. However, this is only to the extent of ICT.

In *Bakhshi v Bashir Ahmed*, the question of the validity of the marriage of a minor girl 15 years came up before the Supreme Court.⁴⁵ While interpreting the provisions of CMRA, the Supreme Court held that since a child marriage had been contracted, the penal provisions of Sections 4-6 of the CMRA were attracted. However, it was held that the marriage itself was not invalid. Following the decision of the Supreme Court in the *Bakhshi* case, several courts have similarly held that the validity of a child marriage will not be affected.⁴⁶ For instance, in the *Allah Nawaz* case, the Lahore High Court ruled that even though Section 375 of the Pakistan Penal Code 1860 provided that sexual intercourse with a girl child who is below the age of 16 was criminalized as this would constitute as rape (regardless of whether the girl had consented to it), on the present facts, the fact of marriage being contracted wilfully and validly between the parties meant that such sexual intercourse could not be equated with rape.⁴⁷

The *Mumtaz Bibi* judgment was a departure from the view that a child marriage contracted in violation of the CMRA was nevertheless valid. The judgment provides clarity on the law on child marriage in terms of a being unlawful, non-registrable and one that cannot be given effect by a court “as that would tantamount to defeating provisions of law that have been promulgated to uphold rights of children guaranteed by Article 9 of the Constitution read together with the provisions of United Nations Convention on the Rights of the Child”. Further, the Court was of the view that taking a complete reading of Sections 376 and 377A of PPC, Article 9 of the Constitution and the CRC “unequivocally provides that no one can engage in sexual conduct in any form with a child”.⁴⁸ A holistic account of Islamic principles, international human rights law, and family law and criminal law in the Pakistani legal system in addressing the issue of child marriage and advancing the rights of girls in the *Mumtaz Bibi* judgment is instructive. However, despite its progressive approach to the protection of girls in the child marriage context, as noted above, the judgment is only applicable to the extent of ICT. This means that it only remains persuasive for the rest of the provinces and is not binding. Given the disharmony between the federal and provincial areas in relation to the law on child marriages, there is still a need for uniformity in the law for strengthening the protection of the rights of women across the country.

⁴⁵ *Bakhshi v Bashir Ahmed*, PLD 1970 Supreme Court 323.

⁴⁶ *Allah Nawaz vs. Station House Officer Mahmood Kot, District Muzaffargarh*, PLD 2013 Lahore 243.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

Option of Puberty

Under classical Islamic law, a minor girl who has not attained puberty and is incompetent to enter into marriage, may be contracted in marriage by her parents or guardian.⁴⁹ However, upon attaining puberty, she/he is given the option to repudiate her marriage (discussed in Section 5 below). However, in light of the recent judgment in the Bhoja case, the CMRA does not codify such a right of repudiation as Sections 5 and 6 of both the CMRA and the SCMRA proscribe the solemnization of marriage of a minor girl under the age of 16 and 18 years, respectively. Further, the *Mumtaz Bibi* judgment, while dismissing puberty as a test for determining the capacity of a minor girl to enter into marriage, held that in view of the penalties imposed under PPC for engaging in sexual conduct with a minor girl, the possibility of either the parents giving away a minor girl for marriage or a minor girl consenting to the same was removed.

Registration of Marriage

The *nikahnama* is a public document and requires registration under Section 5 of the MFLO. The duty of the *Nikah* Registrar or a person who solemnizes marriage in this regard is vital.⁵⁰ As noted above, in Punjab, there is an added duty to ensure that all columns of the *nikahnama* are accurately filled. In *Tahira Bibi v Station House Officer and Others*⁵¹ the duty was explained to properly ascertaining the ages of the parties; rather than relying on self-declaration of the parties in respect of their age, and filling out each column of the *nikahnama* individually, with specific answer of the bride and groom pursuant to Section 5 (2A) of the MFLO, as applicable to the province of Punjab. In *Shah Din and Others vs. The State*, the Court held that the *Nikah* Registrars should “realize that the duty that they are required to perform is very sacred because rights to succession, maintenance, dower, divorce, legitimacy of children and several other rights flow from a valid marriage.”⁵² Similarly in *Ali Abbas Khan v Mst. Palwasha Khan and Others*, where Column No. 18 of the *nikahnama*, relating to the wife’s delegated right to divorce, had been filled in ambiguously, the Islamabad High Court held that the *Nikah Khwan* who had solemnized the marriage had not discharged his duty properly since the column was filled in uncertain terms.⁵³

However, courts on various occasions have held that non-registration under Section 5 of the MFLO does not *ipso facto* invalidate the marriage. The Supreme Court in *Abdul Majid Khan and Another v Mst. Anwar Begum* laid down a test on the basis of which it would be presumed that a couple has entered into a valid marriage, in the absence of direct evidence of the *nikah*.⁵⁴

⁴⁹ *Aas Muhammad v Sakina Bibi*, 1982 CLC 2295[5].

⁵⁰ Non-registration of *nikahnama* will incur criminal liability for the *Nikah* Registrar of imprisonment up to three months, or fine of one thousand rupees, or with both. This provision has been amended by Section 4 of the Punjab Muslim Family Laws (Amendment) Act 2015 to increase the fine from one thousand rupees to one hundred thousand rupees.

⁵¹ *Tahira Bibi v Station House Officer and Others*, PLD 2020 Lahore 811.

⁵² *Shah Din and Others vs. The State*, PLD 1984 Lahore 137.

⁵³ *Ali Abbas Khan v Mst. Palwasha Khan and Others*, 2010 YLR 1632.

⁵⁴ *Abdul Majid Khan and Another v Mst. Anwar Begum*, PLD 1989 Supreme Court 362 (It was noted “The presumption regarding Muslim marriage, in absence of direct proof has been raised and acted upon, in the following instances:- (a) Prolonged and continuous cohabitation as husband and wife, (b) The fact of acknowledgement by the man, of the paternity of the children born to the woman, provided all the

4. MATRIMONIAL PROPERTY RIGHTS

Under Pakistan law, the subject of women's rights to matrimonial property is regulated through legislation on: dower; dowry; bridal gifts; presents; and personal property.

As will be discussed below, such matrimonial property may be received by the bride at the time of the marriage or during its subsistence, as given to her by: (i) her parents/guardian; (ii) her relatives; (iii) the groom; (iv) the groom's parents; or (v) the groom's relatives. Further, such matrimonial property may be either movable or immovable in nature and may be granted to the woman either immediately or in the future upon the happening of a contingency.

The ensuing discussion shall detail women's rights to each of the aforementioned categories of matrimonial property in light of the applicable laws and their interpretation by Superior Courts.

Dower

Dower or *Haq Mahar* is a necessary requirement for a valid marriage contract. Various High Court judgements have explained that dower serves as consideration for the marriage contract.⁵⁵ It includes a sum of money or other property that becomes payable by the husband to the wife as an effect of the contract of marriage.⁵⁶ Courts have held that dower is the "*inalienable right*" of a woman under the marriage contract and a financial gain which the wife is entitled to receive.⁵⁷

It has been clarified that only the wife, and not any third parties — such as her parents⁵⁸ — are entitled to recover this debt and be entitled to its payment from her husband. In *Mst. Manzoor Elahi v Muhammad Nawaz*, it was held that dower is the "*financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself.*"⁵⁹ However, its non-payment does not ipso facto render the marriage contract invalid; however, as noted above it gives rise to a debt liability in favour of the wife against her husband.⁶⁰

Forms of Dower

Dower may take various forms and can consist of any property or possession. The Peshawar High Court in a case entitled *Sar Anjam Khan v Mir Afzal Khan*,⁶¹ elaborated the forms of dower by quoting Syed Ameer Ali, which is as under:

"Anything over which dominion or the right of Property may be exercised, or anything, which may be reduced into possession, either in praesenti or in futuro,

conditions. of a valid acknowledgement are fulfilled; or (c) The fact of the acknowledgement by the man, of the woman, as his wife.")

⁵⁵ *Sohail v. Mst. Nazi Amin*, 2015 CLC 1374; *Muhammad Sajjad v. Additional District and Sessions Judge*, PLD 2015 Lahore 405.

⁵⁶ David Pearl & Werner Menski, note 22, 179.

⁵⁷ *Muhammad Azam v Additional District Judge*, 2006 YLR 33.

⁵⁸ *Bakht-e-Rawida v Ghulam Habib*, PLD 1992 Karachi 46.

⁵⁹ *Mst. Manzoor Elahi v Muhammad Nawaz*, 2002 MLD 988.

⁶⁰ *Ibid.*

⁶¹ *Sar Anjam Khan v Mir Afzal Khan*, PLD 1972 Peshawar 37.

anything, in fact, which comes within the meaning of the word mal, and has a value, may according to the Hanafi doctrines, form the subject of dower."

Further, the dower may include any property having a tangible value and also profits accruing from business or land.⁶²

Quantum of Dower

It is noted that there is no obligation to set the amount of dower before the marriage. Further, if an amount for dower has been set at the time of marriage, it may subsequently be: (i) increased by the husband; (ii) abated by the wife in part in her husband's favour;⁶³ (iii) relinquished by the wife in total;⁶⁴ or (iv) amended by the spouses through mutual agreement.⁶⁵

The husband may also give his immovable property in lieu of dower. It is noted that Column No. 15 of the *nikahnama* provides the details, including the value of the immovable property being given in dower as an oral gift.⁶⁶

Classification of Dower

The amount of dower may either be specified at the time of marriage or left unspecified.

(i) Specified Dower (Mahar Musammat)

In case the amount of dower is fixed by the parties to the marriage, it is called specified dower or *Mahar Musammat*.

Specified dower has been further divided into sub-categories, i.e., (i) prompt dower (*mu'ajjal*) and; (ii) deferred dower (*mu'wajjal*).⁶⁷ In case the total specified dower is to be divided into prompt and deferred dower, Column No. 14 of the standardized *nikahnama* requires such mode of payment to be detailed along with its breakdown. Further, the form of payment of dower (i.e., cash or property) is to be detailed in Column No. 15 of the same.

In case titled *Muhammad Sajjad v Additional District and Sessions Judge*⁶⁸ the Lahore High Court elucidated the difference between the two categories of specified dower as under:

"The only difference between Mu'wajjal and Mu'ajjal i.e. prompt and deferred dower is that deferred dower is not payable till the arrival of stipulated period whereas prompt dower is payable immediately on demand..."

Therefore, the difference between the aforesaid categories of specified dower lies in

⁶² Ibid.

⁶³ However, it is noted that in PLD 1956 Karachi 363, it was held that in case such abatement must be done with the wife's free consent, and not under mental stress; or to gain the husband's favour.

⁶⁴ Ibid.

⁶⁵ *Ghania Hassan v Shahid Hussain Shahid*, 2016 SCMR 2170.

⁶⁶ *Mst. Allah Jawai v Allah Ditta*, PLD 1975 Lahore 1399.

⁶⁷ It is noted that in PLD 2015 Lahore 405, it has been held that these sub-categories have no legal sanction and have been merely adopted by way of general practice.

⁶⁸ *Muhammad Sajjad v Additional District and Sessions Judge*, PLD 2015 Lahore 405.

their time for payment. Further details on payment of dower are discussed below.

(ii) Unspecified Dower (Mahar-i-Misl)

In contrast to specified dower, in instances where no dower has been fixed by the parties, the wife is entitled to “proper” dower.⁶⁹ Further, the amount of dower in such an instance shall be settled by reference to the amounts of “*dower of the females of her class or of her father’s family, the financial position of the groom, the social status of the bride, the prevalent custom of the time and place, and the agreement that the bride and the groom can reach over the amount.*”⁷⁰

Payment of Dower

It is further noted that a woman’s entitlement to dower is confirmed upon: (i) consummation; (ii) death of either party; or (iii) valid retirement.⁷¹

(i) Payment of Prompt Dower

The payment of prompt dower is recoverable on demand during the subsistence of the marriage. In *Shah Daraz Khan v Mst. Naila and Others*,⁷² the Peshawar High Court states:

“Admittedly prompt dower is payable during subsistence of marriage tie whereas deferred dower is payable on the time stipulated between the parties.”

In case prompt dower is not paid to the wife, she has the legal right to refuse to live with her husband and is relieved of her matrimonial obligations.⁷³ Since, in general, a woman is entitled to maintenance, she may leave her marital home with the lawful excuse of her husband’s failure to pay dower, and is entitled to maintenance from her husband during the period in which she does not reside with the husband.⁷⁴

(ii) Payment of Deferred Dower

In contrast to prompt dower, deferred dower is payable on a stipulated time decided between the parties. Where no time is stipulated for payment of such deferred dower, courts disagree as to the time of payment.

The traditional view is that deferred dower will only be payable if the marriage is dissolved either through divorce by the husband or death of the husband.⁷⁵ The aforesaid view was upheld by the Supreme Court in *Saadia Usman v Muhammad Usman Iqbal Jadoon*.⁷⁶ In this case, the main question to be determined was whether the wife would be entitled to deferred dower on demand for which no time had been stipulated by the parties. The Supreme Court held that:

⁶⁹ Mulla, note 25, 481.

⁷⁰ *Muhammad Qayyum Anjum v Additional District Judge*, 2022 MLD 416.

⁷¹ Mulla, note 25, 481.

⁷² *Shah Daraz Khan v Mst. Naila and Others*, 2015 MLD 73.

⁷³ *Mst. Muhammadi v Jamil-ud-Din*, PLD 1960 Karachi 66.

⁷⁴ *Shamshad Bibi v District Judge, Multan and Others*, 2012 YLR 277.

⁷⁵ Mulla, note 25, 482.

⁷⁶ *Saadia Usman v Muhammad Usman Iqbal Jadoon*, 2009 SCMR 1458.

“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.”

In contrast to the above, the Lahore High Court in *Muhammad Sajjad v Additional District and Session Judge*,⁷⁷ held as under:

“The view that deferred dower is not payable unless the marriage is dissolved is not supported by any recognized principle based on some authority whereas on the other hand, the deferred dower shall always be treated as prompt if no specified period for the payment of dower is fixed...“The deferred dower is source of guarantee for a woman against ill-treatment, non-maintenance, desertion or any other abnormality in the family life. Thus, the payment of deferred dower is deemed to be postponed till either the specified time and if no time is specified, till the wife demands it.”

It is noted that the prevalent view in the Superior Courts is that in case the time of payment for deferred dower is not stipulated, it shall be payable on demand by the wife.⁷⁸ This suggests that the High Court departed from the line of reasoning in the earlier Supreme Court judgement in *Saadia Usman*.

(iii) Mode of Payment Not Specified

It is noted that pursuant to Section 10 of the MFLO, “where no details about the mode of payment of dower are specified in the nikahnama, the entire amount is to be presumed to be payable on demand by the wife.”⁷⁹

It is noted that legislation has sought to address the issue of not entering details for, *inter alia*, the mode of payment of dower. Through the Punjab Muslim Family Laws (Amendment) Act, 2015, *Nikah* Registrars are under an obligation to ensure that all Columns of the standardized *nikahnama* are filled out accurately by the parties.

Effect of Second Marriage in Violation of Section 6 (5) of the MFLO

In accordance with Section 6 (5) (a) of the MFLO, in case a husband contracts a second marriage without acquiring the permission of the Arbitration Council beforehand, he is liable to immediately pay the entire amount of dower, whether prompt or deferred, that is due to his existing wife.⁸⁰

(i) Payment of Dower in Case of Divorce by the Husband

In case the husband divorces the wife after consummation of marriage, he is liable to pay the entire amount of dower (i.e., both prompt and deferred).⁸¹ Whereas, if the divorce is given before consummation of marriage, the husband is liable to pay only half

⁷⁷ *Muhammad Sajjad v Additional District and Session Judge*, PLD 2015 Lahore 405.

⁷⁸ Please see 2013 MLD 1466 and 2000 CLC 1384.

⁷⁹ *Muhammad Qayyum Anjum v Additional District Judge*, 2022 MLD 416.

⁸⁰ *Muhammad Jamil v Mst. Sajida Bibi*, PLD 2020 SC 613.

⁸¹ *Aamir Farooq v Naima Farooq*, PLD 2022 SC AJ&K 17.

of the specified dower, unless the husband voluntarily waives this right.⁸²

(ii) Payment of Dower in Case of Dissolution of Marriage by the Wife

(a) Dissolution for Cause under Section 2 of DMMA

In case the marriage is dissolved by court on grounds enlisted in Section 2 of the DMMA,⁸³ such as on the basis of non-provision of maintenance allowance and non-performance of conjugal rights on the part of the husband, the wife is not required to return the dower amount.⁸⁴ *“A wife would lose her dower only if she seeks dissolution of marriage on the sole ground of Khula but not when she urges other grounds in support of her case unless the other grounds are not proved. Her entitlement to receive dower or its retention would remain unaffected and intact if she was able to prove other grounds like cruelty of the husband.”*⁸⁵

(b) Dissolution By Way of Khula

Pursuant to Section 10 (4) of the FCA, 1964,⁸⁶ family courts have been empowered to dissolve a marriage on the basis of *khula*⁸⁷ in summary proceedings. In such a scenario, the parties are to be provided an opportunity of reconciliation, failing which a decree for dissolution may be passed upon return or relinquishment of dower and other benefits to the husband by the wife which had been given to her as consideration for the marriage.^{88,89} Such right of the woman to obtain *khula* upon return of dower and other benefits has been likened to the husband’s right to exercise his right of divorce.⁹⁰

(iii) Determination of Quantum of Dower to be Restituted by the Wife During Khula

It has been consistently upheld by the Superior Courts that the restitution of dower does not necessarily have to be of the whole amount and the determination of its quantum is to be seen on a case-to-case basis. For instance, if the husband is also at fault, then a proportionate reduction in the amount of dower to be restituted by the wife has to be reflected.⁹¹ As per the Punjab Family Courts (Amendment) Act, 2015:

*“The surrender by the wife under Section 10(5) of the Act is only a part of the dower and not the whole of it. The scope of discretion of the Family Court in this regard covers not only whether or not to direct surrender of the dower by the wife but also how much or what part of the prompt or deferred dower.”*⁹²

⁸² *Muhammad Akbar v Shazia Bibi*, PLD 2014 Supreme Court 693.

⁸³ Section 2, DMMA 1939.

⁸⁴ *Muhammad Shahid Farooq v Judge Family Court*, 2016 CLCN 103.

⁸⁵ *Farhat Imam v Sajid Nazeef and Another*, 2020 CLC 1874.

⁸⁶ Section 10(4), The Family Courts Act 1964.

⁸⁷ Described in detail in Section 5(v) below.

⁸⁸ *Ana Liaquat v Additional District Judge, Gujranwala and Others*, PLD 2021 Lahore 757.

⁸⁹ *Mst. Shahista v Sheikh Liaquat Ali Sathi and Others*, PLD 2006 Lahore 158.

⁹⁰ *Ana Liaquat v Additional District Judge Gujranwala and Others*, PLD 2021 Lahore 757[8].

⁹¹ *Mst. Balqis Fatima v Najm-ul-Ikwam Qureshi*, PLD 1959 Lahore 566.

⁹² It is noted that through Punjab Family Courts (Amendment) Act, 2015 Sub-Section (4) of FCA was amended and Sub-Sections (5) and (6) were inserted in Section 10 of the FCA. The Act specified that up to fifty percent of the deferred dower or up to twenty five percent of the admitted prompt dower must be surrendered, however, this was later rejected by the Federal Shariat Court.

While previously this above amendment further prescribed a ceiling on the portion of the dower that could be restituted, the Federal Shariat Court rejected that provision as being repugnant to the provisions of Islam.⁹³ Resultantly, there is no longer a maximum limit set by the FCA for return of dower, and the courts shall determine the quantum for restitution of dower on a case-to-case basis as noted above.

Further, it has been clarified that “*the restitution of dower is not an indispensable condition for the grant of khula and non-restoration of dower and other benefits will not have any effect upon the validity of the decree.*”⁹⁴ In this regard, the courts have held that non-restitution of dower cannot be made a precondition to the validity of a decree of *khula* since that would have the unjust effect of depriving a destitute wife of her right simply based on her incapacity to return the dower and other benefits received during marriage.

Dowry, Bridal Gifts, Presents and Personal Property

The practice of giving dowry articles (*jahez*) to brides by her parents (or guardian) is a custom and tradition in Pakistan.⁹⁵ Typically, cash, jewellery, clothes and household items are given to the bride as dowry. In addition, the bride may receive other property during the subsistence of the marriage.

In contrast to dower, which is a necessary effect of marriage under Islamic law (as explained above); dowry is a customary tradition in Pakistan. As detailed below, the subject of dowry, bridal gifts and presents is regulated by the DBGA, and its practice has been discouraged by proscribing and penalizing the practice of giving such items over the prescribed amount.⁹⁶

Dowry, Bridal Gifts and Presents

Dowry and other bridal gifts are regulated by the DBGA and the rules framed thereunder. Specifically, the terms “*bridal gift*”, “*dowry*” and “*presents*” have been defined in Clauses (a) (b) and (e) of Section 2. The difference between the three categories is that dowry is received by the wife from her parents. Whereas, bridal gifts and presents are received by the wife from the groom and his parents and relatives. In common tradition, gifts to the wife from the groom and his family are referred to as *Wari*.

The Lahore High Court in case titled, *Mst. Shahnaz Begum v Muhammad Shafi*,⁹⁷ further held that a woman cannot be deprived of these items and can recover the articles given to her by the bridegroom or the bridegroom’s family at the time of their marriage since they constitute her belongings.

Personal Property

Under Section 5 of the FCA read with Entry No. 9 of its Schedule, family courts have been given exclusive jurisdiction over claims relating to, *inter alia*, “the personal

⁹³ *Imran Anwar Khan and Others v Government of Punjab and Others*, PLD 2022 Federal Shariat Court 25.

⁹⁴ *Aurangzeb v Mst. Gulnaz*, PLD 2006 Karachi 563.

⁹⁵ 2017 SCMR 393, 6; and Muslim Family Law, note 22, 193.

⁹⁶ Dowry and Bridal Gifts (Restrictions) Act (DGBA) 1976.

⁹⁷ *Mst. Shahnaz Begum v Muhammad Shafi*, PLD 2004 Lahore 290.

property and belongings of a wife”.⁹⁸

The items stated in the said Entry No. 9 refer to property which is in addition to dowry, bridal gifts and presents described above, and is property that has been acquired by the wife during the subsistence of the marriage; but excluding property which is given either before or after the marriage. This Entry No. 9 property includes property acquired by the wife during the marriage through: (i) her independent means; (ii) means provided by her husband; and (iii) money provided by her parents and other relatives.⁹⁹

Restrictions on Dowry, Bridal Gifts and Presents

A wife cannot be deprived of property gifted to her simply due to the reason that its value exceeds the Maximum Prescribed Limit stated under Section 3 (1) of the DBGA:

“Neither the aggregate value of the dowry and presents given to the bride by her parents nor the aggregate value of the bridal gifts or of the presents given to the bridegroom shall exceed five thousand rupees.”¹⁰⁰

The purpose of the said bar on value of such property was interpreted by the Lahore High Court. In case titled, *Masud Sarwar v Farah Deeba*,¹⁰¹ (the “Farah Deeba Judgment”), the restriction on the value of property gifted to the bride was simply a means to enable women and their families to afford dowry, where they were previously unable to get married due to the high value of dowry they were expected to pay. The court held that the restriction “was not enacted to deprive the wives of the ownership of their dowry and Wari.”¹⁰² The Lahore High Court further held that depriving women of dowry etc., under Section 3 (1) of the DBGA is against the injunctions of Islam, and therefore there is “no limit on the value of bridal gifts which may be given to her by her parents or by the husband or his parents.”

Further, it is noted that Section 5 of the DBGA provides that “*All property given as dowry or bridal gifts and all property given to the bride as a present shall vest absolutely in the bride and her interest in property however derived shall hereafter not be restrictive, conditional or limited.*”¹⁰³

The Superior Courts have interpreted Section 3 (1) in light of Section 5 and held that even if the value of dowry exceeds the bar of Rupees Five Thousand (Rs. 5,000/-), it would not deprive the wife of her right and title to property or confiscate it as it is a restrictive law, not a prohibitory law.¹⁰⁴ Therefore the bride is the absolute owner of her dowry, irrespective of its value and whether or not it exceeds the restricted amount.¹⁰⁵

⁹⁸ FCA, 2002.

⁹⁹ *Muhammad Akram v Mst. Hajra Bibi*, PLD 2007 Lahore 515.

¹⁰⁰ Section 3 (1), DGBA 1976.

¹⁰¹ *Masud Sarwar v Farah Deeba*, 1988 CLC 1546.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Masud Sarwar v Farah Deeba*, 1988 CLC 1546.

¹⁰⁵ *Mussarat Zaman Begum v Ali Hassan*, 1986 CLC 2265.

Recovery of Dowry, Presents and Bridal Gifts

Under Section 5 of the FCA, read with Entry No. 8 of its Schedule, family courts have been given exclusive jurisdiction over dowry. Accordingly, all suits for recovery of dowry and related items are to be filed by the wife before the family courts under Section 7 of the FCA.

Further, under Section 8 (1) of the DBGA, the bride's parents are required to submit with the Registrar lists of the dowry, bridal gifts and presents received by her in connection with the marriage.¹⁰⁶

Interpretation of Evidentiary Requirements

The Superior Courts have held that non-production of the lists prescribed under the DBGA and/or receipts evidencing the purchase of such items is not fatal to a woman's claim for recovery of dowry etc.¹⁰⁷

By relying on Section 17 of the FCA, which excludes the operation of the Qanoon-e-Shahadat Ordinance, 1984, the courts have held that a wife need not prove the existence of dowry articles etc. through evidence, including purchase receipts. Instead, while acknowledging the custom of dowry in Pakistani society where parents invariably gift dowry and other items to their daughters, there is a presumption in favour of recovery by the wife.¹⁰⁸ There is an understanding that it is "impossible" to produce a list of dowry articles with the required proof as dowry articles are customarily accumulated over a long time period, before the bride's marriage.¹⁰⁹

In this manner, unsubstantiated lists (not prepared in accordance with the strict requirements of DBGA) as well as solitary statements by the wife, in absence of cogent evidence to the contrary by the husband, have been held to be sufficient. Further, the courts have also held that, in the absence of evidence, to determine the quantum of dowry and other items, they will look at the financial status of the wife's family.¹¹⁰

¹⁰⁶ The term "Registrar" has been defined as "a *Nikah Registrar licensed under the Muslim Family Laws Ordinance, 1961 (VIII of 1961)*, and such other person as may be designated from time to time to perform the functions of the Registrar".

¹⁰⁷ *Hamid Ali v Mst. Nabila Riaz*, 2012 YLR 2693.

¹⁰⁸ *Muhammad Habib v Mst. Safia Bibi*, 2008 SCMR 1584.

¹⁰⁹ *Mst. Shakeela Bibi v Muhammad Israr and Others*, 2012 MLD 756.

¹¹⁰ *Azra Bibi v Lateef and Others*, 2020 YLR 282.

5. DISSOLUTION OF MARRIAGE

Under Pakistan's law, five broad forms of dissolution of marriage exist. These include: (a) *Talaq*, (b) *Talaq-e-Tafweez*, (c) Mutual Divorce, (d) Dissolution under Dissolution of Muslim Marriages Act 1939 (DMMA 1939), and (e) *Khula*.

Additionally, a marriage may be dissolved unilaterally by a spouse or mutually by both spouses. A wife may unilaterally dissolve her marriage by seeking *khula* or dissolution of marriage under DMMA 1939 from a court. Alternatively, she can exercise the right to *talaq-e-tafweez*, which does not require court intervention but is contingent upon delegation of the right in the *nikahnama*. Both *khula* and *talaq-e-tafweez* are forms of no-fault based divorce, whereby the wife does not need to provide cause for seeking dissolution. However, dissolution of marriage under DMMA 1939 is fault-based and some fault on part of the husband needs to be assigned.

A husband, on the other hand, can unilaterally divorce his wife by pronouncing *talaq*, which does not require any court intervention or assigning any cause.¹¹¹ A husband and wife can also mutually dissolve their marriage through a mutual divorce deed.

Each of the above modes for dissolution of marriage as well as their requirements under the applicable laws are discussed below.

Talaq

Under Pakistan's law, a husband has an absolute right to divorce, whereby he can unilaterally dissolve the marriage without assigning any cause and does not need to approach the courts. Section 7 of the MFLO lays out the process for *talaq*, whereby when a husband wishes to divorce his wife, he makes a pronouncement of *talaq* and is thereafter required to notify the chairperson of the Union Council in writing and provide a copy of the same to the wife.¹¹²

If a husband fails to send a notice to the Union Council, he shall be punishable with a simple imprisonment for up to one year or with a fine of Rs. 5,000, or both.¹¹³ On the failure to notify, section 7(2) of the MFLO provides:

"2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both."

A review of case law on the subject of notice requirement and validity of *talaq* in case of failure to notify suggests that the Superior Courts have dealt with this on a case-to-case basis. In certain instances, the Superior Courts have interpreted the requirement of notice very stringently and have declared *talaqs* void for non-compliance of notice

¹¹¹ Mulla, note 25, 307.

¹¹² Section 7(1), MFLO 1961 reads as: "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife." In 2021, the National Assembly of Pakistan introduced section 7(1A) in the MFLO through Muslim Family Laws (Second Amendment) Act, 2021, based on which the manner for pronouncing *talaq* for persons adhering to the *Fiqah-e-Jafria* (Shia school of thought) was codified. The amendment is only applicable in the Islamabad Capital Territory.

¹¹³ Section 7(2), MFLO 1961.

requirement. In other instances, the notice requirement has been interpreted liberally as having no impact on the validity of the *talaq* itself; rather simply that the consequence of non-compliance would be the imposition of the penalty envisaged in Section 7(2) of the MFLO.

It appears that the guiding principle for such varied interpretation has been to protect and preserve the rights of women, be it sheltering them from criminal prosecution or preserving their inheritance rights as divorcees. With the promulgation of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, new punishments for the offence of adultery were introduced. This provision was abused by husbands who withheld the service of notice under Section 7(1) of the MFLO in order to allege adultery against their wives who had since entered into subsequent marriages after *talaq*.¹¹⁴ However, mindful of these tactics, the Superior Courts have rejected mere non-service of notice under Section 7(1) of the MFLO as a ground to render the *talaq* ineffective and hold a woman guilty for the offence of *zina* proscribed under the Ordinance, 1979.

In *Allah Dad v Mukhtar*,¹¹⁵ it was argued on behalf of the husband that since the notice requirements under Section 7(1) of the MFLO had not been complied, and the wife had contracted another marriage, she was guilty of having committed the offence of *zina*. However, the Supreme Court repelled this argument, and held that mere non-compliance with Section 7(1) requirement(s) did not render the *talaq* ineffective. Further, the offence of *zina* under the Ordinance of 1979 required the accused to have “wilfully” committed adultery, which ingredient was also absent. The relevant part of the judgment is reproduced as under:

“19. ...if a woman after obtaining a divorce from her husband and after the necessary period of `Iddat`; contracts a marriage with a third person, their marriage cannot be held as invalid marriage, at least for the purpose of the Ordinance...the divorce became effective in Shariah and the marriage contracted thereafter is a valid marriage, especially for the purpose of the Ordinance and the cohabitation of the respondents cannot be held as `Zina`.”

In *Abbas Khan v Sat Bheria*,¹¹⁶ the appellant filed a suit seeking a declaration that the respondent was not entitled to property owned by her husband who had issued a notice of divorce to her during his lifetime but had passed away prior to the lapse of the period of ninety (90) days specified in Section 7 of the MFLO for the same to become effective. The appellant argued that the respondent, being the deceased’s divorcee, was not entitled to inherit her husband’s estate.

The Lahore High Court dismissed the appeal and held that in the circumstances where the deceased had passed away before the lapse of the prescribed ninety (90) day period in which he could revoke his *talaq* pronouncement, it could not be concluded that the same had become effective. More importantly, in line with the aforementioned principle, the Court observed that in the instance where a wife would be deprived of her civil rights of inheritance, the notice requirement of Section 7 of the MFLO was to be construed strictly. Whereas, in cases where there was the potential of criminal liability on the wife for having engaged in unlawful intercourse, the requirements were to be construed

¹¹⁴ David Pearl and Werner Menski, note 22, 353.

¹¹⁵ *Allah Dad v Mukhtar*, 1992 SCMR 1273.

¹¹⁶ *Abbas Khan v Sat Bheria*, 1993 CLC 2181.

liberally in her favour. The relevant portion of the judgment is reproduced as under:

“7. ... A perusal of the abovesaid provision clearly shows that Talaq does not become effective unless and until period of 90 days elapses w.e.f. date of receipt of notice of Talaq by the Chairman of the Union Council a copy whereof has been received by the wife...The widow cannot be deprived of her right to inherit her husband when the statute is clear on point that Talaq will not become effective unless and until period of 90 days elapses w.e.f. the date of issuance of the notice of Talaq to the Chairman of the Union Council...”

Moreover, in *Farah Naz v Judge Family Court, Sahiwal*,¹¹⁷ a wife had filed a suit for recovery of maintenance as her husband had not paid any. The husband asserted that he had pronounced *talaq* on the appellant earlier, and therefore she was not entitled to maintenance. The high court upheld the stance of the husband. However, upon appeal, the Supreme Court overturned the Lahore High Court decision and held that under Section 7 of the MFLO, the husband was bound to send a notice of *talaq* to the Chairperson. Therefore, the husband’s simple pronouncement of *talaq* did not render the same valid:

“...his bald statement that he had announced Talaq to her on 13-12-1997 cannot be accepted at all as he utterly failed to substantiate it. In law, he was required to send notice to the Arbitration Council under the Muslim Family Laws Ordinance 1961 and also to send a copy of notice to the appellant by registered post.”

Talaq-e-Tafweez (Delegated Right to Divorce)

A husband may delegate the right to divorce, or *talaq-e-tafweez*, to his wife or to a third person in column 18 of the *nikahnama*,¹¹⁸ either conditionally or absolutely.¹¹⁹ Once the right is delegated, it cannot be revoked.¹²⁰ Section 8 of the MFLO 1961 provides for the procedure for *talaq-e-tafweez*. The said Section 8 is reproduced as under:

“8. Dissolution of marriage otherwise than by talaq. – Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq, the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply.”

(Emphasis Added)

In *Dr. Qamar Murtaza Bokhari v Zaniab Bashir*,¹²¹ the Lahore High Court acknowledged that the concept of *talaq-e-tafweez*. The relevant portion of the judgment is reproduced hereunder:

“5. ...Under Muhammadan Law husband enjoys an absolute power of divorce to his wife. He may delegate this power to his wife by way of a contract.

¹¹⁷ *Farah Naz v Judge Family Court, Sahiwal*, PLD 2006 Supreme Court 457.

¹¹⁸ *Khawar Iqbal v. Federation of Pakistan*, 2013 MLD 1711.

¹¹⁹ *Sajid Hussain Tanoli v. Nadia Khattak*, 2013 CLC 1625. See also Mulla, note 25, 19.

¹²⁰ *Khawaja Muhammad Shoab v. Nazim Union Council*, 2010 YLR 1; *Qambar Murtaza Bokhari v. Zainab Bashir*, 1995 PLD Lahore High Court 187; *Sajid Hussain Tanoli v. Nadia Khattak*, 2013 CLC 1625.

¹²¹ *Dr. Qamar Murtaza Bokhari v Zaniab Bashir*, PLD 1995 Lahore 187.

... In the present case the respondent No. 2 has produced certified copy of the Nikahnama carrying a stipulation against Column No.18 about the delegation of Talaq Tafweez. ...In the present case the entries against Column No.18 of the Nikahnama are very clear and the respondent No.2 has exercised that delegated power of divorce i.e. (Talaq Tafweez) (sic) and has repudiated herself through a notice dated 28-3-1994 duly served upon the petitioner according to sections 7 and 8 of Muslim Family Laws Ordinance, 1961..."

(Emphasis Added)

It may also be mentioned here that in *Muhammad Ali Raza v Province of Punjab*,¹²² the Lahore High Court repealed the argument that a Shia woman cannot exercise the right to *talaq-e-tafweez* on the assertion that it does not comply with the requirements of Shia personal law.

Right to Talaq Must be Delegated in Express Terms

In *Ali Abbas Khan v Palwasha Khan*,¹²³ the Islamabad High Court held that *talaq-e-tafweez* must be delegated in express and unambiguous terms. Otherwise, it cannot be construed that the right has been delegated to the wife. The Court observed that a vague phrase such as '*Shary haqooq hasil hay*' (Shariah rights are granted) in column 18 of *nikahnama* cannot be deemed sufficient for delegation of the right. The relevant portion of the judgment provides:

"12. In the present case, if it would have been mentioned against column No.18 "yes or no" then the proposition would have been very simple and the right exercised upon the said words could not be questioned, but the words/sentence "(Shary Haqooq hasil hay)" have converted it into a very complicated and alarming situation...

13. Sequel of the above discussion is that it is not a shari right of a wedded women to divorce upon herself without specific delegation of such power by the husband. ...the words mentioned against column No.18 of Nikahnama do not vest any power upon respondent No.1 to exercise right of Talaq e-Tafweez and thus no power was delegated by the petitioner to respondent No.1 to exercise right of Talaq-e-Tafweez upon her. If such type of words are allowed to be considered as a right of Talaq-e-Tafweez it would mean that whatever is incorporated against column No.18 would be presumed as a right of Talaq-e-Tafweez."

(Emphasis Added)

(i) Conditions on Right to Talaq-e-Tafweez

As noted above, the right to *talaq-e-tafweez* may be subject to certain conditions and contingencies. However, once these conditions are met, the right becomes absolute and the wife is free to exercise it and pronounce *talaq* on herself. In *Aklima Khatun v Mahibur Rahman*, it was held that the right to divorce may be delegated absolutely

¹²² *Muhammad Ali Raza v Province of Punjab*, 2016 YLR 15.

¹²³ *Ali Abbas Khan v Palwasha Khan*, 2010 YLR 1632.

or conditionally and it may be for once only or for a lifetime.¹²⁴

(ii) Procedure for Talaq-e-Tafweez

Under section 8 of the MFLO, the procedure for *talaq-e-tafweez* — including the requirement to notify the Chairperson of the Union Council — is the same as in the case of a husband exercising his right to *talaq*. As with *talaq*, a pronouncement of *talaq-e-tafweez* would be effective after a period of 90 days from the receipt of notice, unless it is revoked by the wife.

In *Khawar Iqbal v Nadia Khan*,¹²⁵ the Lahore High Court held:

“5. ...In case the wife exercises the right delegated to her, the provisions of section 7 of the Muslim Family Laws Ordinance, 1961, apply mutatis mutandis as provided under section 8 of the Ordinance ibid. No formal mode for exercise of the right is prescribed and the only requirement is that a notice in writing must be given to the Chairman about exercise of the right. ...No formal order to give effectiveness to it is required rather in view of section 7(3) of the Muslim Family Laws Ordinance, 1961, if not revoked, it will become effective 'after expiry of 90 days of its delivery to respondent.'”

(Emphasis Added)

Furthermore, in the case of *Muhammad Ali Raza*,¹²⁶ the Lahore High Court clarified that in case of exercise of *talaq-e-tafweez*, the notice under section 7(1) of the MFLO should be served by the wife to the Union Council where she resides.

Mutual Divorce (*Mubarat*)

In case of mutual divorce, or *mubarat*, a husband and wife mutually agree to dissolve the marriage. Section 8 of the MFLO provides for the procedure for mutual divorce. There is no prescribed form of mutual agreement which is required under the law; all that is needed is a “meeting of the minds” between the parties. In *Ali Ijaz v Arbitration Council*,¹²⁷ the Islamabad High Court held as under:

“10. Mubaraat is an extra-judicial form of joint divorce applicable to a Muslim husband and wife. It is a dissolution of marriage by mutual consent of the spouses. The law does not insist on a particular form in which such mutual agreement is to be made. What is essential is the meeting of the minds of the parties to such an agreement. When both the parties enter into Mubaraat, all mutual rights and obligations come to an end. It is an irrevocable divorce. The offer for a divorce through Mubaraat may proceed from the wife or from the husband but once it is accepted, the dissolution of marriage is complete and irrevocable.”

¹²⁴ *Aklima Khatun v Mahibur Rehman*, PLD 1963 Dacca 602.

¹²⁵ *Khawar Iqbal v Nadia Khan*, PLD 2011 Lahore 265

¹²⁶ *Muhammad Ali Raza*, note 122.

¹²⁷ *Ali Ijaz v Arbitration Council*, PLD 2023 Islamabad 75.

Withdrawal of Mubarat

Once Mubarat is pronounced it is irrevocable by one party alone, i.e., it cannot be withdrawn during the prescribed notice period of ninety (90) days given under Section 7 of the MFLO (which is to apply to Section 8 *mutatis mutandis*, so far as applicable).

In case titled, *Sana Shehzad v Secretary Union Council No. 81*,¹²⁸ the Lahore High Court held that unilateral revocation of pronouncement of *talaq* by husband within the prescribed notice period under Section 7 of the MFLO did not apply to a *talaq* effected through Mubarat. The relevant part of the judgment is reproduced as under:

“8. It is settled law that if divorce is with mutual consent and on the basis of Muba'arat, the husband cannot retract or withdraw the divorce, nor Administrator/Chairman Union Council has any authority to adjudicate upon validity of the divorce. The Administrator/Chairman Union Council is bound to issue divorce effectiveness certificate and has no power under law to entertain the notice of withdrawal of divorce and to start proceedings on the basis thereof

....

11. In view of the rule in the precedent cases and settled provision of law, I am of the view that in case of Talaq Muba'arat, the husband has no authority to revoke the divorce and Chairman Union Council has no authority except to state that proceedings conducted under section 7 of the Ordinance, 1961 did not succeed and accordingly issue the certificate of effectiveness of Talaq.”

Procedure for Mubarat

As per section 8 of the MFLO 1961, the procedure for mutual divorce is the same as in the case of *talaq* exercised unilaterally by the husband. For this purpose, the notice requirement under Section 7(1) of the MFLO is deemed to be satisfied when both spouses communicate their agreement to mutually dissolve their marriage to the Chairperson, Union Council. In *Princess Aiysha Yasmeen Abbasi v Maqbool Hussain Qureshi*,¹²⁹ the Lahore High Court held the following:

“6. The spirit of the law would be satisfied if a notice of dissolution of marriage in the form of Khula’/ Mubara’at is sent to the Chairman by virtue of the provisions contained in section 8 read with section 7 of the Ordinance. Because of use of the expression “mutatis mutandis and so far as applicable” in section 8, the form of the notice would of course change and it might be different from the one in simple Talaq which is to be sent by the husband under subsection (1) of section 7 of the Ordinance.”

(Emphasis Added)

Dissolution under the DMMA 1939

To dissolve a marriage under the DMMA 1939, the wife needs to prove some fault on the

¹²⁸ *Sana Shehzad v Secretary Union Council No. 81*, PLD 2014 Lahore 632.

¹²⁹ *Princess Aiysha Yasmeen Abbasi v Maqbool Hussain Qureshi*, PLD 1979 Lahore 241.

part of the husband before a family court, under any of the grounds for dissolution under the DMMA 1939. In this form of divorce, the wife is not required to return her dower for the purpose of securing the dissolution of her marriage.

Section 2 of the DMMA 1939 provides several grounds for dissolution of marriage:

- (i) husband's disappearance for four (4) years,
- (ii) husband's failure to provide maintenance for two years,
- (iii) husband's sentence of imprisonment of seven years or more,
- (iv) husband's failure to perform marital obligations,
- (v) husband's impotence at the time of marriage,
- (vi) husband suffering from insanity or leprosy.
- (vii) A wife's repudiation of her marriage as agreed to by her *wali* before turning eighteen years of age, provided it was unconsummated.
- (viii) *Lian*¹³⁰
- (ix) Cruelty
- (x) Any other valid ground recognised under Islamic Law

A detailed discussion on the grounds for dissolution of marriage stipulated under Section 2 of the DMMA are detailed below:

Non-Payment of Maintenance

Under Section 9 of the MFLO, it is the duty of the husband to maintain his wife during the subsistence of the marriage. In case of non-payment of maintenance for a period of two (2) years, a wife may file for dissolution under Section 2 (ii) of the DMMA 1939.

In order for a wife to obtain dissolution under this ground, she must demonstrate that she has been performing her matrimonial obligations and has not deserted her husband. Provided, however, in case she has a lawful excuse for not performing her matrimonial obligations,¹³¹ she may still be eligible to seek dissolution under this ground. In *Gul Hassan v Nasreen Akhtar*,¹³² the Peshawar High Court held as under:

"10. ...Dissolution of Muslim Marriages Act, 1939 provide recognized grounds for dissolution of marriage. Under the ibid Act, neglecting or non-maintaining the wife for a period of two year's give her right for dissolution of marriage. ...Non-payment of dower by the husband makes the wife entitled to live apart from her husband till her dower is paid and during this period, the husband become bound to pay her maintenance, even though she is living apart from him. Plethora of evidence available on record, reveals that respondent has succeeded to establish

¹³⁰ *Lian* refers to a mode of divorce when one spouse accuses the other of adultery without legal proof. Thereupon, both spouses swear their accusation of adultery four times before a judge, who then pronounces the dissolution of the marriage on this basis.

¹³¹ This has been interpreted to include non-payment of dower, cruelty, entering into a subsequent marriage without the consent of the existing wife and desertion.

¹³² *Gul Hassan v Nasreen Akhtar*, 2014 YLR 1743.

her entitlement to dissolution of marriage on grounds of cruelty and non-maintenance for sufficient long time, during subsistence of marriage.”

Husband’s Subsequent Marriage without Consent of the Existing Wife

If a husband enters into a subsequent marriage without the consent of his existing wife, the wife has the right to dissolve the marriage under Section 2 (ii-A) of the DMMA 1939.

In *Sajjad Hussain v Judge Family Court, Mailsi*,¹³³ the Lahore High Court elaborated on this ground as under:

*“12. It is thus clear from the above provision of law that not only permission of the first wife is required for contracting second marriage, but permission of the Arbitration Council in writing is also required. As is evident from the statement of the petitioner-husband, he had not obtained any such permission either from his wife or from the Arbitration Council concerned. **Thus, contracting second Marriage on the part of the petitioner alone was sufficient for the respondent-wife to justify seeking decree for dissolution of marriage.** ...This being so, in the event of a decree for dissolution of marriage passed on any of the grounds enumerated in section 2 of the Dissolution of Muslim Marriages Act, there was no requirement of law that the wife should have been directed to return the benefits to the husband which she had received due to her marriage with him...”*

Failure to Perform Marital Obligation

Under Section 2 (iv) of the DMMA 1939, the wife has the right to dissolve the marriage in case the husband neglects to perform his marital obligations. This ground is distinguishable from the ground of impotency in that it covers the situation where the husband is capable of performing intercourse but neglects to do so.

In this regard, some guidance can be taken from *Muhammad Ansar Chaudhary v Maida Zahoor*,¹³⁴ wherein this ground was interpreted as under:

“The right to matrimonial obligations belongs to both the husband and wife, and it is misconception that in Islam only the husband has this privilege. The wife has as much right as husband. A husband religiously obliged to fulfill the sexual needs of his wife and not deprive her of this right. Refusing or neglecting without any genuine reasons or excuse from performing marital obligations is forbidden in Islam.

In light of above mentioned saying it becomes clear that a husband is duty bound to fulfill the marital obligations of his wife and he cannot neglect her without any genuine reasons or excuse from performing marital obligations. Under Section 2 (iv) of the Dissolution of Muslim Marriages Act, 1939, if a husband without reasonable cause neglects his wife and fails to perform his marital obligations for a period of three years, the wife shall be entitled to obtain decree for dissolution of her marriage”

¹³³ *Sajjad Hussain v Judge Family Court, Mailsi*, 2015 CLC 1347.

¹³⁴ *Muhammad Ansar Chaudhary v Maida Zahoor*, PLD 2019 Azad Jammu & Kashmir High Court 5.

Husband's Impotence

Under Section 2 (v) of the DMMA, the wife may dissolve the marriage on the grounds of her husband's impotence. In interpreting this provision, the Superior Courts have distinguished impotency from infertility and physical weakness of the husband. It has been held that this ground can only be invoked if a husband is unable to perform sexual intercourse. In *Saeeda Javed v Javed Iqbal*,¹³⁵ the Peshawar High Court held:

"10. Infertility is not a recognized ground for dissolution of marriage under the Dissolution of Muslim Marriages, Act 1939, thus, it could not be based for dissolution of marriage..."

(Emphasis Added)

Further, in *Zulfiqar Ahmad v Judge, Family Court*,¹³⁶ the Lahore High Court provided:

"9. It is obvious that the ground for dissolution of marriage under this head is the impotency of the husband. The physical weakness is not provided anywhere as a ground. Impotency means that the husband is not in a position to perform the sexual intercourse while the physical weakness does not reflect on impotency..."

(Emphasis Added)

Dissolution by Exercise of Option of Puberty

Under Section 2 (vii) of the DMMA, a Muslim girl who has been contracted into marriage by her guardian before the age of puberty, may repudiate the marriage if the following conditions are met:

- (i) The marriage took place before she attained the age of sixteen (16) years;¹³⁷
- (ii) The marriage has not been consummated; and
- (iii) The repudiation of marriage takes place before she attains the age of eighteen (18) years.

In *Ghulam Sakina v Falak Sher*,¹³⁸ the Lahore High Court held that the girl's express assent to marriage or implied conduct of cohabitation could not be construed as depriving her of the option to repudiate the marriage if this assent or cohabitation took place before she reached puberty.

Moreover, in *Allah Diwaya v Mst. Kammon Mai*,¹³⁹ the Lahore High Court clarified that the right to repudiate the marriage is not destroyed in case consummation of the marriage takes place before puberty.

¹³⁵ *Saeeda Javed v Javed Iqbal*, PLD 2013 Peshawar 88.

¹³⁶ *Zulfiqar Ahmad v Judge, Family Court*, 2003 CLC 1954.

¹³⁷ It is noted that at the time of enactment, Section 2 (vii) of the Dissolution of Muslim Marriages Act prescribed an age of fifteen (15) years. However, after promulgation of the Muslim Family Laws Ordinance, this age was raised to sixteen (16) years.

¹³⁸ *Ghulam Sakina v Falak Sher*, PLD 1949 Lahore 75.

¹³⁹ *Allah Diwaya v Mst. Kammon Mai*, PLD 1957 Lahore 651.

There is no prescribed form or procedure for exercising the option of puberty, as confirmed by the Lahore High Court in *Muhammad Nawaz v Additional Sessions Judge, Jhang*.¹⁴⁰

*“6. The law does not prescribe any particular form of the procedure for repudiation of marriage, it may be by oral or even by conduct seeking rejection of marriage **and if the minor is entered into second marriage on attaining the age of puberty it would have sufficient proof of repudiating her marriage and subsequent marriage would be valid.**”*

(Emphasis Added)

In this regard, the Lahore High Court in *Muhammad Riaz v Robina Bibi*,¹⁴¹ also confirmed that it was not necessary for a woman exercising the option of puberty to obtain a decree of court.

Lian:

Under Section 2 (vii-a) of DMMA 1939, the wife can dissolve the marriage if she has been accused of adultery by her husband and she denies the allegation.

Under Islamic law, if a man accuses his wife of committing adultery, he may be called upon on the application of the wife to: (i) retract the charge; or (ii) confirm it by oath coupled with a curse on oath in the following terms: “The curse of God be upon him if he was a liar when he cast at her the charge of adultery”. The wife must then be called upon to: (i) either admit the truth of the imputation; or (ii) deny it on oath coupled with a curse in the following terms: “The wrath of God be upon me he be a true speaker in the charge of adultery which he has cast upon me”. If she takes the oath, the judge must believe her, dissolve the marriage.¹⁴²

In *Muhammad Walayat v Maqsoodan Bibi*,¹⁴³ the Lahore High Court acknowledged the right of the wife to dissolve the marriage where she had been accused of adultery:

“6. If a husband charges his wife with adultery, wife is entitled to claim judicial divorce without any prejudice to her right to bring defamatory suit for unjust imprecations (Mahomedan Law, page 126). The husband is required to substantiate his accusation of adultery by producing four witnesses, but if no evidence except himself is available, he can take an oath on li'an, if the wife declines and also takes oath, the Judge must separate them as the sexual union has become unlawful and under such circumstances the decree of divorce cannot be avoided by the husband by his retraction of the charge...”

Cruelty:

Under Section 2 (viii) of the DMMA 1939, the wife has the right to dissolve the marriage if her husband treats her with cruelty. The said section provides the following instances

¹⁴⁰ *Muhammad Nawaz v Additional Sessions Judge, Jhang*, 2006 CLC 1036.

¹⁴¹ *Muhammad Riaz v Robina Bibi*, 2000 MLD 1886.

¹⁴² Mulla, note 25, 333.

¹⁴³ *Muhammad Walayat v Maqsoodan Bibi*, PLD 2000 Lahore 359.

which shall be considered as cruelty on his wife, i.e., if the husband:

- (i) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;
- (ii) associates with women of evil repute or leads an infamous life;
- (iii) attempts to force her to lead an immoral life;
- (iv) disposes of her property or prevents her exercising her legal rights over it;
- (v) obstructs her in the observance of her religious profession or practice; or
- (vi) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

Out of the enlisted grounds above, the Superior Courts have grappled with the first one pertaining to mental cruelty, i.e., the husband makes his wife's life miserable by cruelty of conduct, even if such conduct does not amount to physical ill-treatment.

The Superior Courts have given the said provision a very wide interpretation. Recently, in *Tayyeba Ambareen v Shafaqat Ali Kiyani*,¹⁴⁴ the Supreme Court explained that cruelty under Section 2 (viii) (i) could be physical as well as mental, but in the context of the mental cruelty, an enquiry needs to be made as to the nature of the cruel treatment to determine its effects on the mind of the wife. The apex court held that the real test was to determine the severity of the acts complained of by the wife to adjudge whether they are objectively insignificant, or are of such nature that they cannot be endured by a reasonable person. The relevant portion of the judgment is reproduced as under:

“9. The cruelty alleged may be mental or physical, premeditated or unpremeditated, but lack of intent does not make any distinction. Obviously, if it is a physical act then it would be a question of fact, and in the event of mental cruelty, an enquiry is required to be made as to the nature of the cruel treatment to find out the impact or repercussions thereof on the mind of the spouse. Mental cruelty can be largely delineated as a course of conduct which perpetrates mental pain with such a severity and harshness which would render it impossible for that party to continue the matrimonial tie or to live together. The matrimonial relationship is based on a mutual trust between wife and husband with emotions and it obliges reciprocal respect, love and affection for evenhanded adjustments with the spouse without causing a sense of anguish and disappointment, therefore, while deciding any lis for dissolution of marriage on the ground of cruelty, the Court must adjudge the intensity and ruthlessness of the acts and examine whether the conduct complained of is not merely a trivial issue which may happen in day-to-day married life, but is of such a nature which no reasonable person can endure.”

(Emphasis Added)

The Supreme Court further elaborated that the question of whether a spouse is guilty of cruelty has to be decided on a case-to-case basis. In such instances, no set categories of

¹⁴⁴ *Tayyeba Ambareen v Shafaqat Ali Kiyani*, 2023 SCMR 246.

acts or conduct can be created which are to be considered as amounting to cruelty. However, factors which can be considered are: (i) the mental and physical condition of the parties; (ii) the parties' social status; (iii) the impact of the personality and conduct of one spouse on the mind of the other, while bearing in mind all incidents and quarrels between the spouses from that point of view; (iv) the alleged conduct is also to be examined in light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse; and (v) while evil intent on part of the perpetrator is not an essential but important element if it exists.

In light of the above, the Supreme Court considered various acts of the husband in the aforementioned case as amounting to cruelty, including: (i) pressurizing the wife to get money to acquire a house on rent; (ii) false allegations that his wife's child was not from the husband; (iii) desertion; (iv) demanding that the wife deposit her salary in a joint bank account opened with the husband, and withdraw money with his prior permission; (v) demands for money from the wife's father.¹⁴⁵

On perusal of case law under Section 2 (viii) of the DMMA 1939, the following acts have been considered to amount to cruelty against the wife: (i) verbal abuse, misbehaviour and disrespect;¹⁴⁶ (ii) entangling her in litigation, without sufficient cause;¹⁴⁷ (iii) false allegation of bad character;¹⁴⁸; (v) habitual disagreement with the wife;¹⁴⁹ (vi) subjecting her to unnatural intercourse;¹⁵⁰ and (vii) misappropriation of her property without her consent.¹⁵¹

Procedure for Dissolution under DMMA 1939

The family court has exclusive jurisdiction on the subject of dissolution of marriage in Pakistan.¹⁵² A wife seeking to dissolve her marriage for cause under the DMMA 1939 must file a suit for dissolution before the family court.¹⁵³ Following the institution of suit, the court initiates the pre-trial proceedings,¹⁵⁴ in which the court seeks to effect reconciliation between the parties. If reconciliation fails, the wife is required to provide evidence for the grounds under DMMA 1939, pursuant to which dissolution of marriage is sought.¹⁵⁵ This was affirmed by the Peshawar High Court in *Muhammad Faisal Khan v Sadia*,¹⁵⁶ whereby it was held that if the wife fails to establish the grounds under DMMA 1939, the court can still dissolve the marriage on the basis of *khula*:

"15. If the dissolution of marriage is claimed on any ground recognized under Dissolution of Marriages Act, 1939, then it is the duty of the wife and the burden lies on her shoulders to prove the allegation levelled for dissolution of marriage. If she successfully discharges her burden and proves the allegations, then the Court

¹⁴⁵ Ibid, 15.

¹⁴⁶ *Adnan Zar v Khadija Khanum*, 2020 MLD 1147.

¹⁴⁷ *Zahir Shah v Seema*, 2017 CLCN 26.

¹⁴⁸ *Abdul Hafeez v Shumaila Bibi*, 2013 MLD 1148.

¹⁴⁹ *Muhammad Zafar v Kamal Fatima*, PLD 1981 Lahore 732.

¹⁵⁰ *Abdul Baqi v Abdul Bashir Qureshi*, 1982 SCMR 478.

¹⁵¹ *Shahzada Begum v Abdul Hamid*, PLD 1950 Lahore 504.

¹⁵² Section 5, Family Courts Act 1964.

¹⁵³ Section 7, Family Courts Act 1964.

¹⁵⁴ Section 10, Family Courts Act 1964.

¹⁵⁵ Section 11, Family Courts Act 1964.

¹⁵⁶ *Muhammad Faisal Khan v Sadia*, PLD 2013 Peshawar 12.

shall grant her decree for dissolution of marriage along with other benefits. But if she fails to prove the allegation, then the mere fact that the wife could not establish her allegation qua ground taken for dissolution of marriage would not disentitle her for dissolution of marriage on ground of "Khula". If the wife fails to substantiate her case on the grounds claimed in the plaint for dissolution of her marriage then the court is under legal obligation to dissolve the marriage but on the basis of "Khula", particularly when the wife is not ready to live with her husband at any cost.

(Emphasis Added)

A suit for dissolution of marriage under the DMMA 1939 must be decided within a period of six months from the date of institution.¹⁵⁷ Once the dissolution is decreed by the family court, the wife must submit an application to the relevant Union Council to obtain a divorce certificate. Following which, an Arbitration Council is constituted to attempt reconciliation between the spouses. If reconciliation fails, the Union Council issues a divorce certificate after 90 days of the application.¹⁵⁸

Khula

Khula is an independent right of a Muslim woman to dissolve her marriage through an application to a family court. She may unilaterally dissolve the marriage based on her aversion or hatred towards her husband. In contrast to dissolution for grounds stipulated under the DMMA, in such an instance, the wife is not required to prove misconduct on part of the husband or show any cause. Insofar, *khula* is a no-fault based divorce. Moreover, a wife does not require the consent of the husband to seek a *khula*,¹⁵⁹ and the dissolution of marriage through *khula* is neither revocable nor appealable.¹⁶⁰

The concept of *khula* does not have any legislative grounding, but was rather developed by the Supreme Court in *Khurshid Bibi v Muhammad Amin*.¹⁶¹ In this case, the apex court defined *khula* as the wife's unilateral right to obtain dissolution of marriage without assigning cause, upon return of benefits received from the husband. The Supreme Court held that in the circumstances where there was no possibility left of the parties residing together with amity and goodwill, the wife was entitled to dissolution of her marriage.

Subsequent judgments demonstrate that the Superior Courts have liberally interpreted the only limitation on the said right, i.e., satisfaction of the criterion that the marriage has broken down irretrievably, and the parties will no longer be able to live amicably. In this regard, courts have held that a wife's reasons for developing hatred and aversion towards her husband cannot be questioned.

Further, a wife's claim of having developed hatred and aversion towards her husband cannot be subjected to a yardstick or objective criteria. Instead, each such claim is to be assessed in its own circumstances on a case-to-case basis, with the underlying principle

¹⁵⁷ Section 12A, Family Courts Act 1964.

¹⁵⁸ Under the amended section 21B of the FCA 1964 in Punjab, the family court must send a certified copy of the *khula* decree to the concerned Union Council within 3 days of the decree date. Whereupon, the Chairperson is required to immediately initiate *khula* proceedings by instituting an Arbitration Council.

¹⁵⁹ *Khurshid Bibi v Muhammad Amin*, PLD 1967 Supreme Court 97.

¹⁶⁰ *Sadia Arif v Adnan Shahid*, 2021 YLR 1753.

¹⁶¹ *Khurshid Bibi v Muhammad Amin*, PLD 1967 Supreme Court 97.

that a hateful union may not be imposed by the court. This principle was affirmed by the Supreme Court in *Naseem Akhtar v Muhammad Rafique*.¹⁶²

Procedure for Dissolution through Khula

A wife seeking to dissolve her marriage through *khula* is required to file a suit before the family court. Akin to a suit for dissolution of marriage under the DMMA 1939, the court attempts reconciliation between the spouses. But if the reconciliation fails, the dissolution is ordered by the Family Court in summary manner. The evidence stage as in the case of dissolution of marriage under DMMA 1939 does not exist in case of *khula*.

It is important to note that where husbands do not appear in response to a court summon, the court proceeds with the case *ex parte* and passes a *khula* decree. As with a suit for dissolution under the DMMA 1939, the family court must decide a *khula* case within a period of six months from the date of institution.¹⁶³

Once the court grants a *khula* decree, the wife is required to submit an application to the relevant Union Council to obtain a divorce certificate. Thereafter, an Arbitration Council is constituted to attempt reconciliation between the husband and wife. If reconciliation fails, the Union Council issues a divorce certificate after 90 days of the application.

¹⁶² *Naseem Akhtar v Muhammad Rafique*, PLD 2005 Supreme Court 293.

¹⁶³ Section 12A, Family Courts Act 1964.

6. THE WIFE'S RIGHT TO MAINTENANCE

The wife's right to maintenance was interpreted in the case of *Abdul Ahad Ansari v Lubna Qaiser*.¹⁶⁴ This means, the husband has an obligation to 'maintain' his wife by providing for her sustenance, including shelter, food and clothing etc.¹⁶⁵ The case of *Khair-ud-Din v. Mst. Sabiha*,¹⁶⁶ held that a husband has a fundamental duty to treat his wife with love and affection, respect and provide for her maintenance during the duration of their marriage. The laws that governs the wife's right to maintenance are the Muslim Family Laws Ordinance of 1961 ("MFLO") and the Family Courts Act of 1964 ("FCA"). Moreover, the Dissolution of Muslim Marriages Act of 1939 ("DMMA") also provides wives the right to file a petition for dissolution of marriage on the grounds that a husband failed to provide her maintenance for two years or above.

Entitlement of the Wife to Receive Maintenance from her Husband

The Supreme Court, in *Haseenullah v Mst. Naheed Begum and Others*,¹⁶⁷ interpreted the wife's right to maintenance during marriage to be maintained by her husband is absolute as long as she remains faithful to him and discharges, or is willing to discharge, her own matrimonial obligations. A husband is bound to maintain his wife even if no term in this regard is agreed to at the time of the marriage or she can maintain herself out of her own resources. This case highlighted the limitations to the wife's entitlement for maintenance, i.e., she shall remain faithful to the husband and perform her matrimonial duties. However, a wife may still be entitled to maintenance if she shows that she refused to perform her marital obligations and cohabit with her husband for a fault attributable to the husband.¹⁶⁸

Lawful Excuse for Non-Performance of Marital Obligations by the Wife

Over the years, the Supreme Court has held that a wife shall have a 'lawful excuse' to not perform her matrimonial obligations towards her husband for reasons attributable to the husband.

Further examination of case law on this subject shows that there is no definitive explanation for what amounts to a 'lawful excuse' for a wife to refuse to perform her marital obligations and still continue to live with the husband. This question has been dealt with by the Courts on a case-to-case basis¹⁶⁹. The case of *Muhammad Sharif v Additional District Judge and Others*¹⁷⁰ is useful for understanding the view of the Superior Courts on the subject. In this case, the wife had filed for maintenance for a period of three (3) years as well as for the *iddat* period against which the husband had appealed before the Supreme Court. The Supreme Court dismissed the appeal and held that the wife was entitled to maintenance since she had a lawful excuse to not reside in the matrimonial home. The wife had been subjected to cruel treatment by her husband's family and her husband had deserted her by moving to Saudi Arabia. The

¹⁶⁴ *Abdul Ahad Ansari v Lubna Qaiser*, 2021 CLC 297, 7.

¹⁶⁵ *Mst Shazia v Muhammad Nasir*, 2014 YLR 1563.

¹⁶⁶ *Khair-ud-Din v. Mst. Sabiha*, PLD 2012 Peshawar 85.

¹⁶⁷ *Haseenullah v Mst. Naheed Begum and Others*, PLD 2022 Supreme Court 686.

¹⁶⁸ Mulla, note 25, 466.

¹⁶⁹ *Shahab Saqib v Sadaf Rasheed*, PLD 2023 Islamabad 34, 14.

¹⁷⁰ *Muhammad Sharif v Additional District Judge and Others*, 2007 SCMR 49.

judgement highlighted that this was a sufficient lawful excuse for a wife. The husband is under legal obligation to maintain his wife even if he has deserted her and she is forced to live away from him.

Moreover, in *Safeer Ahmad v Mst. Gulshan Bibi and Others*¹⁷¹ the wife had been accused by her husband of “*bad character*”. The Lahore High Court in its landmark judgement held that such allegations coupled with disrespectful behaviour towards the wife amounted to a valid and lawful excuse for her to leave the matrimonial home. Thus, she was entitled to maintenance even though she was not residing in the matrimonial home. Moving on, in the case of *Sadia Bibi v Muhammad Arif*¹⁷², the Lahore High Court held that a wife’s right to maintenance cannot be rejected even in the case of *khula* or where consummation (*rukhsati*) has not taken place due to *nikah* being performed at the time when the wife was a minor. This judgement is extremely relevant because the wife had a sound and valid excuse to not live with her husband, which further affirms that it's the husband's legal obligation to maintain the wife. This was further emphasised in *Nasreen Bibi and Others v Maqbool Shah and Others*¹⁷³ the Peshawar High Court held that where the husband had failed to pay her prompt dower, the wife had a lawful excuse to not reside in the matrimonial home and was entitled to maintenance for such period. This case is a significant judgement as it affirms that non-payment of prompt dower will amount as a lawful excuse for a wife to not reside with her husband. Therefore, the husband is liable to pay maintenance to his wife from the date of institution of suit against him until the payment of dower amount to wife.

Burden of Proof

The wife is entitled to maintenance if her refusal to perform her matrimonial obligations is deemed as a valid and lawful excuse. However, the Courts place the onus on the wife to prove that she had left her husband with a lawful excuse. In instances when the wife is unable to discharge this onus, the Courts do not grant her maintenance. This was stated in *Sherinzadgi v Gul Muhammad*.¹⁷⁴ The wife had been living separately from her husband and had refused to return to her husband’s house. Thus, the husband was under no duty to provide for maintenance. In *Kashif Akram v Nabila and others*,¹⁷⁵ another restriction towards the wife’s right to maintenance was brought into light. The Sindh High Court stated that when it is the wife’s decision to leave the house, she is not entitled to her maintenance rights.

Quantum of Maintenance

Section 9(1) of the MFLO 1961¹⁷⁶ deals with the matter of quantum of maintenance. As per this section, the husband is under an obligation to: (i) adequately maintain his wife; or, in the case he has multiple wives, (ii) maintain them equitably.

¹⁷¹ *Safeer Ahmad v Mst. Gulshan Bibi and Others*, 2022 CLC 634.

¹⁷² *Sadia Bibi v Muhammad Arif*, CLC 2003 1624.

¹⁷³ *Nasreen Bibi and Others v Maqbool Shah and Others*, 1996 CLC 1723.

¹⁷⁴ *Sherinzadgi v Gul Muhammad*, PLD 1961 Peshawar High Court 66.

¹⁷⁵ *Kashif Akram v Nabila and others*, 2011 MLD 571.

¹⁷⁶ Section 9(1) of MFLO 1961, states; “if any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, can seek any other legal remedy available, apply to the Chairman who shall constitute to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.”

In the case of *Mian Arif Mehmood v. Tanvir Fatima and another*.¹⁷⁷ The Court held the following while determining the quantum of maintenance: (i) inflationary trends and rising cost of living are to be considered; (ii) a balance has to be struck, i.e., the amount must not be so little so as to merely amount to a “bare minimum sustenance allowance”; and neither can it be so high so as to “tempt the wife to stay away from her husband” and encourage separation; and (iii) the husband’s paying capacity and circumstances, from his “visible means” and “earning capacity”, is also to be considered.

A few important cases that have provided a clear understanding of quantum of maintenance are; *Muhammad Asim and Others v Samro Begum*,¹⁷⁸ where the Supreme Court held that the quantum for maintenance shall be based on the husband’s “present and past earnings” which must be disclosed by him. In the event of the husband’s “intentional non-disclosure”, it would be assumed “that he does not want to be “fair” and has “unnecessarily embroiled” his wife in unnecessary litigation. In such an instance, the court would draw a negative inference against the husband, and it would be presumed that husband is well within his means to pay the demanded sum of maintenance. Another key case is *Rukhsana Ambreen v District and Sessions Judge, Khushab*,¹⁷⁹ where the husband was ordered to pay past-maintenance for the time the marriage subsisted between the parties. The quantum of this maintenance was based on the husband’s financial condition and financial status. In *Naveed Ahmed v Mehwish Riaz and Others*,¹⁸⁰ the Lahore High Court held that a woman is entitled to maintenance for breastfeeding the suckling baby.

Recovery of Maintenance

A woman may claim her unpaid maintenance or future maintenance through the Chairman¹⁸¹ under Section 9 (1) of the MFLO; and by filing a suit for recovery of maintenance under Section 7 of the FCA.¹⁸²

Recovery Through Proceedings before the Chairman

Under Section 9 (1) of the MFLO, a wife is entitled to apply to the Chairman in case she: (i) is not maintained adequately; or, in case she is one of the multiple wives, and is not maintained (ii) equitably by her husband. Upon receipt of such application, the Chairman then constitutes the Arbitration Council,¹⁸³ which determines the matter and issues a certificate specifying the amount which is to be paid by the husband as maintenance.

The question as to whether the Chairman of Arbitration Council has the jurisdiction to grant a wife maintenance through the aforementioned recovery procedure arose before the Supreme Court in a case titled, *Muhammad Nawaz v Mst. Khurshid Begum and others*.¹⁸⁴ In this case, the husband had filed an appeal before the Supreme Court after his wife had approached the Chairman, Union Council and subsequently the Supreme

¹⁷⁷ *Mian Arif Mehmood v. Tanvir Fatima and another*, PLD 2004 Lahore 316.

¹⁷⁸ *Muhammad Asim and Others v Samro Begum*, PLD 2018 Supreme Court 819.

¹⁷⁹ *Rukhsana Ambreen v District and Sessions Judge, Khushab*, 2021 CLC 1512.

¹⁸⁰ *Naveed Ahmed v Mehwish Riaz and Others*, 2004 CLC 473.

¹⁸¹ As defined in Section 2 (b) of the Muslim Family Laws Ordinance, 1961.

¹⁸² As defined in Section 7 of the Family Courts Act, 1964.

¹⁸³ As defined in Section 2 (a) of the Muslim Family Laws Ordinance, 1961.

¹⁸⁴ *Muhammad Nawaz v Mst. Khurshid Begum and others*, PLD 1972 SC 302[306].

Court granted a certificate specifying the monthly maintenance allowance must be given.

Recovery Through Suit Filed before the Family Court

Pursuant to Section 5 of the FCA,¹⁸⁵ as read with Entry No. 3 of its Schedule, the family courts have exclusive jurisdiction on “maintenance”. Further, pursuant to Section 7(2) of the FCA, a woman may file a composite suit for dissolution of marriage (either for cause or on the basis of *hula*) in which she may, *inter alia*, claim maintenance. Accordingly, if a woman wishes to sue her husband for non-payment of maintenance, she may file a suit for its recovery under Section 7 of the FCA.

Interim Order for Maintenance by the Family Court

(i) Provinces other than Punjab including Islamabad Capital Territory

Pursuant to Section 17A¹⁸⁶ of the FCA, the family courts have the power to pass an interim order for maintenance at any stage of the proceedings. In case of husband’s failure to pay the interim amount of maintenance by the fourteenth (14th) day of each month, his defence shall be struck, and the Family Court is empowered to strike off the husband’s defence and decree the suit in favour of the wife.¹⁸⁷ However, while passing a final decree granting maintenance and determining the rate of maintenance, the family court has to judicially determine the same by holding an inquiry into the financial sources of the husband and the needs of the wife. The family court may do this by appointing a local commission for such purpose under Section 17B¹⁸⁸ of the FCA, who has the power to examine any person; make a local investigation; and inspect any property or document.

In the case of, *Khurram Shahzad v Naseem Akhtar and Others*,¹⁸⁹ the Islamabad High Court interpreted Section 17A with regards to recovery of maintenance allowance. In case the husband fails to pay for interim maintenance, penal action in terms of Section 17-A of the Family Courts Act, 1964 can be taken by the Court upon the discretion of the learned trial Court to consider the facts and circumstances of each case.

(ii) Punjab Amendment

In contrast to the above, Section 17 A of the FCA was amended by the Punjab Family Courts (Amendment) Act, 2015 for the province of Punjab. The amended provision provided that in maintenance suits, the Family Court must set an interim amount of maintenance for a wife or child on the date of the defendant’s first appearance. Should he fail to pay the interim amount of maintenance by the fourteenth day of each month, his defence shall be struck, and the Family Court shall issue a judgement and decree based on the averments contained within the plaint and other supporting documents

¹⁸⁵As stated in Section 5 (1) of the Family Courts Act, 1964.

¹⁸⁶ “The Section 17 A states, at any stage of proceedings in a suit for maintenance, the Family Court may pass an interim order for maintenance, whereunder the payment shall be made by the fourteenth day of each month, failing which the Court may strike off the defence of the defendant and decree the suit.”

¹⁸⁷ 2009 CLC 980.

¹⁸⁸ Section 17 B states conditions and limitations as may be prescribed, the Court may issue a Commission to; (a) examine any person; (b) make a local investigation; an (c) inspect any property or document.”

¹⁸⁹ *Khurram Shahzad v Naseem Akhtar and Others*, 2021 CLC 1300.

within the case record. Moreover, the amended Section 17A (2) of FCA permits a Family Court to set maintenance at an amount higher than prayed for in the plaintiff and may also prescribe an annual increase of the same, keeping in mind that in absence of a specified annual increase, the maintenance shall increase annually by ten percent.

In essence, the Punjab amendment to Section 17 A converts the discretionary powers granted to the court into a mandatory obligation with the replacement of the word “may” with “shall”.

In this regard, reliance is placed on the Lahore High Court’s case, *Syed Ahmad Sher v Additional District Judge and Others*,¹⁹⁰ where the relevant judgement states:

“Section 17A(1) of the Act, it is manifested that in a suit for maintenance, the Family Court is required to pass an order fixing interim monthly maintenance for wife or a child that’s payable by fourteenth day of each month. The purpose or object of such a mandatory requirement apparently is to ensure subsistence of wife or child till final determination of his or her entitlement qua the maintenance. A sanction has been created by the legislature in the form of striking off defence of the defendant followed by a decree to be passed to guard against failure of the defendant to pay interim monthly maintenance in compliance with the order of the Court.”

In addition, family courts in Punjab have been vested with the following powers:

- (i) Prescribe an annual increase in maintenance. Provided, however, if no increase is fixed by the family court, the maintenance fixed shall automatically stand increased at the rate of ten per cent (10%) annually; and
- (ii) For fixing maintenance, the powers of the family court seem to have been broadened by empowering it to summon relevant documentary evidence from any organisation, body or authority for determining the estate and resources of the husband.

¹⁹⁰ *Syed Ahmad Sher v Additional District Judge and Others*, PLD 2022 Lahore 715.

7. CUSTODY AND GUARDIANSHIP

This section focuses on the issues related to custody and how they have been treated by the Superior Courts in Pakistan. These issues involve discussion by the Courts on the principle of 'Welfare of Minor', qualifications of the custodian of a minor, persons entitled to the custody of minor, visitation rights of the non-custodial parents, guardianship of minor, and settlement of custody/guardianship through private settlement etc.

The terms "custody" and "guardianship" are often used interchangeably. However, they are each treated as two distinct concepts under the Islamic law. Custody, for instance, is referred to as '*hadanah*' and it implies upbringing, nursing or fostering of the minor and taking care of their emotional as well as personal affairs on a day-to-day basis. The right to custody/*hidhanat* belongs to the mother. On the other hand, guardianship is termed as '*wilayah*', and it relates to the power to affect legal transactions and contracts on behalf of the minor with responsibility for legal consequences.¹⁹¹ Under Islamic law, the father of a child is taken to be the guardian/*wali* of the child as well as the guardian of the property of that child.¹⁹²

In Pakistan, the issues relating to the custody and guardianship of minors are governed under the Guardian and Wards Act 1890 (GWA) and FCA.

Difference between Custody and Guardianship under the Pakistani Law

The provisions of GWA do not distinguish custody from guardianship. The law does not provide any definition of the term 'custody'; whereas "guardian" has been defined in Section 4(2) of GWA. Given the absence of the express provision on the definition of the term 'custody', reliance is largely placed on court decisions. The Superior Courts have distinguished these concepts based on Muslim personal law.¹⁹³

It is to be noted that the lack of definition and reference to "custody", or the referral of guardianship as custody within the Act, may create ambiguity and the reliance on court decisions for the express definition of custody may lead to arbitrary understandings and application of the term.

'Welfare' of the Minor

Generally, in the case of separation of spouses, the mother has a preferential right of the custody of minor if the minor, in the case of a boy is below the age of 7, and in the case of a girl has not attained puberty, whereas the father is bestowed with responsibility to

¹⁹¹ Jamal J. Nasir, *The Islamic Law of Personal Statutes* (2nd edn, Graham and Trotman 1990) [173]-[190].

¹⁹² Keeping in view the role of both parents, it is common practice under the Islamic law that custody of a minor during his/her initial years is given to the mother, or in her absence or disqualification, to other female relatives. There is a consensus among scholars of the Sunni school of thought that a mother has preferential right to custody/*hidhanat* of her son until he attains the age of seven and her daughter until she attains puberty. Whereas, Shia school of thought is of the view that a mother has the right to custody/*hidhanat* of her son until he attains the age of two and her daughter until the age of seven. These rulings on the custody are mostly products of *Ijtihad* and are not found expressly in the Quran.

¹⁹³ See for example, *Muhammad Sadiq v Mrs. Sadiq Safoora* (PLD 1963 Lahore 534); *Fahimuddin Khokar v Mst. Zaibunnisa* (PLD 1968 Karachi 774); *Ms. Shazia Akbar Ghalzai v Additional District Judge, Islamabad* (2021 MLD 817).

act as guardian for the person and property of minor.¹⁹⁴

However, this is not a strict rule and while determining the issue of custody, the welfare of the minor is the paramount consideration for the courts.

The welfare of a minor has been defined differently across various cases. In *Ammara Waseem v Syed Khawar Hussain*,¹⁹⁵ a divorced mother of a minor who had left Pakistan after contracting a second marriage with a person residing in the US, left the minor in Pakistan with his maternal grandparents. The father of the minor, who had not remarried, asked for the custody of the minor, quoting 'welfare of the minor' as his ground for claiming custody. This was granted as the father was said to be "very keen to accept custody of the minor,"¹⁹⁶ that "it would not be in the interest and welfare of the minor to allow the petitioner to keep the child in her custody in the house of his step-father,"¹⁹⁷ and because his mother was planning on moving him to a country "far flung from the one of the father, for which, no plausible reason could be offered."¹⁹⁸ For these reasons it was considered that the welfare of the minor would be supported best by the father. However, the definition of welfare has evolved within court decisions over time, providing a more all-encompassing understanding of what the welfare of a minor would entail.

*"The court must consider all factors from the parents' ability to provide for the child including physical and emotional needs, medical care but also relevant is the parents' ability to provide a safe and secure home where the quality of the relationship between the child and each parent is comforting for the child. Hence, there is no mathematical formula to calculate the welfare of the minor, as the factors range from financial and economic considerations to the household environment, the care, comfort and attention that a child gets."*¹⁹⁹

Qualification of Custodians

According to case law developed so far, there are certain qualifications required of the custodian of the child. The qualifications are summarized below:

Custodian to be a *Just* and *Honest* person

A person stands disqualified if the Court has reason to believe that he is a habitual sinner, "Fasiq" or is dishonest Khaayan" such as the case of *Imtiaz Begum v Tariq Mahmood*.²⁰⁰

Custodian to be *Mahram* to the Minor

Generally, the Muhammadan Law has been interpreted to mean that a mother's remarriage to a stranger disentitles her to the custody of a minor. However, the Courts have now stated that these conditions are not absolute, and are now reading the welfare

¹⁹⁴ *Muhammad Haneef v Abdul Samad*, PLD 2009 Supreme Court 751.

¹⁹⁵ *Ammara Waseem v Syed Khawar Hussain*, 2011 SCMR 148.

¹⁹⁶ *Mst. Razia Rehman v. Station House Officer and others*, (PLD 2006 SC 22).

¹⁹⁷ *Mst. Naseem Akhtar v. District Judge, Multan and others*, (2009 SCMR 1052).

¹⁹⁸ *Ammara Waseem*, note 195.

¹⁹⁹ *Shabana Naz v. Muhammad Saleem*, 2014 SCMR 343.

²⁰⁰ *Imtiaz Begum v Tariq Mahmood*, 1995 CLC 800.

of the minor into this interpretation of the Muhammadan Law.²⁰¹

*“Section 17 of the Act requires the Court to consider the welfare of the minor when appointing a guardian and welfare will be decided based on the age, sex and religion of the minor, as well as the character and capacity of the guardian and the preference of the minor where they are old enough to state their preference intelligently.”*²⁰²

The Supreme Court of Pakistan, while relying on several case laws, has addressed the issue of the mother’s remarriage and held that a second marriage of the mother cannot become a stand-alone reason to disqualify her right to custody as *“there can be no substitute for the mother of the minor child especially of tender age.”*²⁰³

They have now started to take the view that *“although the general rule is that the mother on contracting a second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of the child, custody should be given to the mother.”*²⁰⁴ Therefore, her remarriage to a person not related to the minor does not disqualify her from retaining custody of the child.

*“The United Nations Convention on the Rights of the Child, (UNCRC) recognises that the best interest of the child shall be a primary consideration in cases concerning children, mentioning within Articles 7, 9 and 12 that every child has the right to be cared for by their parents, that the child should be in contact with both parents if they have separated (unless either one can cause harm), and that a child capable of forming their own views should express them. These highlight the essential role of sensitivity in and the participation of children in custody cases while assessing their welfare.”*²⁰⁵ As Pakistan’s laws must be in compliance with the guidelines of the UNCRC, it is important to factor in the statements by the UNCRC with Pakistan’s custody laws.

Mental and Physical Wellbeing of Custodian

If the custodian of the minor is found mentally or physically unwell, he/she will be disentitled to the custody of the minor. In the case titled as *Imtiaz Begum v Tariq Mahmood*, cited above, that Court was of the view that “[t]he incapacity (physical or mental) of a person would disentitle him/her to keep the minor.”

Financial Wellbeing of Custodian

Financial wellbeing of a custodian also plays a decisive role in the determination of custody disputes. While in now overturned case law, courts restricted custody of mothers who did not have financial means, the conclusive Supreme Court ruling in *Mst. Foroze Begum v Muhammad Hussan* holds that *“the mere inability to maintain the child is not a ground for depriving the mother of the custody of her children.”*²⁰⁶

²⁰¹ *Shabana Naz v. Muhammad Saleem*, 2014 SCMR 343.

²⁰² *Raja Muhammad Owais v Mst. Nazia Jabeen and others*, 2022 SCMR 2123.

²⁰³ *Mst. Shahista Naz v. Muhammad Naeem Ahmed*, 2004 SCMR 990.

²⁰⁴ *Muhammad Siddique v. Lahore High Court*, Lahore through Registrar and others, PLD 2003 SC 887.

²⁰⁵ *Shabana Naz*, note 201.

²⁰⁶ *Mst. Foroze Begum v Muhammad Hussan*, 1983 SCMR 606.

Further, in the case titled *Harbal v. Usman*,²⁰⁷ the court considered whether the mother's poverty or incapacity to maintain the child can be a ground for her disqualification as the custodian of the child. The High Court noted that mother's poverty is no hindrance to the custody of her minor daughter as the law requires the father to provide for the maintenance of the minor irrespective of where the minor resides, and that "*the mere fact that a mother is poor and has to work for her living can never be allowed to operate to deprive her of her right of custody of her minor children, to which she is entitled under the personal law applicable in the case*". They further held that where the mother lives is not relevant so long as she has somewhere to live, as this should make no difference to the welfare of the minor.

While the Lahore High Court in *Imtiaz Begum v Tariq Mahmood* had taken into consideration the financial status of the mother, this judgment has now been conclusively replaced by the Supreme Court's judgment on the matter in *Mst. Foroze Begum v Muhammad Hussan* above.

Persons Entitled to the Custody of the Minor

Mother of the Minor

As explained above, the mother of a minor child has preferential right to his/her custody. In case of the mother's death or disqualification, the maternal grandmother maintains the right to custody until the minor reaches seven years of age. This rule, however, is subject to the welfare of the minor.

As pointed out in *Raja Muhammad Owais v Mst. Nazia Jabeen and others*,²⁰⁸ the second marriage of a mother cannot be treated as a sole ground for denying her the custody of her child. The overarching principle is the 'welfare of the child', and if the welfare of the child, depending on the circumstances of each case, demands that he/she should remain in the custody of the mother, the Courts must order accordingly.

Foreign Non-Muslim Mothers

In the case titled *Christine Brass v Dr. Javed Iqbal*,²⁰⁹ the Peshawar High Court refused to award custody of the minor to a Canadian Christian mother on the ground that it would be in the interest of the minor to reside in Pakistan with Muslim father.

However, in the case *Peggy Collin v Muhammad Ishfaq*,²¹⁰ custody was granted to the French mother keeping in view the child's welfare. The father had taken custody of the child and brought him back to Pakistan despite the French court's order in favor of the mother. The father, a fugitive with criminal charges and arrests, argued for custody on the basis of being a Muslim and a Pakistani. However, the court argued being a Muslim and Pakistani is not enough and ruled in favor of the mother's custody in view the guiding principles of a child's welfare.

²⁰⁷ *Harbal v. Usman*, PLD 1963 Karachi 888.

²⁰⁸ *Raja Muhammad Owais*, note 202.

²⁰⁹ *Christine Brass v Dr. Javed Iqbal*, PLD 1981 Peshawar 110.

²¹⁰ *Peggy Collin v Muhammad Ishfaq*, PLD 2010 Lahore 48.

Father Residing in Foreign Country

Generally, courts do not award custody of a minor to the father residing in a foreign country. In the case titled *Fauzia Begum v Amin Saddruddin Jamal Gonji*, the father, who had a Canadian nationality, was refused custody of the minor on the ground that it was not in the welfare of the minor to go outside the country.²¹¹ The custody was accordingly given to the mother, who was residing in Gilgit. The father argued that Gilgit is a backward area and the minor could have better facilities in Canada, but the Court refused to agree with the father's contention.

Visitation Rights of Non-Custodial Parents:

Non-custodial parents, i.e., parents not given custody of the minor, have visitation rights according to section 12 of the GWA and section 7 of the FCA. Under this Act, courts are required to provide a feasible visitation schedule and should facilitate a friendly environment. However, these laws do not specify the visitation venue. Guardian courts usually follow the precedent of monthly, two-hour visits in court.

However, the family court judges often hesitate to exercise their parental jurisdiction and discretion vested in them by virtue of their office as the courts “lack proper facilities and arrangements, and is not comparable to a homely environment.”²¹² Therefore, the courts do not serve the purpose of the meeting which is to facilitate the development of love and bondage between the child and the non-custodial parent to improve the welfare of the minor. These meetings are thus preferably held at the premises of the contesting parent to familiarise the minor with the environment and strengthen the relationship between the minor and the non-custodial parent.

Guardianship of Minor

The scheme of the GWA, particularly Sections 4, 7, 17, 19, and 41 when read together, shows that the father is generally the “natural guardian” of the minor and obligated to provide financial assistance to the minor, even when the mother has custody of the child.²¹³

It is an established position that the father of a minor child is the *maintainer* and *caretaker* of that child and “remains in constructive and legal custody of the child even though its physical or actual custody rests with the mother or other female relatives.”²¹⁴

Further, the court does not have the authority to appoint a guardian in place of the father when the father is alive and not unfit to be the guardian, and only in these circumstances would the appointment of a guardian in the stead of the father be brought forward for the sake of the child’s welfare.²¹⁵

It is pertinent to note that in 2013, sections 7,17, and 27 of the GWA were challenged in a case titled *Mrs Ambreen Tariq Awan v Federal Govt. of Pakistan* before the federal

²¹¹ *Fauzia Begum v Amin Saddruddin Jamal Gonji*, 2007 CLC 1403.

²¹² *Umer Farooq v Khushbakht Mirza*, PLD 2008 Lahore 527.

²¹³ *Ms. Shazia Akbar Ghalzai v Additional District Judge Islamabad*, 2021 MLD 817.

²¹⁴ *Muhammad Sadiq v Mrs. Sadiq Safoora*, PLD 1963 Lahore 534.

²¹⁵ *Ms. Shazia Akbar Ghalzai v Additional District Judge Islamabad*, 2021 MLD 817.

Shariat court on the basis of being repugnant to the injunctions of Islam.²¹⁶ Important findings of the court are as follows:

“The sections impugned by her which clearly authorizes the Court to appoint a guardian or a person for the person or property or both for safeguarding interests of the minor, are just for his/her welfare and the Court is duty bound to consider all facts and circumstances of each case and pass an appropriate order in accordance with the norms of justice as deemed appropriate for the welfare of a minor. Regarding the juristic opinions..... This court is not at all authorized to decide Shariat petitions in the light of the juristic opinions of Fuqaha. Article 203D (1) of the Constitution which specifies the power, jurisdiction and functions of this court is quite clear in this respect.

Settlement of Custody/Guardianship through Private Agreement

There are instances where parties to a dispute of custody have tried to settle the issue of custody through private compromise agreements. Even in these scenarios, the courts have observed that the custody of a minor cannot be effectively settled by private compromise in all circumstances. The courts hold that such agreements cannot be given any legal effect unless they promote the welfare of the minor.

“It is a settled proposition of law that in such cases the paramount consideration is welfare of the minor. No doubt initially the parties had settled the dispute as above, the fact, however, remains that later on the circumstances, stood materially changed and the question of welfare of minor again cropped up in a more serious manner than before: Issue of custody of minor in all cases cannot be effectively settled by private compromise.”²¹⁷

The Court's powers with regard to custody of the minor are in the nature of parental jurisdiction. Therefore, the Court must act in a way a wise parent would do.

²¹⁶ *Mrs Ambreen Tariq Awan v Federal Govt. of Pakistan*, 2013 MLD 1885.

²¹⁷ *Hameed Mai v Irshad Hussain*, PLD 2002 Supreme Court 267.

8. CONCLUDING NOTE

In conclusion, the review and analysis of court rulings within the framework of Muslim marriages in Pakistan reveals a dynamic landscape that highlights positive advancements and persistent challenges concerning women's marriage rights. There have been commendable developments in court rulings empowering women's access to justice, overruling previously ambiguous discourse regarding concerns such as the minimum age for marriage and women's rights to divorce, maintenance and custody.

The Report outlines the importance of judgements that supersede previous, vague rulings that are vulnerable to misinterpretation as they are decided on a case to case basis. Judgements such as in the *Farooq Omer Bhoja* case held that the CMRA was to prevail over any interpretation of age given under the Muslim personal law, and that prescribing a minimum age is in line with *Shariah*, so as to avoid the damaging effects of child marriages. Such judgements display a notable milestone in expanding the scope of determining the capacity and consent of women in regards to their marriage rights.

Further, recent judgements on dower and dowry highlighted in the Report's preceding sections have also promised favourable outcomes for women. Regarding dower, the courts have clarified that the non-restitution of dower cannot be made a precondition to the validity of a decree of khula as that would unjustly deprive a woman of her right. The judicial clarification that dowry amount restrictions are intended to benefit economically disadvantaged women rather than being outright prohibitory encapsulates an equitable approach, justifying women's entitlements within the ambit of their Islamic rights.

In terms of maintenance, the Report also highlights court rulings that have repeatedly affirmed that a woman has the right to maintenance regardless of whether she has the ability to independently provide for herself, and that so long as she has a lawful excuse to refuse to perform her marital obligations, she still sustains that right. Moreover, recent rulings pertaining to child custody have also expanded their understanding of factors that impact the 'welfare of a child,' accepting that even if a child's mother has remarried or does not have the financial means to maintain her child, if it is in the interest of the child, the mother should be given custody, despite previous debate against this. As this expanding definition of the welfare of a child is in line with the UNCRC, it is evident that in aligning national laws with global gender equality standards, higher courts in Pakistan are taking necessary steps to empower women and children.

Notwithstanding these progressive strides, substantial impediments remain in realizing women's access to justice in the realm of marriage rights. Despite the criminalization of child marriages, a legislative vacuum concerning the validity of such unions persists, allowing their continuance without sufficient consequences. Additionally, the ambiguity enveloping the term 'lawful excuse,' and other vague terms leaves much room for interpretational variances that unjustly place the burden of proof on the woman.

Moreover, the lack of uniformity between the federal and provincial areas in relation to the laws on child marriages, as well as the absence of clear definitions on rights related to custody and maintenance, among other shortcomings, are barriers that disempower women within their marital relationships.

Overall, court rulings on women's marriage rights in Pakistan reflect both progress and challenges. By addressing these challenges collectively, Pakistan can create a future where Muslim women may fully access and implement their marriage rights.