

Women's Rights and the Nikah Nama in Pakistan

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Introduction

Marriage under Islamic law is in the nature of a contract based on the principles of offer and acceptance, where the intention to enter into the contract has to be mutually made clear by either the concerned parties or their representatives.

Marriage in Islam does not have the Christian notion of a sacrament implying the indissoluble nature of the bond. The requirements for a valid Muslim marriage are more contractual in nature rather than being ceremonial or sacramental.

The nature of marriage under Islamic law has been considered by the Courts and in the case of *Khurshid Bibi v Muhammad Amin*¹ it was held that it is well settled that marriage among Muslims is not a sacrament but in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause.

In Pakistan the applicable law for marriages performed under Muslim Law is The Muslim Family Laws Ordinance (MFLO) 1961. The MFLO takes precedence irrespective of any other law, custom or usage and a marriage performed under Muslim law shall only be registered under the provisions of this law². As has been mentioned above, a Muslim marriage is a contract and to record the contract deed a standardized form called the *Nikah Nama* has been prescribed³. The MFLO does not provide any definition of “marriage” which is to be recognized under Muslim law. What constitutes a valid Muslim marriage along with its pre requisites are matters governed under the general principles of Muslim jurisprudence.

What is a Nikah?

Nikah is an Arabic word mentioned in the Quran, meaning a Muslim marriage. The act of marrying is entering into a Nikah and in a religious sense there is no specific ritual prescribed. Irrespective of what the religious and social directions are regarding marriage, Muslim marriage is a contract and its requisites are as follows:

- a) A declaration or offer (aijab) of marriage by or on behalf of one party and acceptance (qabool) by or on behalf of the other party, having capacity to marry, with both being expressed at one sitting. The offer can originate from either side.
- b) The free and full consent of both parties (a guardian can give a minor in marriage and that is not an invalid marriage, though liability will exist under the Child Marriage Restraint Act 1929 (CMRA))⁴.
- c) The presence of adult, sane Muslim witnesses (two men or one man and two women)⁵.

¹PLD (1967) SC 97.

² Section 2 of MFLO.

³ Nikah Nama prescribed under the rules framed under the MFLO.

⁴ In case the bride is less than 18 years of age, she is not considered to have legal capacity to speak for herself and in such circumstances there must be a guardian giving the minor in marriage but the guardian will run the risk of incurring liability under the CMRA because this will be a child marriage.

d) Fixation of dower (mahr)⁶.

Now looking at each of these aspects in detail:

Offer & Acceptance

The Nikah has to be conducted in a single sitting. As offer and acceptance for the Nikah can be through the representatives (vakeel) as well⁷, Nikahs are also conducted over the phone or over Skype when both parties are not physically present in the same place.

For such a Nikah one party and the representative of the other party along with the witnesses come together in one place and the other party (whose representative is present) is contacted via phone or on Skype. The representative fulfills the responsibilities of the actual party with regard to offer and acceptance in the presence of the witnesses. Such a marriage is recognized in Pakistan. Many legal jurisdictions don't accept such a marriage, generally called proxy marriage, irrespective of it being recognized under the law of the country where it was solemnized.

Note: As per the requirements of registration of marriage under Pakistani law, the 'one sitting' for the purposes of the Nikah will be where the bride is. Witnesses of the marriage, the representative of the groom and the person solemnizing the marriage are all to be in one place. The groom can be contacted over the phone or Skype. The marriage will be registered with the Nikah Registrar of the area where it was solemnized. The groom's representative will sign the Nikah Nama (the Nikah Nama requires the signature of the groom or his representative). The bride's presence in this sitting is required because she has to sign the Nikah Nama in person; her representative, if any, alone cannot sign.

Caveat: This refers to the capacity of the parties to enter into a valid marriage and give full and free consent. The relevant factors concerning age, gender, mental capacity, religion, relationship to each other and marital status are as follows:

- Age: Under the CMRA, the minimum age of marriage is specified to be sixteen for females⁸ and eighteen for males.⁹
- Gender: One party must be male and one female.
- Mental Capacity: The parties must be of sound mind.
- Religion: The parties must be Muslims, or one party may be a Muslim man and the other a *kitabia* (follower of a revealed religion) woman. Note that the marriage of a Muslim woman to a non-Muslim man, even a *kitabia* man, is not recognized in Muslim law as applicable in Pakistan.

⁵ This is the position under Muslim jurisprudence. In the Nikah Nama prescribed for marriage however there are only two columns to record the names of the witnesses of the marriage.

⁶ Sum payable by the husband to the wife on marriage being contracted.

⁷ This means the representatives that the bride and groom can appoint to speak for them. This is something provided for in the nikahnama and such a person is known as the vakeel. Normally the groom does not appoint a vakeel and speaks for himself but in case he is not physically present, his vakeel can speak on his behalf.

⁸ In the province of Sindh, it is eighteen years under Sindh's CMRA, 2013.

⁹ Section 2 CMRA, 1929.

- Prohibited Degrees: The parties must not be within prohibited relationships to each other. Prohibited relationships of the parties are degrees of consanguinity, affinity and fosterage.
- Marital Status: Although the husband may have one or more subsisting marriages, up to a maximum of four, the wife must not have a previous subsisting marriage.¹⁰

There is no specific law that relates to this as regards the liability of the nikah registrar. If there a case pertaining to any of these factors above it will have a bearing on the validity of the marriage and not necessarily the role of the nikah registrar.

Consent

The free and full consent of the parties to all formalities and conditions is required. Consent has to be clear and there can be no ambiguity. It is a conscious expression of one's acceptance without any external intimidation or coercion.

A marriage without consent or in which consent is obtained through force, coercion, fraud or misrepresentation is void¹¹.

If a woman is forced into marriage against her will it will attract criminal cognizance for the offenders¹². The woman can obtain a decree from the Family Court declaring the marriage to be null and void even if the marriage was registered under the law. Such a decree is called jactitation of marriage.

If the forced marriage is coming within the ambit of the offence of forced marriage as defined in the Penal Code then the registrar can be made party to the proceedings. Barring that it is unlikely. Here again it is the validity of the marriage that will be questioned.

If on the other hand the marriage in question is not a forced marriage according to the Penal Code and the bride is unhappy with a particular condition but doesn't raise it at the time and signs the nikah nama then there is no liability on the registrar.

Witnesses

The registrar should ensure that the witnesses to the appointment of the vakeel and the witnesses to the marriage are not the same.

To date there has been no such case where this has been a problem. This is something which would be handled administratively at the UC level.

¹⁰ Under Section 6, MFLO, a Muslim man may validly contract a polygamous marriage, subject to obtaining a permission certificate from the relevant Arbitration Council.

¹¹ See two land mark cases Matloob Hussain vs Mst Shahida & 2 others PLD 2006 SC 489 and Humaira Mahmood v The State PLD 1999 Lahore 495.

¹² Forcing a woman into marriage is a Penal offence under section 498-B, of Pakistan Penal Code, punishable with 3 to 10 years imprisonment and a fine of five hundred thousand rupees. Giving a woman in marriage to settle a criminal case or a Civil liability is also an offence under section 310-A of the Penal Code punishable with 3 to 10 years imprisonment.

Dower

Dower is a mandatory requisite of a valid Muslim marriage. It is a sum payable by the husband to the wife upon contracting marriage. It often gets referred to as consideration of marriage. It is a mandatory obligation and the law applicable in Pakistan requires it to be fixed at the time of marriage¹³. Even if it is not fixed at the time of marriage and no specified amount of money or any other property is mentioned in the Nikah Nama, the woman's right to claim dower will remain unaffected due to the existence of the marriage contract.

Dower can be fixed later through mutual consent. If the parties are not in agreement then the wife can go to court and have the court fix an amount taking in account factors like social standing and the husband's salary etc.

An amount not being fixed at the time of nikah is not a bar to her being able to claim the right.

The first column pertaining to mahar in the Nikah Nama uses the word raqam (cash) but dower does not have to be restricted to cash only and can include both moveable and immoveable property. The four columns provided for the recording of dower clearly allow for it to be recorded as cash and/or property of any kind that has been agreed upon. Dower can be fixed later but if the husband does not do it the wife can get it fixed from the court and claim it.

Note: We have not come across case law relating specifically to this so cannot say how common claims like this are but generally speaking the wife would go to court asking for her dower to be paid. The judge would be informed that no amount was specified during the nikah and the court will fix an amount that she will then claim.

With regard to its payment, dower can be divided into prompt and/or deferred dower. The prompt part of the dower has to be paid immediately and a time period can be agreed upon with regard to deferred dower or alternatively it can be made payable upon the wife's demand. Where the payment of the deferred dower is made contingent upon the wife's request, the mahar is known as indul-talab.

Note: Often prompt dower is confused as indul-talab. This is not correct. Prompt dower becomes due right upon completion of the Nikah.

If no time period is determined as regards deferred dower then it becomes payable either upon termination of the Nikah (provided the termination is such that is entitled to retain this right) or upon the death of the husband.

Dower is a debt that the husband has to discharge and if not paid in his lifetime mahar is one of the first things to be paid out of his estate unless the wife forgoes her claim.

A deceased woman's unpaid dower can be claimed as her inheritance by her heirs.

¹³ See the Nikah Nama form which has 4 columns to record it [column 13 to 16].

If the Nikah Nama doesn't say that the mahar is prompt or deferred, the judge will assume that it is prompt and payable immediately.¹⁴ If the bride goes to court claiming that her dower has not been paid and the column itself has been left empty in the nikah nama at the time of the nikah then the judge will assume that it is prompt and immediately payable to the bride. After the 2015 amendment in the law in Punjab however, the nikah registrar is under an obligation to ensure that all columns are filled and questions answered or else he will be held liable.

If the dower is prompt it would be considered the woman's personal property. If it is deferred one will have to see the conditions of the deferment and subsistence of marriage. If there is a divorce then the mahar is payable.

The mahar is a right that belongs to the wife alone. It has been seen that areas where exchange marriages are prevalent, the perception is that the woman is not entitled to mahar and the same isn't agreed upon at the time of Nikaha. This is a violation of the law. As mentioned earlier, the right to claim dower remains unfettered whether fixed at the time of marriage or not. The wife in such a situation can claim mahar and if it is not settled or paid by the husband, she can approach the Family Court for redress where the amount would be decided taking into account factors like social standing, salary, ownership of assets etc.

The superior courts have clarified through judgments that in order to contract a valid Muslim marriage it is imperative that the parties determine the mahar and agree upon it.

If a dower amount has been agreed upon but not recorded accurately in the nikah nama it would be possible to hold the nikah registrar liable under the amended section 5 of the Muslim Family Law Ordinance (only in Punjab) resulting in one month imprisonment and a fine of 25,000/-. If however, no amount has been agreed on or whether it is prompt or deferred has also not been agreed on then it would be unlikely that the nikah registrar would be held liable.

The Nikah Khwan/Nikah Registrar

The Nikah Registrar is a public servant and is appointed by the relevant Union Council. The law mentions no specific qualification (in terms of either education or knowledge of the Muslim Family Laws) for a person applying for the appointment of Nikah Registrar. Any person deemed competent of solemnizing a marriage under Muslim law can apply to the relevant Union Council for the grant of the licence of a Nikah Registrar. If the Union Council, after making such inquiries as it may consider necessary, is satisfied that the applicant is a fit and proper person for the grant of a licence, it may, subject to the conditions specified, grant a licence to him. .

This licence is issued to him on a permanent basis and it cannot be transferred to anyone else. This licence can be revoked if the Nikah Registrar violates any of the conditions of associated with the licence. Violation of any of the provisions of the MFLO and the rules framed under it is included in the list of such violations. **On violations of any of the conditions of the licence, the punishment for the**

¹⁴ See Section 10 of the MFLO.

Nikah Registrar is imprisonment which can extend to one month or a fine which may extend to two hundred rupees or both¹⁵.

In the Province of Punjab the law stipulates that it is mandatory on the person solemnizing a marriage (Nikah Registrar or any other person) to fill all the columns of the Nikah Nama with specific answers of the bride or the groom. **Violation of this will result in imprisonment up to one month and a twenty five thousand rupees fine¹⁶.**

The Superior Courts in the country have, through their decisions, clarified the duties of Nikah Registrars and have stated that their responsibility is not limited to just filling out the columns of the Nikah Nama. The Registrar has to be mindful of the fact that the duty he is carrying out is important and has important consequences as rights of inheritance, maintenance, dower, dissolution of marriage, legitimacy of children and several other rights originate as a result of a valid marriage.

As a public servant it is his responsibility to ensure that the parties have the capacity to understand their actions, are exercising free will, are not underage, and there is no coercion or duress involved before he registers a Nikah. **If he is unable to do this or is negligent then he can be held responsible for the legal complications that arise subsequently and be made a party to any civil and/or criminal litigation that arises as a result¹⁷.**

In the case of *Bashir Ahmed V Usman alias Chara and others*¹⁸ a father filed a writ of habeas corpus (writ requiring an unlawfully detained person to be produced in Court) to recover his daughter who was fifteen/sixteen at the time. The respondent in the case claimed that he had contracted a valid Nikah with the girl in question approximately 3 years before the filing of the habeas writ. This was a Nikah that was contracted on the basis of a watta satta or exchange marriage.

The alleged husband produced a registered Nikah Nama in Court as proof and in the next hearing produced an attested copy of the Nikah Nama from the Union Council. The Court noticed a discrepancy between the two documents as regards the filling of the columns pertaining to mahar (dower) and ordered the Assistant Director Local Government to conduct an inquiry as regards the discrepancy within six weeks and present a report before the Deputy Registrar High Court.

The fact that there was a discrepancy between the nikahnama produced by the husband and the attested nikahnama taken from the Union Council alerted the Court which ordered an inquiry into the matter and on the basis of that inquiry came to the conclusion that this was in fact an under-age marriage and not a dower issue leading to proceedings commencing against the nikah registrar.

The Court held that at the time of the alleged Nikah the girl was 12/13 years old and that this was a case of registering an underage marriage. The District Collector was ordered to ensure that proceedings commence against the Nikah Registrar for registering an underage marriage.

¹⁵ For issuance of licence of Nikah Registrar and conditions of license see rules framed under MFLO.

¹⁶ Amendment introduced in section 5 of the MFLO in March 2015. See section 5-2A and sub section 4 of section 5.

¹⁷ See *Farman Ali vs Abid Ali* PLD 1995 Lahore 364.

¹⁸ NLR 1995 SD 665.

Registration of Marriage

The Muslim Family Law Ordinance, under Section 5, requires mandatory registration of all marriages performed under Muslim Law.

For the purposes of registration every Union Council appoints a Nikah Registrar in its area and that Nikah Registrar is issued a licence by the Union Council. The Registrar is either given a seal or given permission to use one which bears his licence number along with the number of the Union Council.

There is no time limit with regard to the registration of marriage but it is preferable that it is registered as soon as possible.

If the law as regards the mandatory registration of marriages is violated it will result in 3 months simple imprisonment and a fine of one hundred thousand rupees. Punishment shall be for the person who solemnized the marriage, if he was someone other than the Nikah Registrar.

Generally it is the parties that follow up with the registrar to ensure registration.

An additional registration required is with NADRA. All marriages, regardless of whether under Muslim law or otherwise, have to be registered with NADRA. This registration is compulsory. NADRA issues a certificate, titled Certificate of Marriage but it is not a substitute of the Nikah Nama.

The Nikah Nama

The Nikah Nama is the document that records the contents of a Nikah. It records the personal details of the parties to the marriage, amount of dower, conditions of the Nikah settled between the parties, and the names and addresses of the witnesses to the marriage. After being registered it serves as a proof of marriage and being a public document is acknowledged in a Court of law as a piece of evidence in any dispute about the marriage.

The Nikah Nama records those facts and conditions of the Nikah which have been settled between the parties as is evident from the language of its columns, distinguished by numerical numbers.

Information in the Nikah Nama should be recorded carefully and should be recorded in the manner in which it is being asked. This is important so that in case of any dispute the facts recorded can be understood clearly and there is no ambiguity. **Violation of this will result in imprisonment up to one month and a twenty five thousand rupees fine.**

The Nikah Nama provides for columns to record specific information along with settlements between the parties with respect to dower, any document made in relation to maintenance or dower, delegation of right of talaq to wife by the husband or the imposition of any restriction on the husband's right of talaq. Another column is provided for recording any other special conditions agreed between the parties.

All the columns of the Nikah Nama may not be relevant to every marriage depending on the circumstances. Obviously there are some columns which are mandatory for every marriage. The rest are

to be filled if they are relevant and apply to the marriage in question. These columns start with the words 'if' or 'whether' and these are to be filled if there is particular information with respect to that column. For example, column 7 asks if the bride has appointed any representative (word vakeel is used in Urdu which also means lawyer but here it is used for representative) for herself. The column is only to be filled in the event that she has and it is not mandatory for the bride to appoint one.

Conditions in the Nikah Nama

Conditions of the Nikah to be recorded in the Nikah Nama have to be decided at the time of the Nikah or before it. However, any conditions can be revised by the parties with mutual consent and it is better to record those in writing in the form of an acknowledgement or an agreement depending upon the nature of the condition or settlement and registered separately with the Registrar appointed under the Registration Act, 1908. **Any violations will result in liability for the registrar which is imprisonment up to one month and a twenty five thousand rupees fine.**

The columns in a Nikah Nama can be roughly divided into 3 categories.

The first category of columns requires factual information pertaining to both parties. The Nikah Khwan/Registrar must ensure that the names of the concerned parties along with their dates of birth are the same as on their ID cards and/or B Form. If the current address is different from the permanent address both can be mentioned. If documentation is not checked and the marriage is found to be an under-age marriage then liability will be incurred by the parties under the Child Marriage Restraint Act.

The second category pertains to the marital status of the bride and the appointment of a vakeel or a representative. The bride does not necessarily have to appoint someone as a vakeel. If she has not appointed any one as her representative then it is to be clearly mentioned that she has not appointed any representative. In this case the next two columns asking for the names and relation with the bride of the two witnesses to the appointment of the bride's representative are to be filled carefully. It should be clearly mentioned in those columns that they don't apply. The witnesses to the Nikah don't have to be related to the female but the relation of the witnesses to the appointment of the bride's representative, if any, has to be stated. These two set of witnesses cannot be the same.

The registrar must ensure that the witnesses to the appointment of the vakeel and the witnesses to the marriage are not the same.

Note: we have not come across any cases where this has been a problem. This is something which will be handled administratively at the UC level.

In a case of an alleged forced marriage especially as a result of alleged kidnapping or abduction if the witnesses to the appointment of the vakeel of the bride are not known to her, the Courts are more inclined to suspect foul play and order an inquiry.

Other columns in this category become operative if the groom is a widower or a divorcee and if he has any child/children then their names and ages are to be recorded in the Nikah Nama. In case the groom is contracting another marriage (after having obtained the permission certificate from the relevant

Arbitration Council) then the existence of an earlier wife/wives and all information regarding the certificate is also to be recorded (reference number and date of letter under which groom was granted permission by the Arbitration Council). The Nikah Registrar cannot be held responsible if it transpires later that the groom is in fact contracting a second marriage without having received a permission certificate from the Arbitration Council.

Note: The columns pertaining to the personal status of the husband (whether he is a widower or a divorcee) and the recording of the children, if any, in either of the two situations are only provided for in the Nikah Nama in the province of Punjab.

The third category of columns pertains to the conditions and settlements in the marriage.

Before moving on to the actual columns and what they ask it should be noted that the parties cannot decide on a condition which goes against the spirit of the Nikah itself. Such a condition, even if agreed upon by the parties would be legally unacceptable.

Conditions opposed to law and public policies are also not valid and cannot be legally enforced.

A legal right belonging to either of the parties to the marriage also cannot be taken away. A right can be curtailed or a condition can be imposed upon but it cannot be terminated. One example of this could be a condition in the Nikah Nama which states that the wife shall not petition a Court for khula. This condition is illegal even if agreed upon and will not be legally enforced. An agreement between the parties saying that the mother will not take her children's maintenance will also be struck down because she is legally obligated to look after them and she cannot contract their rights away, regardless of where the agreement is registered.

Other examples include agreeing upon giving a female in marriage from the groom's family or to pay compensation in case that female is not given in marriage. Both these conditions are illegal.

Caution should be exercised when including a condition in the Nikah Nama that will have the effect of terminating a lawful right. Where a lawful right is being surrendered one has to see if the right is valid and secondly if the person in question knows the consequences of giving up that right.

The Nikah if conducted properly will be considered valid. If the Nikah Nama contains a condition that is void, it would not invalidate the Nikah.

(For a discussion on the columns (13-16) pertaining to mahar see section on 'Dower' below)

Column 17:

Column 17 asks about special conditions, if any.

This column can be used to put in conditions pertaining to mutual responsibilities and various aspects' of the couple's married life.

Conditions in column 17 can curtail a right belonging to the other party but these conditions cannot be used to entirely terminate another party's lawful right. One example could be the wife placing a

condition on the husband's second marriage like increasing her maintenance in case he contracts another marriage. In this case his legal right is not being curtailed.

Conditions in column 17 can either be time bound i.e. be applicable only within a certain time frame or can be applicable for the entire length of the couple's married life. When writing them down, the conditions should be clear and unambiguous and should ideally not contain anything that would require interpretation as that can cause difficulties in their enforcement.

Watta satta or exchange marriages is a prevalent practice in many parts of Pakistan and the parties mutually agree upon the 'condition' of giving a woman in exchange for the marriage. This condition can be present in the Nikah Nama or the parties can have the agreement drawn up separately on stamp paper with the Nikah Nama referring to the separate document.

Third parties cannot be bound by the conditions set in an earlier Nikah and such a condition will be considered invalid and unlawful. Nikah Khwans and Nikah Registrars should be mindful of this and not enter invalid and unlawful conditions in the Nikah Nama. Such conditions have no legal status and cannot be enforced through a court but parties put pressure on the fulfillment of such conditions stating that they have the Nikah Nama as proof. Such an assertion has no legal basis.

Column 18:

Column 18 deals with whether or not the wife has been given the delegated right of talaq by the husband, if so, under what conditions?

According to Muslim family law the husband has the right to unilaterally terminate the Nikah by pronouncing talaq and this is a right that he can also delegate to his wife. This means that the husband's right subsists and at the same time the same right is given to the wife. If the woman uses this right she on behalf of her husband pronounces talaq upon herself and will have to adopt the same procedure as if her husband would have to in case he pronounced it. .

There is common misperception that in delegating the right of talaq the husband loses that right for himself. This is not the case. In case of delegation both husband and wife enjoy an identical right.

This is a right that can be delegated unconditionally or the husband can attach conditions to it. These conditions can pertain to events that may occur in the future, or can pertain to a particular time frame etc.

The first thing that column 18 asks is whether or not the husband has delegated the right of divorce to the wife. A simple yes or no will suffice here. In the event the answer is yes the column further asks if any conditions have been attached to the right that is being delegated.

In practice there are instances when the Nikha Khwans or Nikah Registrars cross out this column; legally this is not something they can do. After the 2015 amendment (in Punjab) these columns need to be answered with a yes or no and cannot be crossed out in which case legal liability will be incurred. More often than not the parties also labour under misconceptions as regards this and believe that a wife can only obtain a khula in order to get out of the marriage.

There have also been instances where the column has been misunderstood to by the parties to mean the right regarding khula. This is even though the wife's right to obtain khula is a right separate from this and the husband has no authority over it and cannot interfere with it.

There have also been cases where on the face of it the right is being given to the woman but the way in which it is written renders the right virtually meaningless. Moreover the conditions attached to the exercise of this right are sometimes such that the exercise of the right becomes contested.

Examples include delegating the right of divorce but making it conditional upon the agreement of all the elders, or the permission of parents etc.

There are also examples which state that the right must be exercised according to sharia which renders the right meaningless.

A woman does not have to be Muslim in order to have the right of talaq be delegated to her by her husband.

If the woman belongs to any such religion where she is able to marry a Muslim man according to Muslim law then this right can be delegated to her like any other right in marriage recognized under Muslim law. There were some cases where such conflicts came to the fore and this clarification was deemed necessary. In one such case the High Court declared that a non-Muslim woman who is married under Muslim law to a Muslim man can have this right delegated to her¹⁹.

In *Mst. Shama Farooq V Chairman Union Committee Ward Number 4 Lahore Cantt*²⁰ the right of divorce was delegated to the wife and the condition attached was that she could use it after getting permission from her family elders. The wife used her delegated right and pronounced talaq upon herself and in compliance with the law sent a notice to the Chairman Union Council. The husband raised an objection and said that the wife had not complied with the condition attached to the right delegated. The Chairman Union Council declared her notice of talaq to be ineffective. The woman filed a writ in the High Court and the High Court held the Chairman did not have the authority to give a decision in the matter. The woman in her notice of talaq had stated that she was using this right with the permission of her elders.

The Chairman is to just receive the notice. He cannot give a decision on whether conditions attached to the right have been complied with. That is the job of the Family Courts

The manner in which column 18 was filled out along with the actions of the Union Council resulted in the woman having to wait a year for something that would have been completed within 90 days.

Column 19:

Column 19 asks about whether any restriction has been imposed on the husband's right of talaq. Conditions can be placed on this right but this does not mean that the husband's right to pronounce

¹⁹Caroline Rehman V Chairman Union Council 1985 CLC 2855[Lahore].

²⁰NLR 1995 Civil 560.

talaq has been taken away in its entirety. Moreover it must be clear that the law does not ask the husband for a reason when giving a divorce. If the stated procedure is complied with then the talaq is affected.

As regards the conditions themselves they can be monetary in nature meaning that a condition of monetary compensation can be placed on the husband in case this right is exercised by him. This compensation can also be in the form of property. Another condition could be that if the husband pronounces talaq on his wife because of an accusation then evidence supporting the same will have to be produced. If there is no evidence then the husband will have to pay the woman compensation. It should be kept in mind that if the woman pursues her case for compensation in the Family Court the condition should be very clear. Moreover if the nature of the allegation is such that the woman can pursue legal action (e.g. file a suit for defamation) then she would be entitled to damages under that suit also.

Caution must be exercised when recording these conditions in the Nikah Nama because sometimes the manner in which the condition is recorded means that it is not legally enforceable. Examples include the husband not being able to give talaq without a definite reason.

Where the conditions are invalid and cannot be enforced legally, the husband's right to divorce remains unfettered.

In the case of *Nasrullah V District Judge and two others*²¹ the condition stated in column 19 was that if the husband divorced the wife without any fault on her part he would be liable to pay her 2 lakh rupees. Even though it wasn't expressly stated to be so, such conditions are usually interpreted to mean where the wife violates any of the major tenets of the Nikah.

The husband in this case divorced his wife 5 months after the Nikah and because of the express condition in the Nikah Nama as regards his right to pronounce divorce he stated in the talaq notice that his wife was not of good character.

The matter went to the Family Court, then the District Court and finally to the High Court. The High Court perused the entire record where the oral testimony of the husband before the Family Court stated that he divorced his wife because she was not of good character but when he was asked whether he could produce any evidence to substantiate what he was saying, he replied saying he had provided no evidence as regards the same.

The wife alleged that the husband was casting doubt on her character because he wanted to get out paying the 2 lakh rupees as stated in the Nikah Nama. The High Court dismissed the writ filed by the husband and upheld the decision of the District Court which had ordered the husband to pay his wife the 2 lakh rupees.

Note: For several years there has remained a conflict in the interpretation of the law with respect to any such compensatory conditions settled in the Nikah pertaining to a future happening. Examples of this

²¹2005 SLR 56 Lahore.

could be paying compensation to the wife in case of talaq by the husband or paying compensation upon breach of any of the conditions of the Nikah.

The Higher Courts have rendered conflicting judgments.

This conflict has been multifold because in some cases the Courts have rejected petitions (reference to High Court) on the grounds of whether any restriction vis a vis compensatory conditions could be imposed on the husband's right of talaq. There is also the linked argument of jurisdiction; which Court had the jurisdiction to adjudicate such a dispute? Is it the Family Court which otherwise, has exclusive jurisdiction to adjudicate upon family laws related suits or is it an ordinary civil court operating under Civil Courts law and applying Civil Procedure Code?

In some cases the High Courts decided that the Family Court has jurisdiction in such claims while in the majority of the cases it was held that the Family Court had no such jurisdiction and the matter fell in the ambit of an ordinary civil court. There are many judgments of the High Court where the judges dissented with the decision in *Nasrullah* and the Supreme Court overruled it in a case in 2011.

Note: In the province of Punjab the question of the jurisdiction of the Family Court in such a suit stands resolved with the amendment in the schedule of the Family Courts Act, 1964²². Matter added as item number 10 in first part of the schedule says any dispute arising out of Nikah Nama.

If there is a dispute as regards the interpretation of the contents of the Nikah Nama, the Nikah Khwan/Nikah Registrar can be summoned by the court to give evidence as regards the clauses which are the source of conflict.

Recording Dower in the Nikah Nama:

There are 4 columns in the Nikah Nama to record dower; all may not be applicable to the dower settled in every marriage.

In column 13 the entire dower amount is to be stated regardless of its form.

Column 14 asks how much of the total dower is prompt (moajal) and how much is deferred (ghair moajal or mowajal). If there is no division of dower as prompt or deferred is settled, it should be clearly stated in this column. In the event of there being no division the entire dower will be considered prompt.

Column 15 asks if some part of the mahar has been paid at the time of the Nikah. If any part of the dower or even if the entire dower is paid at time Nikah, it should be clearly mentioned in this column. As a note of caution one should make sure that the payment has in fact been made before filling out column 15.

Column 16 should be filled where any property is given either against part of the dower or against its entire amount. This column further asks for the specifications of any property given (including

²² Amendment in the Punjab Family Courts act incorporated in March 2015.

particulars of the property, its measurements, nature, location) and the value agreed upon between the parties. All these aspects should be carefully filled if they are applicable to the particular Nikah. In the event that these details are missing it will become very difficult for the bride to claim the property mentioned in the Nikah Nama.

The property given in dower becomes the wife's ownership irrespective of the fact that the title deed has not yet been transferred, as yet.

A registered Nikah Nama is a public document and admissible as evidence unless it is proven to be forged. Even if in case the nikkah has not been registered, it would not be an obstacle to her claiming the property. In such an event the bride will have to admit additional evidence to show that the giving of property was in fact agreed upon between the two parties. Any moveable or immoveable property given as dower and duly recorded in a registered Nikah Nama can be transferred in the wife's name on the basis of such a recording. The rules/formalities of the Transfer of Property Act do not apply. A woman cannot be deprived of the property because it has not been transferred in her name.

If the Nikah Nama states that the bride will be given some property in lieu of some of the dower amount then this is something that will come within the category of Hiba-bin-evz and the law will assume that the bride is in possession of that property even if she has not physically taken possession of it.

If a woman has gotten property as dower, no other party can file a suit for pre-emption against it. It is protected property. But a girl who is being given property in dower can file for pre-emption as regards land that is next to it.

A suit for pre-emption or first option to buy is a contractual right to acquire certain property newly coming into existence before it can be offered to any other person or entity. Property acquired by a bride as part of her dower cannot have a suit for pre-emption filed against it by anyone.

In the Province of Punjab the law stipulates that it is mandatory on the person solemnizing a marriage (Nikah Registrar or any other person) to fill all the columns of the Nikah Nama with specific answers of the bride or the groom. **Violation of this will result in imprisonment up to one month and a twenty five thousand rupees fine²³.**

Other Aspects of a Nikkah that can have a Legal Impact

Relinquishing of Dower

The authority to relinquish dower rests with the woman. Juristically the woman can relinquish or gift her dower and the burden is on the person who has to pay the dower to prove the same. In case of a dispute the Court has to ensure that the wife in relinquishing her dower acted as a free agent and was not coerced etc. Even if dower is relinquished through an affidavit, it has to be corroborated by the person that affidavit is being attributed to. If the husband dies and the

²³ Amendment introduced in section 5 of the MFLO in March 2015. See section 5-2A and sub section 4 of section 5.

in-laws claim that the unpaid dower was relinquished during the widow's iddat (which is 4 months and 10 days for a widow), the Courts may not acknowledge it. A widow in mourning may not be in a state to act as a free agent to relinquish her dower.

Other Gifts

Any gifts given to the bride from her in laws or her parents' side at the time of marriage are bridal gifts and her property. Jewelry from the girl's side is hers and jewelry given to her from the boy's side falls in the category of bridal gifts. If any promise or undertaking is made by the husband to give the wife a gift (cash or property) and it is recorded in the Nikah Nama (usually in column 17) she can file a suit for its recovery if the promise or undertaking is not honoured.

Mundekhai is a bridal gift. Every time the word gift is used it is the property of the person who received it. It is therefore the woman's personal property. Clothes, regardless of whether her family gave it or it came from the boy's side would also fall under personal property.

Polygamy

The general perception is that in order to contract a second marriage, a man needs the consent of his first wife.

Legally, however, he will have to take the permission certificate from the Arbitration Council. The relevant forum for permission for a polygamous marriage is the Union Council of the residence of the existing wife at the time of application even if it is in another city.

An application for permission is submitted along with the prescribed fee to the Chairman Union council (in his capacity as Chairman Arbitration Council) of the area where the existing wife is residing at the time of the application. In case of more than one existing wives, it will be submitted to the Chairman of the area of residence the applicant married last.

When one applies to the Council, the application has to expressly state the reasons for the proposed marriage and whether the consent of the existing wife/wives has been. If the consent of the existing wife is in writing it can be attached to the application.

The Chairman on receipt of the application constitutes an Arbitration Council consisting of one representative of the wife and one of the husband's along with the Chairman himself. If there are more than one existing wives, then a representative of each wife shall be included in the Arbitration Council.

The authority to grant or refuse the permission certificate rests with the Arbitration Council. If the existing first wife does not give permission, the Council can still give permission and vice versa because the Council has its own guidelines as stated under the law. The fundamental point the Council has to consider is the reason behind the individual's request for permission for another marriage. The Council has to see whether the proposed marriage is just and necessary and not on a whim; for example, the wife has been declared mentally handicapped by a medical authority and hence, he cannot divorce her.

This means that these 2 requirements cannot be looked at in isolation, they have to be looked as a whole. Factors that the Council can consider include whether the couple is issueless and the man claims he is contracting a second marriage or have children or have a son. Other than this basic rule, there are some other guidelines that the Council has to follow which are given under rule 14 of the MFLO.

The Council's decision on such an application is not final. The permission, if granted, can be conditional as well as unconditional. Both the parties, the applicant husband and the existing wife/wives, as the case may be, can file a revision application before the Collector within 30 days of the decision of the Arbitration Council. The Collector's decision is final.

Where the permission certificate is granted by the Arbitration Council then the fact of the having obtained the certificate, its date and reference of the communication of the grant of such a certificate are to be recorded in the Nikah Nama (columns 21 & 22) when the man marries.

Legal Recourse: If a man marries without having obtained the required permission certificate or in violation of the decision of the Arbitration Council in not granting certificate, the Nikah Nama of such a marriage cannot be registered.

Conviction on a complaint (under section 6(5)) of marrying in violation of the law carries a punishment of simple imprisonment of up to one year and a fine of five hundred thousand rupees but the marriage contracted will not be considered invalid.

The husband becomes liable to pay the entire unpaid dower (prompt or deferred) of the existing wife/wives.

In case the second marriage is contracted without permission, the existing wife/wives will have two courses of action available:

She (in case of more than one wife, any of them) can file a complaint as envisaged under Section 6(5) of the MFLO. This complaint is filed before the Family Court (having jurisdiction over the area where the complainant wife resides or of the area where the alleged polygamous marriage in violation of law took place) and can only be filed against the husband and no other member of his family as having aided or abetted the second marriage.

In the Province of Punjab, the right to file the complaint is with the aggrieved party²⁴. The existing wife/wives come within the ambit of the aggrieved party and if the woman with whom the polygamous marriage in violation of the law is contracted and she was not aware of the man's earlier subsisting marriage/s then she also falls in the category of the aggrieved party. She can also file such a complaint. Parents of the existing wife and of the polygamous marriage who were not aware of husband's existing marriage will also be considered an aggrieved party and will have right to file a complaint.

Secondly the first wife will get grounds for divorce if she so wishes. Under the Dissolution of Muslim Marriages Act (DMMA) a polygamous marriage contracted in violation of Section 6 of the MFLO provides

²⁴ Rule 21 of the Rules framed under MFLO

the earlier wife ground to obtain dissolution of marriage. On obtaining dissolution of marriage on any of the grounds provided in the DMMA wife's right to her full dower is not affected.

The existing (earlier) wife/wives can refuse to live with the husband in the same house along with the wife of the polygamous marriage contracted in violation of the law and remains entitled to be maintained by the husband till the marriage subsists.

Even though there is no time limit to how soon the first wife can object to the husband's second marriage, delay will weaken the case.

Practically speaking it would be difficult for the NR to know if the marriage in question is a second marriage or not especially if the groom conceals this fact. If it later transpires that the marriage in question is in fact a second marriage contracted without permission it is unlikely that the NR would be held liable. Moreover the NR has to document the answers given to him by the parties. He cannot be held responsible if the groom conceals facts.

Underage Marriages

The relevant law here is the Child Marriage Restraint Act (CMRA) 1929. This Act was amended in 2015. The amendments did not introduce any fundamental change in the application of this law; it only enhanced punishment for certain violations.

A child marriage is one where either one or both parties are under the legal age of marriage as prescribed in the CMRA²⁵ (18 for males and 16 for females). A child marriage is not invalid. Such a marriage continues till it is either repudiated or ratified by the parties concerned. It is still illegal even if it is just the nikkah without the rukhsati.

The law, however, provides for punishment as regards anyone who performs, conducts or directs such a marriage. Persons falling within the purview of this law include a parent, guardian who does anything to promote the marriage or permit it to happen or negligently fails to prevent it and a person who being above the age of eighteen years contracts a child marriage with a person below the legal age of marriage. In this case, even the spouse will be punished for marrying someone who he knew was underage.

Any person who is not a minor who contracts a child marriage is liable to punishment of simple imprisonment which may extend to six months and a fine of fifty thousand rupees²⁶.

Whoever, performs, conducts or directs such a marriage is liable to punishment of simple imprisonment which may extend to six months and a fine of fifty thousand rupees, unless he proves that he had reason to believe that the marriage was not a child marriage²⁷.

²⁵ Section 2 (a) CMRA 1929.

²⁶ Section 4 CMRA 1929.

²⁷ Section 5 CMRA 1929.

If a parent, guardian or any other person who has charge of the minor in any capacity, lawful or unlawful does anything to promote the marriage or permits it to happen or negligently fails to prevent it from being solemnized are liable under the law and shall be punished with simple imprisonment which may extend to six months along with a fine of fifty thousand rupees²⁸.

It should be noted that no woman will be punished with imprisonment and unless the contrary is proved, it shall be assumed that where a child marriage has been contracted then the person responsible for that child has been negligent in failing to prevent the marriage from being solemnized²⁹.

Injunction to Prevent Child Marriage:

A Family Court, on a complaint or on the basis of information that a child marriage is arranged or about to be solemnized, can issue an injunction to the persons concerned.

No Injunction can be issued without notice to the parties concerned and affording them an opportunity to show cause against the issuance of the injunction.

Violation of an Injunction:

Violation of an issued injunction is punishable with imprisonment up to three months or a fine of up to one thousand rupees or both.

Weaknesses in Implementation:

The complaint can be filed only by the Union Council and no complaint can be filed after one year of solemnization of a child marriage. It is very rare that a case of child marriage goes in criminal proceedings. Instances where child marriages come to the notice of the courts are either habeas petitions or criminal cases of alleged kidnapping or abduction.

Habeas cases are those where a female has contracted a marriage of her own choice but her age is either below the legal age of marriage or her parent's family claims it to be lower than that, thus making the point that she was not capable of giving consent for marriage on her own.

Child marriage or even promising a child marriage in a watta satta arrangement has been declared by the court to fall within the ambit of slavery.

In *Ms. Haseena and another V Senior Superintendent of police Dera Ghazi Khan*³⁰ a Nikah between two adults was being solemnized. At the time of marriage a 3 year old minor girl from the groom's family was promised to a man from the bride's family and it was agreed between the parties that the rukhsati would take place once the girl in question attained puberty. This promise was also recorded in the Nikah Nama in column 16 (which is for recording any property that is given in lieu of dower).

²⁸ Section 6 (1) CMRA 1929.

²⁹ Section 6(2) CMRA 1929

³⁰ 2000 YLR 2882.

When the girl attained marriageable age, she was married off to someone else and the man from the bride's family to whom she was promised filed a case of zina (extramarital sex) against the girl and her husband.

In reviewing the contents of column 16 the High Court held that the entry of the arrangement that had been decided on between the parties was against Article 11 of the Constitution which forbids slavery in any form.

The Court went on to hold that specifying the name of a person in a column meant for money or money's worth is a violation of the dignity of the individual along with being a violation of the CMRA and quashed the criminal case, fining both the complainant and the police officer who had registered and investigated the case.

In the case of *Muhammad Aslam V The State*³¹ a fourteen and a half year old girl was abducted and the accused took the plea that he had contracted a marriage with her. This plea was rejected by the Trial Court and the accused was convicted of kidnapping and rape. The Federal Shariat Court, on appeal, upheld this conviction. The Court referred to the Child Marriage Restraint Act and held that the girl in question did not possess the capacity to contract a marriage. Moreover the Court held that the accused was 44 years of age and old enough to be her father. Within this context the question of free consent and intelligent choice did not arise.

Remedies:

The remedies available under Muslim Family Law include:

Option of Puberty:

A female given in marriage by her father or other guardian before the age of 16 has a legal right to repudiate her marriage before attaining the age of 18, provided the marriage has not been consummated. As per the interpretation of Higher Courts, till the age of 18 such a marriage is inchoate and liable to dissolution through unilateral repudiation by the girl. The right of annulment continues until she ratifies it by express words or by cohabiting with the husband or by asking for dower or maintenance.

Once the option of puberty is exercised the marriage stands dissolved. The law does not describe a specific mode of repudiation. It can be through clear expression or a refusal to cohabit with the man she is married to. It can be in any form which should establish that she has "rejected" the marriage she was given in by her father or guardian. This act of repudiation is called exercise of the option of puberty. Repudiation has to be established like any other fact. The procedure is that after having repudiated the marriage in any recognized form the female married below the legal age of marriage files a suit before the Family Court for a declaration with regard to the repudiation of the marriage.

When such a matter comes to court, the court is not dissolving the marriage but is recognizing the repudiation of the marriage by the plaintiff female in her exercise of the option of puberty.

³¹ 2012 PCrLJ 11.

Consummation in the age of minority does not destroy the right of the option of puberty – though the statutory provision granting the right of the option of puberty states that this right exists provided the marriage is not consummated. The Higher Courts have interpreted this to mean that anything done during minority would not destroy this right. Cohabitation of a minor girl does not destroy her right of the option of puberty. The law states that the option of puberty is available so long as the marriage has not been consummated but the Courts have taken a broad view of this and through judgments stated that the option is available even in the event of consummation so that the girl's options are not limited.

The courts are also of the view that the fact that the marriage has been consummated may not be enough to validate the marriage³².

If the option of puberty cannot be exercised, the female can file a suit for khula.

For men the right to repudiate such a marriage continues until the marriage is ratified expressly or impliedly, for example by payment of dower or by cohabitation.

Forced Marriages

As has been stated earlier, free consent is an essential requirement of a valid Muslim marriage and a marriage where there is no consent or where the consent has been obtained through force or misrepresentation is void³³

There are some forms of forced marriage that are punishable offences under certain provisions of the Pakistan Penal Code (PPC) or any other law enforced.

Under Section 498-B of the PPC coercing or compelling a woman to get married is recognized as a forced marriage under the Penal Code. The Section states: *whoever coerces or in any manner whatsoever compels a woman to enter into marriage shall be punished with imprisonment for either description for a term, which may extend to seven years or for a term which shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.*

Giving a woman in marriage in order to settle a dispute is also an offence under the law. according to **Section 310A of the PPC** states: Punishment for giving a female in marriage or otherwise in badla-e-sulh, wanni or swara.- *Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, wanni, or swara or any other custom or practice under any name, in consideration of settling a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.*

Kidnapping or abducting a woman with the intention to compel her to marry against her will is also recognized as a crime punishable with imprisonment for life and is also liable to a fine.

³²Behram Khan V Akhter Begum 1952 PLD Lahore 548.

³³Matloob Hussain V Mst. Shahida & 2 Others PLD 2006 SC 489.

The fine amount is at the discretion of the courts as per the facts and the circumstances of the case. Section 365-B of the PPC states: ***Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced, or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this Code, or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.***

Exchange marriages, more commonly known as watta satta marriages, can be another form of forced marriage where during the marriage ceremony a woman from the groom's side of the family is either given in marriage or promised in the future as part of an exchange. Under Muslim law a marriage between two parties cannot bind two parties and hold them to contracting a Nikah in the future. Every Muslim marriage is a separate valid contract and does not need an earlier contract for its enforcement or validity.

If a woman is forced into a marriage because of a watta satta arrangement then that is something that also falls within the definition of forced marriage under Section 498-B of the PPC.

Remedies against Forced Marriage:

A criminal case can be registered against the offender under the relevant criminal laws and relief can also be sought under personal status laws.

Criminal proceedings can be initiated by the woman against the perpetrator(s). She can register a case with the police if the offence is cognizable³⁴. If the offence is non-cognizable³⁵ then she can file a complaint before the Magistrate.

The offence of forced marriage under Section 498-B of the PPC along with the offence of giving women as settlement of a dispute are both non-cognizable, thus only a complaint before the Magistrate.

The complaint can be filed by a woman or a close relative of hers.

Other than the criminal proceedings for the purpose of prosecuting the offender, the termination of the forced marriage may require a separate suit before the Family Court. The penal provisions mentioned earlier in relation to forced marriage don't make such a marriage void in all cases. For example, giving a woman in marriage as vani or swara carries a punishment but does not itself render the marriage void.

Where a woman has been abducted or kidnapped and forced into a marriage, the Court can declare the marriage void and award a criminal conviction to the accused.

³⁴Offences for which the Police have the power to investigate and arrest the accused. These are often serious offence with a sentence of 3 or more years of imprisonment.

³⁵ These are offences for which the Police do not have the power to investigate without the prior permission of the Magistrate and can only arrest an accused after a warrant has been obtained which is issued by the Magistrate or other relevant court.

If the accused is acquitted in the case of an alleged forced marriage, it does not affect the concerned female's right to avail remedies under the Family Laws. An outcome of a criminal case does not have any bearing on a civil case.

Jactitation of Marriage:

A woman who has been forced into a marriage can have the marriage declared null and void by filing a suit for jactitation of marriage.

This suit is filed by the person who is affected by a false claim of marriage by another person. The purpose of the suit is to obtain a declaration that no marriage exists or has ever existed between the two parties and the person claiming the existence of the marriage be restrained from making such claims³⁶. In case of forced marriage the plaintiff woman will claim that no valid marriage took place because of lack of her consent or consent having been obtained through force or coercion.

A suit for jactitation can even be filed where the man claiming marriage has obtained a decree for restitution of conjugal rights³⁷ that is, where a wife refuses to live with her husband without any lawful cause, the husband is entitled to sue her for the restitution of conjugal rights and similarly, the wife has the right to demand fulfillment by the husband of his marital duties. Moreover of the claim of marriage is based on a forged Nikah Nama then an order for cancelling the Nikah Nama can also be obtained in this suit³⁸.

Under Section 23 of the Family Courts Act 1964 Family Courts are barred from questioning the validity of a marriage that has been registered under the MFLO. But this restriction is not applicable in a suit for jactitation of marriage and the superior courts have held that this bar is meant for situations where all the conditions of a valid marriage have been satisfied and the marriage is otherwise valid under Muslim law. Where, however the marriage has been solemnized through fraud or coercion then that marriage will not be exempt from scrutiny.

Suit for Khula:

If a suit for jactitation is not successful the woman can file a suit for dissolution of marriage on the basis of khula or any of the other grounds provided (if available) for in the Dissolution of Muslim Marriages Act 1939.

³⁶Amina Begum V Ghulam Nabi and 2 Others PLD 1974 Lahore 78.

³⁷ Muhammad Rafiq V Family Court PLD 1985 Lahore 613.

Where a wife refuses to live with her husband without any lawful cause, the husband is entitled to sue her for the restitution of conjugal rights and similarly, the wife has the right to demand fulfillment by the husband of his marital duties.

³⁸Nazar Qasim V Mst. Shaista Parveen 1979 CLC 462.

In watta satta arrangements it needs to be determined whether the marriage has taken place or whether there is a promise of an exchange marriage. In the latter case, if the man claims that the female is his wife then she can file a suit for jactitation.

Where a female is forced into such a marriage then along with a suit for jactitation the woman also has the option of filing for dissolution on the basis of khula or any of the ground given in the Dissolution of Muslim Marriages Act (DMMA) 1939.

Weaknesses in Implementation:

Dissolution of Marriages

Dissolution of Muslim Marriages Act (DMMA) 1939

The DMMA lays down the grounds for dissolution of marriage that relate to the conduct (fault) of the husband.

These include: (1) whereabouts of the husband not known for 4 years; (2) wife has not been maintained for 2 years; (3) association with women of ill-repute or leads an infamous life , or forces her to live an immoral life, (4) no conjugal relations without a reasonable cause for a period of 3 years; (5) cruel conduct (physical, mental torture, financial, emotional abuse) by the husband (6) obstructs wife in observance of her religious profession or practice (7) husband has taken another wife in contravention of the procedure for polygamous marriage given in MFLO, (8) husband has more than one wives and does not treat his wife equitably; (9) option of puberty; (10) any other form of divorce recognized under Muslim personal law etc.³⁹

The general perception is that a woman only has the avenue of a khula available to her. That is incorrect. The other options available to her are mentioned below.

Divorce

A marriage performed under Muslim law can be dissolved in one of the following ways:

- **Unilaterally** by the husband by pronouncing talaq and following the procedure given in Section 7 of the MFLO. If the wife has the delegated right of talaq she can also dissolve the marriage unilaterally following the same procedure as is stipulated for the husband for dissolution of marriage in the form of talaq (and not a khula just because it is initiated by the woman).

³⁹ This is the wording of the Act meant to provide a basis for grounds not envisaged by the legislature at the time the statute was enacted.

- **Mutually**, by the husband and wife. This form of dissolution is called Mubar'at. The parties have to follow the procedure given in Section 7 of the MFLO. The difference is that in case of talaq by husband or through the wife's exercise of delegation of right of talaq the notice to the Chairman is given by the husband or by the wife as the case may be. In Mubar'at it is a joint notice with the signatures of both husband and wife.
- **Dissolution through decree of the Family Court.** If a woman wants to seek dissolution of marriage she has to obtain a decree from the Family Court if she does not have the delegated right of talaq or the option of mubar'at is also not available. She can obtain a decree of dissolution either on the basis of khula or on any other ground provided in the Dissolution of the Muslim Marriages, Act (DMMA) 1939, depending upon the facts and circumstances of her case.

Note: Under the law (MFLO) enforced in Pakistan no dissolution of marriage, irrespective of its form including talaq, is effective immediately. Also, dissolution of marriage in any form is revocable within the specified period. It can be revoked by the party effecting it. Only in the case of Mubar'at one party can't revoke it; it has to be done jointly both by the husband and the wife.

Talaq

Section 7 of the MFLO describes the procedure to be followed by a husband who wants to dissolve his marriage in the form of talaq.

After pronouncement of talaq in any form, (verbal or written) the husband has to give a notice of talaq to the Chairman Union Council (where the wife is residing at the time of pronouncement of talaq) with a copy to the wife.

On receipt of such a notice, the Chairman is to form an Arbitration Council consisting of one representative each of the husband and the wife and the Chairman himself.

The Arbitration Council attempts a reconciliation between the parties, but if the reconciliation fails and the 90 days period expires (from the date of receipt of notice by the Chairman), the talaq becomes effective unless the husband has revoked it, expressly or otherwise, within this period of 90 days.

Note: In case of the wife being pregnant, the period of reconciliation is till the delivery of the child or 90 days whichever, ends later.

No Court order is required to make the talaq effective. The Chairman records the proceedings of the Arbitration Council and in case of no reconciliation within the given period of 90 days, he records the fact of non-reconciliation between the parties. He is to provide a copy of this recording to each party.

Once the first notice is received the 90 day period is considered as having begun and the parties are called thrice (once after every 30 days) to appear before the Chairman Arbitration Council where they are asked if any reconciliation between the parties is possible and so there is little room for confusion as regards whether the parties are reconciled or not. Even if one party wants to reconcile, the other has to accept it.

The general practice of the Union Council issuing a certificate declaring the talaq effective has no legal basis. There is no such thing as a talaq certificate but both perception and practice have overpowered the legal position. The Chairman only has to record what transpired and the key information is whether the reconciliation succeeded. He does not have any legal authority to declare the talaq effective.

No talaq is affected immediately after pronouncement. There exists a misconception that if a man proclaims the triple talaq that the talaq is effective immediately. This is not so. Regardless of how many times the talaq is proclaimed it will only be considered as having been proclaimed once.

Legally, from the date on which the notice of talaq from the husband is received by the Chairman the 90 days period begins for efforts of reconciliation. In case of non-representation of both parties the Chairman will act alone as the Arbitration Council.

This procedure gives the parties the opportunity for reconciliation and ensures that there is no ambiguity over when the talaq took place, and whether it took place at all or not.

This 3 month period allows the husband and wife time to reconcile, if they so wish, and stop the proceedings. If however the parties do not want to reconcile then the repeated refusal before the Chairman of the Arbitration Council does not leave room for any kind of ambiguity.

The husband has the authority to revoke the talaq during this period expressly (verbally) or through his conduct (by cohabiting with the wife or any other action that nullifies the talaq).

The same procedure is to be followed in case of exercise of Talaq-e-Tafveez (delegated right of talaq) by the wife.

Mandatory points are that notice has to be given to the correct forum and it is immaterial if the Arbitration Council is constituted or not.

Talaq given without following this procedure may not be recognized by the law. A talaq pronounced but not proceeded upon is considered revoked by the Courts. This law has curbed the immediate termination of marriage and given the parties a chance to reconcile. The 90 day period is iddat (waiting period) by the wife. If the woman is pregnant then the iddat period is till the delivery of the child or 90 days whichever is longer. If the notice is valid the law does not allow for the proceedings to be stretched beyond 90 days.

Mubaraat

Mubarat is dissolution with the mutual consent of both the parties. The procedure for mubaraat is the same as the one for talaq, the only difference being that the notice of mubarat is given jointly to the Chairman Union Council. In mubarat there is no need for a pronouncement of talaq. The only requirement is that through mutual consent the marriage is terminated. Any of the parties can initiate the proceedings.

Divorce through Judicial Process (Khula)

Khula is a specific form of dissolution of marriage obtained by the wife through the judicial process.

The specific procedure for khula in statutory form was enacted in October 2002⁴⁰. Prior to this statutory enactment, khula was recognized and the law on khula evolved through judicial pronouncements. In the *Khurshid Bibi* case⁴¹ the Supreme Court of Pakistan enunciated the law on khula.

Procedure for Khula:

The wife files a suit before the Family Court having jurisdiction over the area of her residence at the time of filling the suit. The Court issues a notice to the defendant husband and sends him a copy of the plaint along with any other document attached by the wife in her plaint.

The husband in his written reply can file a counter suit for the restitution of conjugal rights. The Court on the first day of the appearance of the defendant husband tries to effect reconciliation between the parties.

If the reconciliation fails the Court orders the decree of khula and may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty five percent of her admitted prompt dower to the husband.

Subject to the condition as regards the surrender of part of prompt or deferred dower to husband, the Court shall direct the husband to pay whole or part of the outstanding deferred dower to the wife.

The Court shall within three days of the issuance of the khula decree, send a certified copy of the decree to the concerned Chairman of the Arbitration Council. The decree shall be sent by registered post or other means. The Chairman on receipt of the decree shall proceed for reconciliation between the parties as if he had received intimation of Talaq under section 7 of the MFLO.

As is clear from the procedure for khula described earlier that in a suit of dissolution of marriage there is no trial. The woman does not have to give a reason for khula, which she has to prove to the satisfaction of the Court. In the plaint she has to mention the cause of action which prompted her suit for khula but is not required to give evidence to prove it. Since no evidence needs to be provided, the woman can give any reason for seeking khula.

Misperceptions about Khula and Dower:

The law on khula evolved through judicial pronouncements. In the *Khurshid Bibi* case (mentioned earlier) the Supreme Court of Pakistan enunciated the law and gave guidelines regarding any kind of return a woman has to make to the husband on obtaining khula.

The return, if any, a woman is to make to the husband is called Zari khula (price of khula). The Court explained that the authority to determine what is to be returned (if anything at all) and in what amount will rest with the Court.

⁴⁰ Section 10 of the Family Courts Act, 1964 was amended.

⁴¹ PLD 1967 SC 91.

The implementation as regards the law on khula has been varied despite the guidelines in the *Khurshid Bibi* case and the perception that a wife has to either return the entire dower (if paid) or forgoes it (if not paid) continues to persist.

The 2002 amendments in the Family Courts Act, (amendment in section 10 of the Act) clearly establishes that a woman obtaining khula is to only return part of the dower paid at the time of marriage. If no dower was paid at the time of marriage, she is not required to return any and retains the right to claim the unpaid dower. The current law on khula as applicable in the province of Punjab has been explained earlier. Since such a case has never appeared in court; there is no case law detailing how a judge would deal with it.

Criminal Liability of a Nikah Khawan or a Nikah Registrar?

Criminal liability depends upon two basic factors, intent and action. To bring a Nikah Khawan or a Nikah Registrar, as the case may be, under criminal liability in a criminal case of a forced marriage the key factor will be the question of if he was aware that the marriage being solemnized by him was in any form a forced marriage. It is responsibility of the marriage solemnizer to see if the bride has consented to the marriage or not. In practice, in a case of even forced marriage there may not be any apparent indication of consent being forced. A Nikah Khawan or a Nikah Registrar can be made party to the criminal case if there is evidence that the Nikah was performed and/or registered by him despite knowing it was forced.

Glossary of Common Terms

Badal-e-sulh: giving a woman as compensation or consideration for compromise so that feuds or disputes between families or tribes etc. come to an end.

Bari: is what is given to the bride by the boy's family and commonly includes clothes and jewelry.

Bride price: is actually the opposite of dowry and is money paid by the groom to the bride's parents or family at the time of marriage. This practice is more prevalent in KPK and Balochistan and goes by the name of walwar or sar (KPK) and lub (Balochistan).

Jahez: is what the bride's family gives her at the time of marriage and commonly includes jewelry, household items and clothes etc.

Mahar: is dower which is decided between the parties and is a right of the wife guaranteed by law. It is one of the pre-requisites of a valid nikah.

Wanni or swara: is a custom practiced in Pakistan's rural areas, especially in Punjab and Khyber Pakhtunkhwa where a minor girl is given in marriage to settle crimes such as murder, or zina (fornication or adultery), or settling debts, or for compensation of abduction or kidnapping.