

Islamic Law and Tradition of Dowry and Recovery through Family Courts¹

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A dowry is a gift given by the bride's family to the groom and the newly formed household at the time of their marriage. Historically most societies have had brides go to their husband's families, and often women could not legally own property. The husband would be primarily responsible for the economic prosperity of the household, while women would care for children and the household needs. When a woman or girl married into a family that was agricultural, she often was welcomed as another worker. In families that were more prestigious, however, she may have been viewed as another mouth to feed, and the dowry was an important sign of her gratitude for becoming a member of her husband's family. The earliest dowries were usually land entitlements, but later were attached to sentimental and decorative items as well as various commodities and even later to money.

In the first era of Islam marriage was a simple affair, without pomp or ceremony. Any expenditure incurred in its performance was quite minimal, and not a burden on either family. Indeed, the Prophet stated: **'the most blessed marriage is one in which the marriage partners place the least burden on each other.'**¹ Nowadays, much difficulty and hardship can be caused by the setting and giving of dowries, bride-prices and mahr - not to mention enormous wedding feasts and celebrations in some cultures which bring a most unreasonable financial burden on the families concerned. Financially crippling celebrations are totally in opposition to the spirit of Islam, and are not necessary. They are purely a matter of the culture of certain regions. No Muslim should feel obliged to continue these un-Islamic traditions, or be embarrassed about breaking with their old cultural traditions.

The custom of giving dowry (**jahez**) is not part of Islam, although it actually seems to be on the increase among several Muslim cultures, notably those of Indian, Pakistani and Bangladeshi origin, even when they have settled in the UK or USA. In fact, it is a practice which has never been sanctioned by Islam and is not prevalent amongst Muslims of other cultures. It seems to be in imitation of ancient Hindu culture in which daughters were not given any share in the family property, but were given payments, part of which might be in the form of household goods, as a measure of compensation. Islam granted daughters a rightful share in their family property and inheritance.

A 'bride-price' is either an amount of money, goods or possessions given to the bride by the bride's family at the time of her marriage, in order to attract a good husband for her. It would in effect become the property of the husband or his family upon his marrying her. This is a totally un-Islamic practice. In Islam, women are not 'owned' by their families and should not be 'traded with' in this manner. It is an insulting practice. An amount of money demanded from the bridegroom or his family by the bride or her family, usually the bride's father, without which the

¹ (*al-Haythami, Kitab ab-Nikah, 4:255*).

daughter will not be given in marriage. In the 'jahiliyyah' society before Islam, this money was regarded as the property of the girl's guardian.

The matters of fathers giving the bride gifts of money or property, or paying for an enormous wedding feast, or providing a home, or setting her up in her home with furniture and household effects are left to the discretion of the people involved in Islam. The Prophet himself saw to the marriages of his four daughters. He gave his daughter **Fatimah** various gifts when she married **Ali b. Abu Talib**, but there is no record of his having given anything to his other daughters on the occasion of their marriages. Had such gifts been a recommended Sunnah, he would surely have given the others gifts as well. Moreover, the gifts given to Fatimah were extremely modest household articles. The Prophet gave Abu Bakr some money and asked him to accompany Bilal and Salman, (or Ammar Ibn Yasir) to buy some household necessities for Fatima's house. The Prophet said to Abu Bakr: "**Buy some appropriate household necessities for my daughter with this money.**" Abu Bakr said: "He gave sixty-three (63) dirhams, so we went to the market and bought the following:

1. Two mattresses made of Egyptian canvas (One stuffed with fiber and the other with sheep wool)
2. A leather mat
3. A pillow made of skin, filled with palm tree fiber
4. A Khaibarion cloak
- 05 An animal skin for water
6. Some jugs and jars also for water
7. A pitcher painted with tar
8. A thin curtain made of wool
9. A shirt costing seven dirhams
10. A veil costing four dirhams
11. Black plush cloak
12. A bed embellished with ribbon
13. Four cushions made of skin imported from Ta 'ef stuffed with a good smelling plant
14. A mat from Hajar
15. A hand-mill
16. A special copper container used for dyestuff
17. A pestle for grinding coffee
18. A (water) skin.

When Abu Bakr and the other companions had bought the above-mentioned articles, they carried them to Um Salama's house. When the Prophet saw them, he started kissing every article and supplicated to Allah, saying: "**O Allah, bless them! For they are people who the majority of their belongings are made of natural materials.**"

A woman holds a very high status in the Islamic faith. She is honoured and respected at all times, but many startling transgressions have crept into Islamic practice. These transgressions have been caused by cultural influence that has no basis in Islamic scripture. Muslims living in the Indian subcontinent have slowly incorporated the act of dowry into their lives. Dowry originated in the upper caste Hindu communities as a wedding gift (cash or valuables) from the bride's family to the groom's family. There is nothing strange or unique about a culture influencing Muslim practice, as it is a common characteristic around the globe that when a new religion spreads in an area, people who live in that area retain some of the customs and traditions which they have been practicing for centuries. There is nothing wrong with this as long as those practices do not contradict Islamic law. The practice of dowry, however, does in fact transgress Islamic law.

We usually use the word gift for something, which we give voluntarily, to a person we like. A gift is something that strengthens the friendship bond between two people. Dowry, which is usually defined as a "gift" given along with the bride, by a bride's family to the bridegroom, is used as a tool of coercion and greed in societies like Pakistan. The bride's family must give this

"gift" or the marriage will not take place. Always the price of the dowry is set higher than the bride's family can afford and sadly, this results in the bride becoming burden on her family. The bride's family then struggles to pay the "gift".

In Islam it is the man who pays the Mahr (dower) to the woman. The verses in the Qur'an prove that it is the man who is obligated to pay the Mahr (dower) to the woman unless the woman chooses not to take it.²

Cultures that demand dowry from the bride's family are actually practicing the opposite of what Allah has commanded. They have reversed Allah's words in their practice. The bride is forced to pay a negotiated amount to the groom unless the man chooses not to take it. When the woman brings less than the negotiated amount, she has to endure constant torture from her in-laws after marriage. When the husband or in-laws are not satisfied with the dowry brought by the bride, they even go to the extent of killing the woman after marriage. The most severe among all the dowry abuse is "bride burning". The parties engaged in the murder usually report the case as an accident or suicide.

Dowry abuse is rising in Pakistan despite a **Dowry and Bridal Gifts (Restrictions) Act 1976**. Many women remain unmarried due to this dowry. Another common practice is that people 'exchange' their sons. In other words, they give a bridegroom (mostly their son) to a girl to be married in exchange for a bridegroom from the girl's family (the bride-to-be's brother or any unmarried male relative) so that they can have their daughters married without dowry. This places an incredible disadvantage on the parents who have daughters and no sons. The parents of daughters having to give money to get their daughters married!

It is a sad irony that women (mostly mothers-in-law) are oppressive towards other women (daughters-in-law). Mostly, mothers-in-law-to-be are the ones who demand dowry from the bride's family and who end up torturing the daughter-in-law after marriage if she brings less than the negotiated amount. So in an effort to respect parents and to conform to cultural norms, Muslim youth in Pakistan are bending over backwards to follow traditions that aren't even rooted in Islam. Demanding dowry and getting married may seem valid in the eyes of many, but will the marriage be validated in the eyes of Allah?

Dowry is purely a matter of culture. One should not feel obliged to continue these un-Islamic traditions. If a culture contains un-Islamic aspects, then one should not feel any shame to break the culture's traditional practices. The practice of dowry has caused Muslims in many parts of the world to continue their prejudices against women despite the Islamic prohibitions against it. In Pakistan, a woman is considered to be a great burden mainly because of the dowry system. Here, it is common to see people rejoicing over the birth of a son and lamenting over the birth of

² *"And give women (on marriage) their dower (Mahr) as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer." (An-Nisa' :4) Also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with Mahr (dower, a bridal money given by the husband to his wife at the time of marriage) from your property, -desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise. (An-Nisa' :24)*

daughter. In Pakistan, the reason why people prefer male children over female children is mainly due to cultural practices such as dowry. Why aren't people listening to the message of Islam instead of following the customs of others around them?

Allah has given us warning of this in the Qur'an. Allah tells us that infanticide is a grave sin and that favouring one gender over the other has no grounds in Islam. When news is brought to one of them, of (the Birth of) a female (child), his face darkens and he is filled with inward grief! With shame does he hide himself from his people because of the bad news he has had! Shall he retain her on (sufferance) and contempt, or bury her in the dust? Ah! What an evil (choice) they decide on? ³

As Muslims, we should consider the birth of daughters to be a great blessing. In addition to the Qur'an, the Hadiths also carry the message to value women.

Malik reported Allah's Messenger (may peace be upon him) as saying: **He, who brought up two girls properly till they grew up, he and I would come (together) (very closely) on the Day of Resurrection, and he interlaced his fingers (for explaining the point of nearness between him and that person).** ⁴

Narrated 'Aisha: (the wife of the Prophet) **A lady along with her two daughters came to me asking me (for some alms), but she found nothing with me except one date which I gave to her and she divided it between her two daughters, and then she got up and went away. Then the Prophet came in and I informed him about this story. He said, "Whoever is in charge of (put to test by) these daughters and treats them generously, then they will act as a shield for him from the (Hell) Fire."** ⁵

Islam stresses fairness and kindness. Islam ensures that boys and girls are treated equally. Discrimination between children because of their gender is not advocated in Islam. It is so unfortunate to see people submitting themselves to the dictates of culture rather than the will of **Allah, who is our Creator, Cherisher and Sustainer.**

Let us not succumb to the '**fitna**' caused by culture and let us stand firm in practicing Islam by enjoining what is right and forbidding what is wrong! ⁶ In Islam, the dowry or the mahr, is clearly stated as an obligation by the groom to his bride in the Quran. Allah says in the Quran, **"And give the women their Mahr as a free gift..."** ⁷ **Islam also guarantees the bride has the right to keep the dowry in any event."** **But if you had given the latter a cantar for dower (mahr) take not the least of it back...** ⁸

³ (An Nahl: 58-59),

⁴ [Sahih Muslim: Book 032, Number 6364]

⁵ [Sahih Bukhari :Volume 8, Book 73, Number 24],

⁶ 'Let there arise out of you A band of people inviting to all that is good, Enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity.'
(Al-Qur'an: Aal-e-Imran: 104),

⁷ Quran [4:4].

⁸ Quran [4:20].

Prophet Muhammad's (pbuh) in Last Sermon

".....O People, it is true that you have certain rights with regard to your women, but they also have right over you. If they abide by your right then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friends with any one of whom you do not approve, as well as never to commit adultery.....⁹

Nothing could be more un-Islamic than ostentation. It is ridiculous to attempt to justify flamboyant displays of wealth in lavish gifts or feasting by citing the Prophet's extremely modest gifts to Fatimah. As soon as a daughter is born, the family in general and the father in particular starts calculating the huge financial burden that lies ahead of him. Whereas a Muslim father seizes, the same opportunity with both his hands as his Prophet (pbuh) has promised him heaven or paradise for bringing up his daughter the way he takes care of his male child. A Muslim father does not have to bother for dowry, as there is nothing called 'Dowry' in Islam. On the contrary, Islam enjoins the groom to give a 'Bridal-Gift' or 'Dower' as a token of love and assurance to his would be wife at the time of marriage. In fact without payment of this sum, the marriage cannot get solemnized. The Holy Qur'an instructs the believers

"And give the women (whom you marry) their dower (obligatory bridal gift) happily" (4:4)

Whatever the reasons, Islam does not approve of the dowry being a condition for marriage. It may be said that this is what is done in Pakistan. A dower is agreed between the two parties, but then it is forgone by the wife at a later stage. The fact is that the dower is treated as an awkward technicality. It is mentioned in the marriage contract but on the wedding night, the bride is taught by her family that she must tell the bridegroom that she has forgone every part of it. In other words, she is not doing it out of her own free will. She has no choice in the matter. The bridegroom expects that she would do that. If she does not do it, there may be trouble within the family, especially if the figure named is high. Perhaps neither the bride nor the bridegroom knows why they have to go through this process of naming a figure and forgoing its payment. Islam provides for a dower to be paid as a compensation for the woman in return for the obligation marriage imposes on her to be a good bed fellow to her husband. In other words, she is giving out of herself something to her husband, in consideration of which she is entitled to receive an amount of money in cash or kind, which she deems to be appropriate. Therefore, a woman's right to a dower is not lost unless she herself relinquishes it. For this reason, if the dower is not specified in the marriage contract, the woman does not lose her claim to it. She may ask her husband to give her something, which she deems to be satisfactory. If they can agree on a figure, then the same can be written in the form of an agreement, which will specify an amount, which is normally given to a bride in her social status.

It is now clear that the dower payable by the bridegroom is the one, which Islam requires in marriage. The dowry system is merely a tradition in certain societies. We cannot say to a man who wants to see his daughter married and, therefore, gives her suitor a dowry that he has done

something forbidden. We simply say to him that this is not the way Islamic marriage is arranged. It does not affect the validity of the marriage. Nor is it forbidden for the bridegroom to accept the gifts given to him by his father-in-law. But we should try to explain to the community that the dowry system impedes marriage and is not sanctioned by Islam. When people are aware of the tradition of the dowry may weaken within the Muslim community and it may give way to the proper Islamic tradition.

But despite all this the custom of dowry is prevalent in our society and there are certain presumptions regarding the dowry articles which are as under:

- a. On occasion of the marriage some bridal gifts and dowry articles are given by the parents of the bride and presents are also given by the family of bridegroom;
- b. The amount of dowry articles given by the family of the bride depends upon their economic conditions and status; which in any case is much more than rupees five thousand which is the restriction imposed in the Dowry and Bridal Gifts Restriction Act;
- c. The list of dowry articles is not prepared/maintained and signed by the parties at the time of marriage as this is considered to be a bad omen;
- d. In case of dispute between the husband and wife, when the wife leaves the house of the husband as a result of conflict she is not allowed to take with her the dowry articles (except from jewelry in some cases) which remain at the house of the husband.
- c. As per Islamic law and section 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976 the dowry and bridal gifts are the property of wife.¹⁰

Under **Section 3** of the **Dowry and Bridal Gifts (Restriction) Act 1976** the maximum ceiling of five thousand has been given regarding the aggregate value of the dowry and presents given to the bride by her parents.¹¹ This act provides the penalty of imprisonment which may extend to six months or with fine which shall not be less than the amount proved to have been spent in excess of maximum limit laid down in the Act under **Section 9**, on a complaint filed against violation of the act under **Section 8-A** of the Act to the Deputy Commissioner.¹² The **rule 4** of

¹⁰ Sec 5. Vesting of dowry etc., in the bride.- 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.

¹¹ Sec 3 Restriction on dowry, presents and bridal gifts.-(1) 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**;

Explanation. The ceiling of five thousand rupees specified in this subsection does not in any way imply that the dowry, bridal gifts and presents of a lesser amount may not be given.

(2) No dowry, bridal gifts or presents may be given before or after six months of nikah, awl, if rukhsati takes place sometime after nikah, after six months of such rukhsati.

¹² 8. List of dowry etc. to be furnished to Registrar.-(1) The parents of each party to a marriage shall furnish to the Registrar lists of dowry, bridal gifts and presents given or received in connection with the marriage.

(2) The lists referred to in subsection (1) shall be furnished,-

(a) in the case of property given or accepted before or at the time of the marriage, at the time of the marriage; and
(b) in the case of property given or accepted after the marriage, within fifteen days of its being given or accepted.

the **Dowry and Bridal Gifts (Restriction) Rules, 1976** framed in exercise of the powers conferred by **Section 10 of the Dowry and Bridal Gifts (Restriction) Act, 1976**¹³ provide for preparation of lists of dowry and presents given or received in connection with the marriage which shall be furnished by the parents of the bride in Form D-1 and lists of bridal gifts and presents given or received in connection with the marriage shall be furnished by parents of the bridegroom in Form D-2. In practice however at the time of marriage no such lists are prepared. As per Section 5 of the Dowry and Bridal Gifts (Restriction) Act, 1976 or property given as dowry and bridal gifts and all property given to the bride as presents shall vest absolutely in the bride.

It is the consistent view of the superior courts that articles of dowry, bridal gifts, presents and all other properties are the belonging of bride and the husband if deprives her of the same, she has the right to recover all these articles even though the same were given in contradiction of the provisions of **Section 3 of the Dowry and Bridal Gifts (Restriction) Act, 1976**.¹⁴ It is to be

(3) The lists referred to in subsection (1) shall -

(a) contain details of the property along with the value thereof; and

(b) be signed or thumb-marked by the persons furnishing to, the Registrar and attested by at least two witnesses.

(4) The parents of each party to a marriage shall furnish to the Registrar the details of expenditure incurred on the marriage, duly signed or thumb-marked by them within one week.

(5) The Registrar shall forward the lists furnished under subsection (1) and the details of expenditure submitted under subsection (4) to the Deputy Commissioner within fifteen days of receipt of such list or details of expenditure.

Sec 9. Penalty and procedure.- (1) Whoever contravenes, or fails to comply with, any provision of this Act or the rules made thereunder shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both, and the dowry, bridal gifts or presents given or accepted in contravention of the provisions of this Act shall be forfeited to the Federal Government to be utilized for the marriage of poor girls in such a way as may be prescribed by rules made under this Act;

Provided that if both the parents of a party to the marriage contravene, or fail to comply with, any provision of this Act or the rules made thereunder, action under this section shall be taken only against the father;

Provided further that if the parent who contravenes, or fails to comply with, any provision of this Act or the rules made thereunder is a female, shall be punishable with fine only.

(2) Any offence punishable under this Act shall be triable only by a Family Court established under the West Pakistan Family Court Act, 1964 (W. P. Act No. XXXV of 1961).

(3) No Family Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by, or under the authority of, the Deputy Commissioner within nine months from the date of niah, and if rukhsati takes place some time after nikah, from the date of such rukhsati.

(4) While trying an offence punishable under this Act, a Family Court shall follow the procedure prescribed by the Code of Criminal Procedure, 1908 (Act V of 1898), for the trial of offences by Magistrates.

¹³ *Sec 10. Power to make rule.-The Federal Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.*

¹⁴ *Sec 3. Restriction on dowry, presents and bridal gifts.- (1) 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;*

Explanation.-The ceiling of five thousand rupees specified in this subsection does not in any way imply that the dowry, bridal gifts and presents of a lesser amount may not be given.

(2) No dowry, bridal gifts or presents may be given before or after six months of nikah, and, if rukhsati takes place some time after nikah, after six months of such rukhsati.

noted that the marriages are registered under **Section 5** of the **Muslim Family Laws Ordinance 1961**¹⁵ and in the form of ‘**Nikahnama**’ prescribed by **Rule 8** of the **Muslim Family Rules 1961** in Form- II, which is to be filled and registered does not contain any entry regarding dowry articles.

The strength of a law consists in its implementation. Many of our laws are without teeth. They are mere show pieces. A good member of them is made just to pacify the people when they make a hue and cry about a particular problem. Once they are enacted no one is bothered about their implementation. People's participation is minimum in Pakistan due to illiteracy, ignorance and apathy of the common people. In a democratic system of government, laws cannot be implemented without the active participation and collaboration of the people.

Many of the laws enacted for the benefits of women are not implemented effectively due to the apathy and indifference of the law-enforcing agencies, such a police, bureaucrats, lawyers and judges. The situation can be changed only by awakening the conscience of the people, especially women, regarding their duty to become active partners in implementing the laws made for their benefits. Below are given some suggestions for the effective solutions to the problems relating to dowry articles.

1. The maximum ceiling for the bridal gifts should be increased to **rupees two lac** by amending **Section 3** of the **Dowry and Bridal Gifts (Restriction) Act, 1976** to make it more realistic.
2. The **Nikah Nama Form** prescribed by **Rule 8** of the **Muslim Family Laws Rules, 1961** under **Section 5** of the **Muslim Family Laws Ordinance, 1961** should be suitably **amended** to include an **entry regarding dowry articles**.
3. It is recommended that offering dowry in any form be made an offence just like demanding dowry is explicitly made an offence. A **new section 3-A** in the **Dowry and Bridal Gifts (Restriction) Act, 1976** should be inserted:

2009 MLD 998 Rehan Iqbal Balooch Vs Presiding Officer, 2008 YLR 1124 Shariat-Court-Azad-Kashmir Shaukat Hayat Vs Mst. Shabnam Akhtar , 2006 CLC 1393 Mst. Nasim Sharif Vs Imtiaz Ali Khan, PLD 2004 Lahore 290 Mst. Shahnaz Begum Vs Muhammad Shafi, 2004 YLR 1932 Supreme-Court-Azad-Kashmir Muhammad Mafrooz Vs Mst. Shafeen Akhta, 1995 SCMR 885 Muhammad Tazeel Vs Khair Un Nisa.

¹⁵ Sec5. Registration of marriage.--(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

(5) The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of nikahnama shall be supplied to the parties, and the fees to-be charged thereof, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or ;btain a copy of any entry therein.

“Penalty for demanding dowry. If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.”

4. Women's organizations must be formed and registered wherever possible in view of strengthening women and to enable them to fight for their rights. Initiative must be taken by women's organizations to study the laws critically, to find out their loopholes, and to suggest ways and means to amend them, and implement them effectively. Women legal researchers must interview police officers, bureaucrats, lawyers, judges and common people to get their opinions on the efficacy of the Dowry and Bridal Gifts (Restriction) Act, 1976 Act and the problems faced in implementing its provisions.
5. The **Section 5** of the **West Pakistan Family Courts Act, 1964**¹⁶ deals with the jurisdiction of the Family Courts and provides that the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate specified in part-I of the schedule. It is to be noted that **Section 17** of the West Pakistan Family Courts Act, 1964 makes the provisions of the **Code of Civil Procedure Code, 1908** and **Qanun-e-Shahdat Order, 1984**¹⁷ inapplicable to proceedings before Family

¹⁶ Sec 5. Jurisdiction.—(1) Subject to provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule Part I of the Schedule

SCHEDULE

(See Section 5)

Part I

Dissolution of marriage, Khula

Dower.

Maintenance.

Restitution of Conjugal rights.

Custody of children, and the visitation rights of parents to meet them

Guardianship.

***[Jactitation of marriage].*

**[“8. Dowry.”]*

"9. Personal property and belongings of a wife.

PART II

Offences and aid and abetment thereof under sections 337-A(i), 337-F(i), 341, 342, 343, 344, 345, 346, 352 and 509 of the Pakistan Penal Code (Act XLV of 1860)."

*** Inst. by W.P. Act 1 of 1969, S. 8.*

** Added by Act 1 of 1997, dated 1.1.1997.*

** Words added by Family Courts (Amendment) Ordinance 2002*

¹⁷ Sec 17. Provision of Evidence Act and Code of Civil Procedure not to apply.--(1) Save as otherwise expressly provided by or under this Act, the provisions of the Evidence Act, 1872 Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984) and the Code of Civil Procedure 1908, *[except sections 10 and 11], shall not apply to proceedings before any Family Court in respect of Part I of Schedule

** Words added by West Pakistan Family Courts (Amendment) Act of 19()7, S. 2.*

(2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts.

Court in respect of Part-I of the Schedule. The Schedule of the West Pakistan Family Court Act, 1964 was amended vide **Family Courts (Amendment Act) (VII) of 1997** whereby **item 8** regarding dowry was added. Thus, in 1997 through this amendment the suit for recovery of dowry articles became a family suit and prior to that it used to be to be a civil suit. The whole problem regarding recovery of dowry articles and appreciation of evidence started with this amendment as from then onwards the provisions of CPC and Qanun-e-Shahdat became inapplicable. Another complex situation arose when the Chief Justice Committees meeting issued directions to the Judges of the Subordinate Courts to substitute to examination of Chief of a witness for an affidavit to be sworn by him in Family cases and Rent matters in year 2001.

The provisions relevant on the question of recording of examination in chief are contained in **Article 2(c) of the Qanun-e-Shahdat Order**¹⁸ which is part of the examination of a witness or his evidence. An affidavit on behalf of the witness that too without any order having been by the court under **Rule 1 of Order XIX CPC** or without any agreement by the parties to dispense with the ordinary mode of evidence i.e. (**Order XVIII Rule 4 CPC**) cannot be acquitted with the examination of such witness recorded orally in open court in the presence of and under the personal discretion and superintendence of the Judge. An affidavit replacing an examination in chief may contain irrelevant and scandalous facts which the court otherwise shall not allow to be deposed when the deponent is before the court as a witness. The opposite party would definitely subject the deponent to cross examination on such fact as well. Resultantly, the court time which is sought to be saved by the filing of affidavits in place of an examination in chief, is likely to be consumed more if such an affidavit happens to be submitted.

As regards the family suits **Section 11 of the West Pakistan Family Courts Act, 1964** governs the recording the evidence of the Family Court. Sub Section 4 of the Section reads as under:-

“(4) The Family Court may permit the evidence of any witness to be given my means of an affidavit;

“Provided that if the court deems fit, it may call such witness for the purpose of examination in accordance with subsection (3)”

The subsection (3) provides for a witness to give evidence in his own words, but a party or his counsel may examine, cross-examine or re-examine him.

A combined reading of **Section 11**¹⁹ leads to the conclusion that ordinary mode of giving evidence before a Family Court is by examination of a witness in the court and that it is only with

¹⁸ Sec 2 (c) "evidence" includes--

(i) all statements which the Court permits or requires to be mad before it by witnesses, in relation to matters to fact under inquiry such statement are called oral evidence; and

(ii) all documents produced for the inspection of the Court, such documents are called documentary evidence;

¹⁹ **11. Recording of evidence.**--(1) On the date fixed for the *[recording of the evidence], the Family Court shall examine the witnesses produced by the parties in such order as it deems fit.

* Subs. by W.P. Family Courts (Amendment) Act (1 of 1969) S 7 (a).

(2) The Court shall not issue any summons for the appearance of any witness unless, within three days of the framing of issues, any party intimates the Court that it desires a witness to be summoned through the Court and the Court is satisfied that it is not possible for such party to produce the witness,

*[(3) The witnesses shall give their evidence in their own words;

Provided that the parties or their counsel may further examine, cross examine or re-examine the witness:

Provided further that the Family Court may forbid any question which it regards as indecent, scandalous or frivolous or which appears to it to be intended to insult or annoy or in needlessly offensive in form],

the permission of the "Court" that he may give evidence by means of an affidavit. Thus a **blanket direction to replace examination in chief of a witness by an affidavit sworn by him may defeat the spirit of the provisions contained in Section 11 ibd, therefore this practice should be done away with as it is complicating the decision of family cases.**²⁰

The **subsection (3) of Section 7 of the West Pakistan Family Courts Act 1964** provides that the plaintiff has to append all the documents in his power and possession on which he relies along with the plaint. Where he relies on other documents in possession or power, as evidence in support of his claim, he shall enter such documents in a list to be appended to the plaint, (giving reasons of relevancy of these documents to the claim in plaint).²¹ Similar provision is contained in **Section 8** of the said Act with regard to the production of the documents by the defendant. These provisions are similar to the provisions contained in Order XIII Rule 1 and Order VII Rule 14 of CPC with regard to the production of documents. The accumulative effect of **Sections 7, 8 and 11 of the West Pakistan Family Court Act 1964** read with **Rule 10A of the West Pakistan Family Courts Rules, 1965** is that even a Family Court while recording and appreciating

* Subs. by West Pakistan Family Court (Amendment) Act, 1969, S. 7 (b),

*[(3-A) The Family Court may, if it so deems fit, put any question to any witness for the purposes of elucidation of any point which it considers material in the case

* Added by West Pakistan Courts (Amendment) Act, 1969, S. 7.

(4) The Family Court may permit the evidence of any witness to be given by means of an affidavit:

Provided if the Court deems fit it may call such witness for the purpose of further examination in accordance with sub-section (3).

R.10-A (1) **West Pakistan Family Court Rules 1965** -Mode of recording-Presiding Officer of the Family Court is authorised to have the evidence of witnesses taken down in writing by, someone else in his presence and hearing and under his direction and superintendence.

²⁰ *Substitution Of Examination-In-Chief Of A Witness For An Affidavit Sworn By Him* by Mian Zafar Iqbal Kalanauri, Member Punjab Bar Council, PLD 2001 Journal 26.

²¹ Sec 7. *Institution of suit.*--(1) Every suit before a Family Court shall be instituted by the presentation of a plaint or in such other manner and in such Court as may be prescribed.

(2) The plaint shall contain all material* facts relating to the dispute and shall contain a Schedule giving the number of witnesses indeed to be produced in support of the plaint, the names and addresses of the witnesses and a brief summary of the facts to which they would depose:

* The words "material" inserted by West Pakistan Ordinance X of 1966, section 7.

"Provided that a plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children."; and further that the parties may, with the permission of the Court, call any witness and at any later stage, if the Court considers such evidence in the interest of justice.

**[(3) (i) Whereas a plaintiff sues or relied upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(ii) Where he relies on any other document, not in his possession or power as evidence in support of his claim, he shall enter such documents in a list to be appended to the plaint giving reasons of relevancy of these documents to the claim in the plaint]

** Substituted by West Pakistan Family Courts (Amendment) Act, 1 of 1969, S. 3.

(4) The plaint shall be accompanied by as many duplicate copies thereof including the Schedule and the lists of documents referred to in sub-section (3), as there are defendants in the suit, for service upon the defendants.

*[(5) A Family Court shall conduct hearing of the suits as expeditiously as possible and shall not adjourn hearing for a period exceeding seven days and shall dispose off the suit within a period of 120 days from the date fixed by the court for the appearance of the Defendant.]

*. Added by Senate Bill No. III of 1999 (PLJ 1999 Fed. St. 175).

evidence has take into account the general principles contained in the Civil Procedure Code,1908 and the Qanun-e-Shahdat Order,1984. Therefore, the Family Court should not ignore these principles regarding the production and proof of documents such as the list of dowry articles and a receipt of the purchase of dowry articles and bridal gifts. The tendency of the certain Judges of Family Courts to render verdicts on the basis of mere assumptions should be discouraged and they should be directed to follow the **general principles** contained in the **Qanun-e-Shahdat Order, 1984** regarding the proof of documents and appreciation of documents.

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