

Multiplying Zeroes: (In)Validity of Promises in Marriage Contracts under Pakistani Case Law

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Abstract

This article explains how the superior courts in Pakistan have interpreted stipulations in marriage contracts (*Nikahnama*) in selected cases mostly from 2009 to 2017. The main findings in this article are that in most of the cases, courts have refused to award the stipulated amount in marriage contracts, as compensation or damages or penalty to be paid to the wife, if she is divorced by her husband or she has asked for *khul'*. In some cases, however, courts have declared such stipulations as valid and binding resulting into conflicting decisions on similar issues. In most cases, courts have ruled that the issue of stipulated amount to be paid in case of breach of the contract does not fall within the jurisdiction of the Family Courts. Judges have not delved into the Qur'an, the Sunnah, and the opinions of Muslim jurists on this issue that fortify the rights of women. In this way, courts have often denied the payment of damages to divorced women as stipulated in marriage contracts.

Keywords: stipulations, marriage contract, compensation, Family Courts, jurisdiction, Muslim personal law

Introduction

The main benefit of the doctrine of 'precedent' in our legal system is that similar cases are decided similarly, and the decisions of higher courts are considered binding on lower courts.¹ Therefore, higher courts should give the best possible decisions to establish binding precedents in similar cases for lower courts. Conflicting decisions on the similar legal issues by

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¹ Article 189 (Decisions of Supreme Court binding on other Courts); Article 201 (Decisions of High Court binding on subordinate Courts). For details of the operation of precedent under these two articles, see Muhammad Munir, *Precedent in Pakistani Law* (Oxford University Press 2014) 96-173.

higher courts create confusion for legal practitioners as well as the judges of lower courts. The conflicting, and sometimes vague, decisions of our superior courts regarding stipulations in marriage contract illustrate this legal dilemma.

This article unpacks this puzzle in the light of the judgments of the superior courts (from 2009 to 2017) on these specific legal questions: whether a stipulated amount in *Nikahnama* (described as damages or penalty or compensation to be returned to a woman in case she is divorced by her husband) is treated as valid and enforceable by courts?; can courts determine a sum of money to be given to a wife in the event of unjust repudiation by her husband, especially when she is not at fault and does not want a divorce?; can courts order damages to be paid to the wife in case of an unjust divorce even when these damages are not stipulated?; what does Islamic law state on such stipulations?; and, are decisions that deny women stipulations by their ex-husbands in conformity with Article 35 of the Constitution of Pakistan?

Although the case-law under consideration in this article is reported from a short period of time, that is, from 2009 to 2017, only those cases are evaluated which are worth critical analysis for interpretative reasons, uniqueness of the findings, and the quality and sophistication of legal arguments. Those decisions that do not fall in this category, are left out from the examination. In addition to the selected cases, the classical sources of Islamic law and the legislation of selected Muslim states is examined to analyse this issue.

(In)validity of Stipulations to Pay a Penalty or Damages or Compensation by the Husband in Case of Divorce

(a) Crucial Cases on the Issue of Stipulations

There are conflicting decisions by the Lahore High Court as well as the Supreme Court on whether a stipulation of some amount is to be paid by the husband as damages or compensation or a penalty in case of divorcing his wife or breaching the terms of the marriage contract. The focus of the decisions under review is not the validity or nature of such stipulations or the rights of a battered woman. Courts have mostly confined themselves to the technical issue of whether such conditions are within the jurisdiction of the Family Courts or not.

In *Nasrullah v District Judge*,² a stipulation in the marriage deed dated 4 July 2002 stated that rupees 200,000 would be paid to the wife as compensation for unjustified divorce by the husband. Upon divorce she filed suit for the said amount in addition to amount for her dowry articles. The husband contended that the Family Court has no jurisdiction for recovery of compensation and that he divorced her because she was a woman of bad character. The Family Court awarded her rupees 100,000 on account of dowry but dismissed the claim for compensation declaring the condition as void “as it restricts the husband to pronounce divorce.”³ Both parties appealed and the learned District Judge, Mianwali dismissed the ex-husband’s appeal and awarded the ex-wife rupees 200,000 as compensation on 13 April, 2004. The High Court rejected the accusation of the husband as he could not produce any evidence to support it. While deciding the matter, Justice Maulavi Anwarul Haq opined that the husband accused his ex-wife only to justify the divorce and deprive her of the stipulated amount. Turning to item No. 9 of the Schedule to the FCA, that is, “personal property and belonging of a wife” he ruled that as soon as the terms of marriage deed are violated the lady is vested with a right to bring an action against the petitioner to claim the stipulated amount upon proof of unjustified divorce. Thus, the ex-wife is vested with a right of action or what is known as “actionable claim” under the Transfer of Property Act 1882. He argued that as soon as the “said condition becomes operative the petitioner became indebted to the respondent in the said amount.”⁴ His Lordship further opined that, “even if such debt or beneficial interest so accruing is conditional or contingent, falls within the meaning of actionable claim which is a property and transferable as such.”⁵ He stressed the point that claim of the ex-wife to the stipulated “amount accruing to her upon an unjustified divorce [is] by all means a property and clearly falls within Item. No.9 of the Schedule read with section 5 of Family Court Act, 1964.”⁶ In short, actionable claim is a property which comes under Item No. 9 of the Schedule. This decision and the reasoning given must be highly appreciated but since it was the decision of a single Bench which is easily ignored even by another single Bench.

² PLD 2004 Lah 588.

³ Ibid, 590.

⁴ Ibid, 591.

⁵ Ibid.

⁶ Ibid.

In *Muhammad Akram v Mst. Hajra Bibi*⁷ it was stipulated in column No. 17 of the marriage contract that the husband would pay rupees 100,000 to his wife in case of sour relations between the two or divorce. The wife filed a suit for dissolution of marriage which was decreed. Subsequently, she filed another suit for the recovery of the stipulated amount which was dismissed by the Family Court vide judgment and decree on 22nd March, 2006 stating that she should file an ordinary civil suit for the recovery of the said amount because her suit was not maintainable before the Family Court. The ex-wife's appeal against that decision was accepted by the First Appellate Court which ruled that the matter falls within Entry 9 of the schedule to section 5 of the FCA and that the ex-husband is liable to pay the said amount. The ex-husband brought his petition to the Lahore High Court where a single Bench decided the matter. Mian Saqib Nisar, J (as he then was) authored the decision and ruled that said amount does not fall "within Entry No. 9 of the Schedule to section 5, i.e. "personal property and belonging of the wife""⁸ He opined that personal property or belonging referred to in Entry No. 9 "is a residuary provision"⁹, through which the ex-wife can recover any property she has obtained during her marriage and include ornaments, clothes, items of personal use and nature, anything gifted to her by the husband or his or her relatives or friends. His Lordship specifically excluded anything that is not yet her property "and she has a claim to recover from the husband"¹⁰ The Court categorically rejected the argument that such a claim comes under 'actionable claim' under section 130 of the Transfer of Property Act, 1882. The Court ruled that "'actionable claim' in general means, a claim for which an action will lie, furnishing a legal ground for an action and according to section 3 of the Transfer of Property Act, a claim towards a debt."¹¹ The Court opined that on account of both the meanings such claim cannot be equated with 'personal property and belonging to the wife'. The Court held that the Family Court has no jurisdiction in the matter.

⁷ PLD 2007 Lah 515.

⁸ Ibid, 517.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

As a matter of fact, an amount stipulated in a marriage contract by a husband to be given to the wife in case of a breach or compensation comes under the first description of the phrase by the Court, i.e. ‘a claim for which an action will lie, furnishing a legal ground for an action.’ A claim for any stipulated amount could only arise if the terms of the conditions are violated. The Lahore High Court did not delve into legal reasoning, solid arguments, case law or arguments from Muslim personal law and Islamic jurisprudence to rule on the validity and binding nature of such stipulations. The ruling decreed by the Court that the Family Court has no jurisdiction in the matter is frail because the meaning given by it to the phrase ‘actionable claim’ in fact forms the basis for Court’s jurisdiction.

Justice Nisar got the chance to revisit the position he had taken in *Muhammad Akram* case and examine the ruling of the Lahore High Court in *Nasrullah v District Judge*¹² discussed above the opposite view was taken, when he decided *Mukhtar Hussain Shah v Saba Imtiaz*.¹³ In this case, the parties were married on 3 February 1996 and it was stipulated that in the marriage contract as well as in a subsequent agreement between the parties in case of divorce the husband would pay rupees 100,000 to his wife as damages. The suit was decreed by the Family Court on 16 June 2007; the husband’s appeal was dismissed by the First Appellate Court on 27 March 2008 and his petition was disallowed by the High Court on 8 July 2008. The Supreme Court granted leave to appeal to examine whether the condition in the marriage contract was valid; whether the amount was recoverable through the Family Court; and to resolve the conflict of judgments in the cases of *Nasrullah v District Judge*¹⁴ and *Muhammad Akram v Hajra Bibi*.¹⁵ The Supreme Court did not go into the validity and nature of the condition. It preferred to focus on the technical aspect of the case and opined that the FCA “is a special law which is meant to cater for a specific object and special kind of cases strictly covered by the items mentioned in the schedule thereto.”¹⁶ The Court further opined that “civil courts are the courts of inherent and plenary jurisdiction competent to

¹² PLD 2004 Lah 588.

¹³ PLD 2011 SC 260.

¹⁴ PLD 2004 Lah 588.

¹⁵ PLD 2007 Lah 515.

¹⁶ PLD 2011 SC 260, 264.

adjudicate all the disputes of the civil nature”¹⁷ unless such jurisdiction is expressly or implied barred. The Court observed that in both conflicting decisions the term ‘actionable claim’ has been differently interpreted. Justice Nisar concluded that the term is not mentioned in English and American jurisprudence, however, it may be equated with ‘chooses in action’ or ‘chooses of action’. He attempted to discover the meaning of ‘chooses in action/chooses of action’ rather than ‘actionable claim’. He mentions that as per the Words and Phrases “the words “chooses of action” mean nothing more and can have no broader signification than the words “rights of action” which in other word [sic.] means as [sic.] a personal right not reduced into possession but recoverable by a law suit.”¹⁸ He has also given the definition of the phrase from the *Halsbury’s Laws of England* fourth edition which mentions that “the expression ‘chooses in action; or ‘thing in action’ in the literal sense means a thing recoverable by action as contrasted with a choose in possession, which is a thing of which a person may have not only the ownership but also the physical possession.”¹⁹ He points out that “the expression is also used to describe all personal rights of property which can only be claimed or enforced by an action, and not by taking physical possession.”²⁰ He further elaborated that there are two types of ‘chooses in action’ under the English Law: legal and equitable, the former is recoverable or enforceable “by an action at law, as for instance a debt, bill of exchange, or a claim on an insurance policy etc.” Equitable choose is also “enforceable through the process of Courts, but in connection with the rights, share or interest relating to partnership, trust funds, legacy, under the will, right of the mortgagee to any surplus proceeds of the sale etc.” His Lordship concluded that the subject matter in both types itself “shall not be the personal property of the claimants until and unless the claim in the legal action has been allowed by the Court and a decree to that effect has been passed.”²¹ After venturing into foreign sources his Lordship ruled that: “It is thus clear from the preceding discussion that for interpreting the entry no help can be drawn from the foreign concept.”²²

¹⁷ Ibid.

¹⁸ Ibid, 266.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

Thus, when the phrase ‘actionable claim’ was not available in the legal lexicons his Lordship looked into ‘chooses in action/chooses of action’ in the English law and when that was a bit unhelpful he looked into the phrase ‘right of action’ but perhaps his investigation proved the opposite, because ‘*a thing recoverable by action*’ would definitely include stipulations in the marriage contract when the terms are breached. His Lordship, therefore, had to analyse Pakistani law and has reproduced the definition of ‘actionable claim’ as given in section 3 of the Transfer of Property Act which says,

Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession either actual or constructive, of the claimant, which the Civil Court recognise as affording grounds for relief, whether such debt or beneficial interest be existence, accruing conditional or contingent.²³

However, he quickly dismissed the suggestion that a definition appearing in one statute can be used to interpret the same word in another statute, “until it is specifically so referred and borrowed with a clear command of law.”²⁴ He justified it by arguing that “because the context, the purpose, the object and the requirements of every statute may vary from other”, therefore, “the definition of a word from one statute cannot be safely imported to another, which if so resorted to without ascertaining the clear intention of the legislation by following the rules of interpretation...”²⁵ He issued a warning that such use of words “shall not only be hazardous, rather may distort and frustrate the object of the law and violate the legislative intent which is absolutely impermissible in law.”²⁶ His Lordship stated that the definition of ‘actionable claim’ in the TPA is applicable only to that Act and it cannot be extended beyond that Act; that the term is restricted to the TPA; and that “it cannot be stretched to apply

²³ Transfer of Property Act 1882, s. 3.

²⁴ PLD 2011 SC 260, 268.

²⁵ Ibid.

²⁶ Ibid.

to any other law of the land, including the Family Courts Act, 1964.”²⁷ His Lordship approved his own interpretation in *Muhammad Akram* case and rejected the interpretation in *Nasrullah* case. He justified his interpretation by stating that if the interpretation in the latter case is correct, then “a suit for Specific Performance, declaratory suits of any nature, or any other civil legislation [sic.] between a wife and a husband shall be amenable to the special jurisdiction of the Family Court, which is not the intent of the law.”²⁸ He Lordship concluded that “thus, when in Entry No. 9 ‘actionable claim’ has not been provided by the legislature, it shall be improper and shall impinge upon the legislative intent and the rules of interpretation to add this expression to the clause/entry.”²⁹ The Supreme Court allowed the husband’s appeal and set aside the judgments and decrees of the courts below. Perhaps it is a very pro-husband decision as it was followed in many subsequent cases by the courts.

The interpretation rendered above raises several questions: why could legal lexicons, encyclopaedias and foreign law could be looked into to understand the meaning of a term whereas its definition in another statutory law of our country is considered irrelevant? Why the Court did not look into its own previous decision in *Muhammad Aslam v Mst. Fateh Khatoon*³⁰ discussed below in which even damages were awarded to the ex-wife for unjustified divorce by her husband. In addition, it is unclear how giving the Family Court jurisdiction in this issue would have been hazardous or distorted or frustrated the law or would have been violative of the legislative intent of stipulations in a marriage contract. The marriage stipulations under discussions are obligations created by individuals through which they are bound in case of violation of the terms of the agreement. In fact, by ruling that the matter is out of the jurisdiction of the Family Court husbands are given a clear mandate to promise anything to their wives to lure them into marriage knowing that these are never enforceable as they will get away with such promises through the Courts of law. The Supreme Court also did not look into section 2 of the West

²⁷ Ibid.

²⁸ PLD 2011 SC 260, para [8].

²⁹ Ibid.

³⁰ 1969 SCMR 818.

Pakistan Muslim Personal Law (Shariat) Application Act 1962 which reads as follows:

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

A plain reading of this section asks all the courts to apply ‘Shariat’ in all the above issues. It is very unfortunate that family law cases on contentious issues such as stipulation are loaded with English law and English jurisprudence but there is even no mention of Islamic law. Moreover, our judges have also ignored the Enforcement of Shari’ah Act 1991. Section 2 of the Act mentions that ‘*Shari’ah*’ means the injunctions of Islam as laid down in the Holy Qur’an and [the] Sunnah. The explanation to section 2 is very interesting which says, “While interpreting and explaining the *Shari’ah* the recognised principles of interpretation and explanation of the Holy Qur’an and [the] Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.” Unfortunately, these Acts are negligently ignored while deciding matters involving personal law. It is unfortunate to note the complete absence of legal analysis of such stipulations in Islamic law.

(b) Less Significant Cases on the Issue of Stipulations

In *Mst. Zeenat Bibi v Muhammad Hayat*³¹ the question before the Lahore High Court was whether to award compensation of rupees 50,000 on account of divorce by her husband without any reasonable justification. The Family Court dismissed the prayer of compensation but decreed the suit to the extent of maintenance allowance. The First Appellate Court also

³¹ 2012 CLC 837.

rejected her plea for compensation. *Mst. Zeenat Bibi* approached the Lahore High Court in a writ petition against the decision of the Appellate Court. Justice Abdul Waheed Khan opined that since the husband had filed a suit for restitution of conjugal rights whereas the petitioner (woman) has failed to show any thing on record for her non-reconciliation, therefore, she was not entitled to any maintenance allowance. The Court also rejected her claim to any compensation for unjustified divorce citing the Supreme Court's decision in *Mukhtar Hussain Shah*.³² The Court observed that any such conditions imposed in the *Nikahnama* for the award of damages on account of unjustified divorce have been declared against the basic principle of law by the Supreme Court in *Muhammad Bashir Ali Siddiqui v Mst. Sarwar Jehan Begum*.³³ In this case, the *Nikahnama* had provided that in case of *khula* the wife would have to pay rupees 250,000 to the husband, and in case of divorce by husband, the same amount would be paid to the wife. When the wife's suit was decreed, the husband contended that the Family Court as well as the High Court had failed to implement the condition in the *Nikahnama*. The Supreme Court rejected the petitioner's contention and declared it as frivolous and against the basic principle of law which required the parties to remain in marital tie in a peaceful and tranquil environment and were not required to be bound by stringent conditions to remain in the marriage bond.

In *Muhammad Asif v Mst. Nazia Riasat*,³⁴ a stipulation in column 19 of the *Nikahnama* stated that in case of divorce by the husband he has to pay Rs. 100,000 to the wife. She was divorced and claimed amongst other things, the stipulated amount. The Family Court partially decreed her suit, and on appeal, the Additional District Judge, dismissed the appeal. The ex-husband challenged the same in a writ petition before the Lahore High Court. The main question before the Court was whether pronouncing of divorce by the husband can be made conditional and whether he is liable to pay her Rs. 100,000 in case of divorce. The Court relied on *Muhammad Bashir Ali Siddiqui* case and refused to declare the petitioner (husband) liable for the said amount.

³² PLD 2011 SC 260.

³³ 2008 SCMR 186.

³⁴ W.P. No. 817 of 2017. Date of hearing: 10-10-2017.

The Lahore High Court, however, has taken a different view regarding such a stipulation in *Muhammad Masood Abbasi v Mst. Mamona Abbasi*.³⁵ In this case it was stipulated that the husband would pay to the wife Rs. 100,000 in case she divorced her without a just cause. The husband subsequently divorced Ms. Mamona and contracted another marriage. The ex-wife sued to recover the money, but the Family Court dismissed her suit. On appeal, the District Judge reversed the decision and decreed her suit. On a writ petition to the Lahore High Court it was held that any restriction imposed on the husband's right of divorce, with a view to safeguard the interests of the wife, cannot be deemed as unlawful. The Court further emphasised that "it is true that restriction on husband's right to divorce the wife is not provided under the Family Laws or rules framed thereunder but it is also true that there is no provision in the aforesaid laws or rules that such restriction is void."³⁶ The Court opined that "to preserve the marriage contract and to safeguard the interest of the wife against its unjustified termination by the husband, if any, stipulation is made in the *Nikahnama* whereby the husband agrees to pay some damages in the event of divorcing the wife without any just cause, such stipulation is neither against the injunctions of Islam nor against public policy."³⁷ In this case the husband could not produce any evidence of having a just cause of divorcing his wife.

In *Muhammad Amjad v Azra Bibi*³⁸ the husband had stipulated that in case he contracted another marriage he would be liable to pay Rs. 100,000 to his wife. Justice Ch. Naeem Masood of the Lahore High Court considered the amount to be in the nature of damages and thereby declared the suit outside the jurisdiction of the Family Court. He argued that such a suit could only be pursued before the civil court. The High Court set aside judgments and decrees of the lower courts. By ruling that the Family

³⁵ 2004 YLR [Lahore] 482.

³⁶ *Ibid*, para 6 (*Per* Farrukh Latif, J for the single Bench). The Court has also stated that "Under Islamic Law marriage is a civil contract and the husband has a right to divorce his wife whenever he desires without assigning any cause." At para. 11. As I have mentioned elsewhere the remarks that describes 'marriage as a civil contract under Islamic Law' do not represent the true place of marriage in Islamic law. See, Muhammad Munir, "Marriage in Islam: A Civil Contract or a Sacrosanct Contract" (2008) XXXI (1) *Hamdard Islamicus* 77-84.

³⁷ *Ibid*, 12.

³⁸ 2010 YLR 423.

Court has no jurisdiction, though the matter pertains to a marriage contract, is to put a desperate woman in further pain. The legislature should take notice or the Supreme Court should clarify this issue as it pertains to marriage and apparently falls within the jurisdiction of the Family Courts.

In *Mst. Shaista Shahzad v Additional District Judge*³⁹ column 19 of the *Nikahnama* contained a stipulation that the husband will neither contract second marriage nor he will divorce the petitioner, otherwise he will pay a sum of Rs. 200,000 to the petitioner apart from the dower. As a matter of fact, the marriage never took place as ‘*Rukhsati*’ never happened and therefore the marriage was never consummated until the time when the petitioner was divorced. A single Bench of the Lahore High Court endorsed the decision of the Family Court for maintenance allowance from the time of *Nikah* till the time of divorce. Interestingly, the High Court also endorsed maintenance allowance for the *Iddat* period which was also awarded by the Family Court. Under Islamic law if the marriage is not consummated then there is no *Iddat*; therefore, there is no maintenance for that period. The High Court carefully analysed relevant case law on the issue: whether the issue of additional amount of Rs. 200,000 as compensation, as stipulated in *Nikahnama*, falls under the Family Court’s jurisdiction. The High Court, in reliance upon *Syed Mukhtar Hussain Shah*,⁴⁰ ruled in negative as to the question of jurisdiction and denied the compensation of Rs. 200,000 to the wife.

In *Bahauddin Sirhandi v Mst. Tanvir Amna*,⁴¹ the husband challenged the execution of money decree and asked for setting aside the *ex parte* decree for damages. The plaintiff’s suit was decreed on the ground that the defendant having divorced her, she was entitled to damages of rupees five million because of mental torture and defamation resulting from divorce. Plaintiff’s suit was decreed *ex parte* against the defendant. The Sindh High Court held that Muslim law which governed rights and duties of spouses *inter se* does not envisage payment of damages as a result of dissolution of marriage. Dissolution would entitle

³⁹ PLD 2012 Lah 245.

⁴⁰ PLD 2011 SC 260.

⁴¹ 1997 MLD 1826.

the wife to dower if still unpaid and maintenance but not damages of *any* kind.

All the cases analysed above have not referred to *Muhammad Aslam v Mst. Fateh Khatoon*,⁴² an old decision of the Supreme Court. In this case the petitioner married the respondent in 1953 and the marriage agreement provided that in case of violation of its terms by the husband, he would have to pay rupees 2,000 as damages. The husband violated the agreement by marrying a second wife; threw out his first wife of his house and divorced her. The divorcee, Mst. Fateh Khatoon, filed suit for recovery of rupees 2,000 as stipulated. The main contention of the defendant was that the stipulation in the deed was against section 23 of the Contract Act and thereby the ex-wife was not entitled to claim any damages for breach of the contract. The trial court decreed her suit and the decree and judgment were upheld by the first appellate court as well as the then High Court of West Pakistan, Lahore. The Supreme Court endorsed the decision of the High Court and held that the High Court rightly concluded that some of the stipulations in the marriage agreement were enforceable in law and that the ex-wife was entitled to reasonable compensation for breach of those conditions of the deed. The High Court had also found that the ex-husband had not paid the stipulated maintenance allowance of rupees 50 per month for nine years. The Supreme Court ruled that “in these circumstances, it cannot be said that the amount of Rs. 2,000 which was awarded as damages, was excessive or unconscionable.”⁴³ Accordingly, the Supreme Court dismissed the petition. This decision deserves much appreciation but unfortunately it did not get the judicial attention in adjudication of matters concerning this issue.

Thus, so far, a stipulation in the *Nikahnama* to penalise the husband in case of divorce has brought in conflicting decisions from the superior courts, especially the Lahore High Court, as in some cases such a stipulation was considered valid and binding, while in other cases it was treated as invalid.

⁴² 1969 SCMR 818.

⁴³ *Ibid*, 813.

Stipulations in Marriage Contracts under Islamic Law

It would be interesting to examine these questions and formulations from the perspective of Islamic law. A broader discussion of stipulations in a Muslim marriage contract is beyond the scope of this paper.⁴⁴ This paper focuses on the issues highlighted above. The amount of money payable to the wife, in case of divorce, comes under stipulations that are neither specifically prohibited nor expressly allowed by the Qur'an and the Sunnah of the Prophet Muhammad (Peace be upon him). So, these stipulations are described as 'general stipulations' benefiting women. The superior courts in Pakistan, however, catalogue these stipulations as penalty or damages or compensation. In such a case, we may ignore the form and appreciate the intent of such stipulations-that is the welfare of the divorced women.

The majority of Muslim jurists of the Hanafi,⁴⁵ Maliki⁴⁶ and Shafi'i⁴⁷ school of thought do not approve these conditions. The Hanafi jurists consider such stipulations as invalid,⁴⁸ whereas, the Hanbali school of thought treat them as valid and binding. The arguments of the Hanbali school appear sound, specific and preferable⁴⁹ as they are premised on the Prophetic saying, "The worthiest of all the conditions to be fulfilled are those that legalised women for you."⁵⁰ To them, the conditions imposed by a husband that he will pay a certain amount to his wife in case he

⁴⁴ For details of stipulations in a Muslim marriage contract, see Muhammad Munir, "Stipulations in a Muslim Marriage Contract with Special Reference to *Talaq al-Tafwid* Provisions in Pakistani Law", 12 *Yearbook of Islamic and Middle Eastern Law* (2005-2006) 235-262.

⁴⁵ Neil B.E. Baillie, *A Digest of Moohummudan Law*, (2nd edn, Smith, Elder and Co1875) 1:76.

⁴⁶ Ibn Rushd Abu Walid, *Bidayat al-Mujtahid*, (Maktab Nazar 1995) 2:59.

⁴⁷ Abu Zakariya al-Nawawi, *Kitab al-Majmu' sharh al-Muhadhab*, (Dar al-Kutub al-Islamiyah 1982) 16: 250.

⁴⁸ See, 'Abdullah b. Ahmad b. Mahmoomd al-Nasafi, *Al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq along with Manhatul Khaliq 'Ala Al-Bahr al-Ra'iq*, ed., Zakariya 'Umayrat (Dar al-kutub al-'Ilmiyah 1997) 4:98.

⁴⁹ (n 45) 237-241.

⁵⁰ Muhammad b. Isma'il al-Bukhari, *Sahih, hadith* no. 2721; Sulayman al-Sijistani, *Sunan, hadith* no. 2139. With slightly different words it is also reported by Ahmad b. al-Husain al-Baihaqi, *Sunan al-Kubra*, chapter on *nikah* (Dar al-Kutub al-'Ilmiyah 2003) 7: 405; Ibn Abi Shaybah, *Mussanaf*, ed., Kamal Yusuf al-Hoot (Maktabat al-Rushd 1409 AH) 3: 499.

divorced her is beneficial to such a wife and must be honoured by the husband and judicially enforced. Such stipulations cannot be described as stringent; it is unfair to declare them as frivolous, against the basic principle of law as well as against public policy. It may be argued that safeguarding and protecting a battered woman or declaring stipulations that give her some monetary benefit from her ex-husband is within the public policy pronounced in Article 35 of the Constitution which obliges the State to protect the marriage, the family, the mother and the child.⁵¹ The decision of the Supreme Court in *Muhammad Bashir*⁵², therefore, seems contrary to the letter and spirit of Article 35.⁵³

Compensation for the Wife on Arbitrary Divorce and Islamic Law

The Qur'an says, "There is no blame upon you if you divorce your wives before you have touched them or settled a bridal gift upon them. But even in this case you should make some provision for them: the affluent, according to his means; the straitened according to his means – a provision in fair manner. That is a duty upon the good-doers."⁵⁴ Such a financial benefit to women is called *mutat*. There is no *mutat* for a divorcee if she is entitled to half of her *mahr*. Similarly, there is no *mutat* for a widow. In addition, there is compulsory *mutat* for a woman divorced before consummation.⁵⁵ Our Courts, however, have occasionally declared such stipulations in marriage contract as invalid. So, the law and jurisprudence

⁵¹ See the Constitution of the Islamic Republic of Pakistan [as modified up to 31st May, 2018] (National Assembly of Pakistan 2018).

⁵² 2008 SCMR 186.

⁵³ There is one refreshing *fatwa* by Mawlana Rahmani of India about fine imposed by a court on arbitrary repudiation by the divorcer to be paid to the wife. He appreciates this idea and argues that it will serve as admonishment for the divorcer and some financial assistance to the wife. See, Khalid Saifullah Rahmani, "*Beja Talaq per Jurmana*", available online at <<http://www.suffahpk.com/beja-talaq-par-jurmana/>> accessed 8 July 2019.

⁵⁴ The Holy Quran, 2:236. The translation is taken from *Towards Understand The Quran*, abridged version of Mawdudi's *Tafheem-ul-Quran*, transl. & ed. by Zafar Ishaq Ansari (Leicester: The Islamic Foundation, 1988) also available online at <<http://www.islamicstudies.info/tafheem.php?sura=2&verse=236&to=242>> accessed 8 July 2019.

⁵⁵ Jamal J. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (Koninklijke Brill NV 2009) 156-158.

of our legal system varies from the law and practice of some other Muslim states.

Legislation of some other Muslim states consider conditions that are beneficial to women as valid and binding. For example, Article 14(2) of the Syrian Law of Personal Status (1975) says, "... If the contract is restricted by some condition which makes obligatory something which is beneficial to women, which is not lawfully prohibited, which does not affect the rights of another and which does not restrict the freedom of the husband in his lawful personal affairs, the condition shall be valid and binding." Similar provisions are provided in Article 19(1) of the Jordanian Law of Personal Status No. 61 (1976); Article 31 of the Moroccan Code of Personal Status (Book 1 and 2 of *Mudawwanah*) of 1957 and 1958; Article 6(4) of the Iraqi Law of Personal Status (no. 188) of 1959; Article 11 of Tunisian Code of Personal Status, 1956.

Article 60 of the Moroccan law provides that "Every husband shall have the obligation to provide *mutat* for his divorcee if divorce proceeded from him, according to his affluence and her means, except the woman for whom a dower was specified and was divorced prior to consummation."⁵⁶ This article is based on the spirit of verse 2:236 of the Qur'an. The legislations of Egypt, Jordan and Syria have catered for compensation for a divorcee in the event of arbitrary or unjust divorce. Under Article 117 of the Syrian law, if the Court is convinced that the husband has divorced his wife without any just or reasonable cause, putting her in hardship and misery, he may order the man to pay compensation to her, taking into consideration his arbitrariness and his means; the maximum amount of such compensation could reach the amount of maintenance for three years for the wife to be paid either in lump sum or instalments. This compensation shall be over and above the maintenance during the *iddat* period. Article 134 of the Jordanian law is otherwise similar to the Syrian law; however, it provides that the amount of compensation should not exceed the amount of maintenance for the ex-wife for one year to be paid in instalments or in a lump sum depending on the financial situation of the divorcer. This is over and above the maintenance amount during the *iddat* period. Article 18 (of Act 25/1929) of the Egyptian law provides that a woman who is divorced by her husband without any fault on her side and

⁵⁶ Ibid, 157.

against her wishes shall be entitled to a *mutat* of not less than two years of maintenance, keeping in view the financial situation of the divorcer, the length of marriage, and the circumstances of divorce. Again, this is over and above the maintenance for the *iddat* period. Article 165 of the Kuwaiti law is even more stringent. It provides a compensation equivalent of one-year maintenance for the ex-wife, over and above the maintenance for the *iddat* period, to be paid in monthly instalments unless agreed otherwise. This compensation, however, is not payable, where the wife is the cause of divorce; or if she consented to it; or the marriage is annulled at her request; or the divorce is granted on grounds of non-maintenance by the ex-husband due to his insolvency; and death of either spouse.

The question whether damages can be awarded to the wife or the injured party in case of separation following a discord is answered by the Supreme of Court of Pakistan in the negative. However, the Tunisian legislation has provided for damages to be paid to the injured party. Article 31 of the law provides that damages may be granted to the injured party for moral or material injury caused as a result of divorce, at the request of injured party. Such damages must be sufficient to same standard of living which she enjoyed during her marriage. It will be in the form of one lump sum payment or monthly instalments starting from the end of *iddat* period. Such a payment may also be increased or decreased according to the changing circumstances. She will receive this payment continuously, till her remarriage or till she acquires sufficient means to look after her needs. In the case of the death of the ex-husband, it will be payable from his estate, and in the case of refusal by the legal heirs, the court will order it to be paid in lump sum. The court will also take into account the age of the wife to determine the payment.⁵⁷

In Pakistan, divorced women suffer hardship and miseries upon repudiations of marriage in which they are not at fault. So, we need to make a proper legislation in compliance with Article 35 of the Constitution. This legislation could provide for damages to be determined by the court to be paid to the injured party in case of arbitrary repudiation of marriage by either party. Such legislation should also enhance the jurisdiction of the Family Courts to include “actionable claims” which can be brought in a civil court where the proceedings take ages to conclude

⁵⁷ Ibid, 138.

whereas the Family Court are bound to decide cases within their jurisdictions within a period of six months. Moreover, Family Courts are not bound by procedural laws for quick disposition of cases.

The legislation in this field would help in removing the confusion created by the conflicting judgments of our courts and make such judgments ineffective. It would also demonstrate our political will and constitutional commitment to protect women in Pakistan. The present situation of making and breaking a promise with wife at the husband's convenience reminds one of what Niccolò Machiavelli once said: "The promise given was a necessity of the past: the word broken is a necessity of the present."⁵⁸

Conclusion

The superior courts in Pakistan, especially the Lahore Court, have given conflicting decisions regarding stipulations in marriage contract. The Courts have conveniently rejected women's claim to any compensation, even if it was stipulated in the marriage contract and have ruled that such a claim is not actionable before the Family Courts. The superior courts have also held that such a stipulation for the award of damages on account of alleged unjustified divorce is against the basic principle of law. The decision that since the husband had filed a suit for restitution of conjugal rights and the petitioner (woman) had failed to justify living separately from her husband; therefore, she was not entitled to any maintenance allowance and has no basis for it in Muslim personal law, Islamic law, or equity. Unfortunately, our judges do not delve into the Injunctions of Islam and the formulations of Muslim jurists while deciding cases of personal law although they are required to do so by statutory law. Courts are keen to borrow from legal lexicons, legal encyclopaedias and English law but not from the rich jurisprudence of Islamic law where any stipulation to benefit women are valid, binding, and enforceable. The reason why our legal fraternity is unable to bring in strong and convincing arguments from the rich jurisprudence of Islamic law in order to advance arguments from Islamic jurisprudence and to be able to defend stipulations

⁵⁸ The Philosiblog, 'The Promise given was a necessity of the past: the word broken is a necessity of the present' (Philosiblog, 7 July 2012) <<https://philosiblog.com/2012/07/07/the-promise-given-was-a-necessity-of-the-past-the-word-broken-is-a-necessity-of-the-present/>> accessed 8 July 2019.

that protect and benefit battered women is their ignorance of Islamic legal tradition. At present since counsels have nothing to present from Islamic law to support a genuine valid condition in a marriage deed and get compensation for their clients they instead put much emphasis on the technical issue that the Family Courts have no jurisdiction to decide the so called 'actionable claim'. The three cases analysed in detail above prove this point.

Islamic law does not prohibit the imposition of beneficiary stipulations for women, which include stipulation that in case of divorce or arbitrary divorce by the husband, she will be paid a sum of money by the ex-husband. The legislation of many Muslim states, in fact, has provided that even if there is no such stipulation, the wife will be given a sum of money by the husband in the event of arbitrary divorce by the ex-husband. According to Islamic law and practice of some Muslim countries, courts can determine an amount to be paid to the ex-wife, in case she is not the cause of discord, which may be equal to one or two or even three years of maintenance amount for such a woman and that such an amount shall be over and above the amount to be given as maintenance for *iddat* period. The Tunisian legislation even provides that a woman may claim damages in case of material or moral injury as a result of unjust repudiation.

In view of Islamic law and established jurisprudence of many Muslim states, the conflicting judgments given by our superior courts declaring beneficiary stipulations for women in marriage contracts as frivolous, against the basic principle of law and public policy should be reviewed by a full-bench of the Supreme Court of Pakistan and/or be annulled through legislation.