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Stipulations in a Muslim Marriage Contract with Special Reference to Talaq Al-Tafwid Provisions in Pakistan

Muhammad Munir*

1 INTRODUCTION

Human beings form many relationships in their lifetimes. The most important of these is the conjugal relation that is constituted through the *nikah* and later this turns into a family when the husband and wife become parents. Good terms between the husband and wife, fulfilling all the terms and conditions of the *nikah*, and love and deep affection between the two are necessary for the stability and success of a family. Unfortunately, love and affection are governed more by emotions than by legal rules, which only come into play when conjugal relations turn sour. The Qur’ān and the Sunnah have given details of rules governing these relations more than any other area of civil law. Muslim jurists have also laid down detailed rules in their treatises on Islamic family law (alternatively known as Muslim Personal Status) since the 19th century.

These laws remain comprehensive even today despite the fact that the present-day situation is very different from the times when they were formulated by early Muslim jurists. However, even though these historical works still guide modern academics, many Muslim states have adopted new legislation which gives women maximum protection in order to adapt to changing circumstances.

Moreover, higher courts in the former Indian sub-continent have given numerous rulings both during the British *Raj* and after independence. These decisions are considered binding on the lower courts because of the doctrine of precedent. In addi-

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tion, to the author’s knowledge, no practical survey has been carried out until this work by any researcher in the world regarding the practical impact of the option of talaq al-tafwid (delegating the right of talaq to the wife in the Nikah Nama), available to Pakistani women since 1961.

This article gives classical Islamic law as expounded by the Muslim jurists; explains how and to what extent that classical Islamic law is incorporated into statutes around the Muslim world; describes case law of the Indo-Pak sub-continent on stipulations based on the doctrine of stare decisis in the common law world; surveys talaq al-tafwid in Pakistan to ascertain the extent of its practical application by the masses; and explores the role of Nikah Registrars – ulamas – who are authorised by the government to solemnise nikah throughout the country.

2 GENERAL STIPULATIONS BENEFITING WOMEN

The following discussion focuses on these areas.¹

2.1 Classical law

Under stipulations in marriage three main areas are discussed here:

• The incorporation of any additional stipulation in the marriage contract that benefits the woman.
• The delegation of the right of divorce by the husband to his wife (talaq al-tafwid)² or a proxy.
• The stipulation of an increase in the amount of dower in case of a divorce.

There are three main types of stipulations:

• Express stipulations that hold the husband responsible for maintaining the wife and those which state that the wife will obey her husband within the permitted parameters. These are valid and enforceable stipulations but are not necessarily required to be covenanted as such because they are the objectives of the nikah itself, but if done, then it will reaffirm the already existing duties and obligations.³
• Invalid stipulations, which omit a condition in the marriage contract, for instance, one stating that the husband will not maintain his wife; one cancelling the wife’s dower; restricting a man’s sexual relations with his wife; or, one allowing a woman

¹ Initially I prepared a handout for my students of the LLB External Programme, University of London, because their syllabus contained very little on the topic. Later I decided to develop it further into a full-fledged article.
² The author has deviated from the way this term is usually spelled: talaq-e-tafwid.
to partake from the share of her husband’s second wife. Imam Bukhari, reporting on the authority of ‘Abd Allah ibn-i-Mas’ud, states that a woman may not lay down in her marriage contract that her sister in Islam, i.e. the co-wife, be divorced.⁴ He also relates, on the authority of Abu Hurayrah, that the Holy Prophet (PBUH) has said that it is not legal for a woman to stipulate that the co-wife be divorced in order to increase her own share because she will only get what Allah has prescribed for her.⁵

- This category of stipulations is the most important and consists of conditions that benefit the wife, but are neither prohibited, nor expressly allowed in Islam. The husband will give up some of his rights by accepting them, for example, when his wife lays down the restriction that he will not marry a second time during their marriage, or that she should not be taken out of her matrimonial home/city.⁶ Not surprisingly, the validity of such stipulations is disputed amongst different schools of thought. The Hanafi, Shafi’i and Maliki schools regard these conditions to be illegitimate while the nikah containing them will itself remain valid. Amongst those who consider these stipulations invalid are ‘Ali, Sa’id ibn al-Musayyab,⁷ Hasan al-Basri,⁸ Ibn Sirin, Sufyan al-Thawri,⁹ Abu-Hanifah, Malik¹⁰ and Shafi’i.¹¹ Meanwhile, the Hanbali School considers them to be valid and binding on both parties.

2.1.1 Arguments against stipulations (view of the majority: Jumhur)

There is a Prophetic saying that goes, “Any stipulation that is not in the book of Allah (the Qur’ān) is void.”¹² The majority of scholars believe that the above-stated stipulations are not mentioned in the Qur’ān and are, therefore, not binding.

Another saying of the Prophet (PBUH) is quoted as follows:

The rights and obligations of Muslims should be according to stipulations and conditions which they have set for themselves, except any stipulation which legitimises an illegal thing or prohibits something legal.¹³

It is often narrated that a woman was promised by her husband to be given a house and when it was denied, the matter was adjudicated by ‘Ali who is reported to have said that the stipulation of Allah prevails over that of the wife.¹⁴

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The *Jumhur* argue that when Islam has allowed an already married man to take a second wife\(^\text{15}\) or to keep his wife anywhere (within the reasonable limitations), then doing away with any of these rights would amount to prohibiting what is legal.

2.1.2 Arguments for stipulations (Hanbali view)

There are, however, many great names in the list of those who regard these stipulations as legal and valid. These protagonists include 'Umar,\(^\text{16}\) 'Amr ibn al-'As,\(^\text{17}\) Shurayh,\(^\text{18}\) 'Umar ibn 'Abd al-'Aziz,\(^\text{19}\) Awza'i,\(^\text{20}\) 'Abdullah ibn Mas'ud,\(^\text{21}\) Bukhari, Abu Dawud, and Ahmad ibn Hanbal,\(^\text{22}\) whose arguments run as follows:

- **The Holy Qur'an states:** “O you who believe abide by your contracts”.\(^\text{23}\) Abu Bakr al-Jassas al-Razi (d. 370 A.H.) quotes on the authority of 'Abdullah ibn 'Abbas, Mujahid, Ibn Jurayj, Abu 'Ubaydah and others that the Qur'anic word *Uqud* mentioned in the above verse means promises and agreements,\(^\text{24}\) including those stipulations put forward at the time of *nikah*. He argues that any condition that a person promises to fulfil in the future is binding.\(^\text{25}\) This verse, being the basis of all contracts, prevails and therefore all obligations, when undertaken, should be carried out accordingly. The Hanbalis regard the above verse as the basis of the law of contract, thereby invoking the principles of both freedom of contract and *pacta sunt servanda*. Another Qur'anic verse that is cited to support this view is: “And fulfil every engagement, for it will be enquired into (on the day of the Reckoning)” (27:34). These arguments are further supported by the following verse, “And fulfil the covenant of Allah when you have covenanted.”\(^\text{26}\) According to Qurtubi, ‘ahd’ mentioned above denotes ‘common’, encompassing any promises and commitments that person makes, whether it concerns business, relationships or anything else that is allowed in religion.\(^\text{27}\)

- **The Holy Prophet (PBUH) said,** “From among all the conditions which you have to fulfil, the conditions which make it legal for you to have sexual relations (marriage contracts) have the greatest rights to be fulfilled.”\(^\text{28}\) In other words, “The worthiest conditions to be honoured are those that make women lawful for

\(^{15}\)“And if you fear that you shall not be able to deal justly with the orphan girls then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one...” [Qur'an 4:3].


\(^{17}\) Ibid., p. 228.

\(^{18}\) Ibid., p. 226.


\(^{23}\) Qur'an, 5:1.


\(^{26}\) Qur'an, 16:91.


you”. Most of the muhaddithin (compilers of hadith) have quoted this hadith and consider it as binding authority.  
  
- ‘Abd al-Rahman ibn Ghunaym narrates that a couple came to ‘Umar (the second Caliph) in his presence, and woman complained that her husband, having agreed at the time of their nikah to keep her in her paternal home, should now abide by it and not take her out of there. ‘Umar consequently ruled in her favour. (It should be noted that this event took place in Madinah and no Companion had objected to it, so it is considered Ijma’ as well.)

2.1.3 Evaluation of the arguments of both sides

We will look at each argument in turn. The first argument of the majority needs some discussion because it is important to analyse the context in which it was said in order to ascertain its true meaning.

It is reported that a woman named Barirah, who was a slave, was manumitted by her master. She came to the Holy Prophet’s (PBUH) wife, ‘Aishah and asked her for financial help to set her free. The Prophet’s (PBUH) wife told her that she would buy her and then set her free so that she herself could get the right of patronage (wala), or the relationship between a freed slave and his/her former master. Barirah’s master agreed that ‘Aishah could buy and set her free, while he would retain the right of patronage. However, such an arrangement was against Islamic principles, comparable to the blood relation where the right of patronage cannot be conferred by a mere understanding between two parties. Thus A’s son cannot become B’s son under an agreement, and similarly if X is bought and set free by A, A will retain the right of patronage, not B (the original owner), even if a contract was made to do otherwise.

When the Holy Prophet (PBUH) was told of this irrational stipulation, he expressed his disdain by stating, “How could some people attempt to impose stipulations that are not in the book of Allah? Whosoever stipulated conditions that are not in the Qur’ān then these are not binding even if there were a hundred such stipulations.” However, other reports state that the Holy Prophet (PBUH) allowed such an arrangement to materialise since the right of patronage transfers to the person who sets a slave free and not the master.

Ibn Hazm (d. 456 A.H.) pleads a very strange argument at this point. He states that previously a slave master was allowed to impose such a condition because the Holy Prophet (PBUH) could only have allowed ‘Aishah to do so if it was valid since He could not have contradicted Islamic teachings. However, such stipulations became illegal later when the Holy Prophet (PBUH) publicly denounced them in his sermon. He further iterates that any stipulation not mentioned in the Qur’ān and the Sunnah is obviously prohibited and that general verses and ahadith cannot be used to support the view that such a stipulation, which is not specifically allowed

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29 Kamal al-Din Muhammed Ibn al-Humam Fath al-Qadir Sharh al Hidaya (Cairo: Matba Mustafa Muhammad, 1900, p. 217. The words cited above are those of Bukhari.


31 In Islamic law, by virtue of his act of manumission, the master acquires the right to inherit from his freed slave if the latter dies without any heirs (by blood).


therein, may be covenanted and fulfilled accordingly. This, if accepted, will run contrary to all principles of Islamic law.

Thus forbidden postulations are those that are expressly outlawed by the Holy Qur’ân. For instance, a man or a woman cannot stipulate that he or she will not have sexual relations with his or her spouse, or one put forward by a man trying to escape the obligation of maintaining his wife, and so on.

Ibn Taymiyah (d. 728 A.H.) argues that something that is ‘not in the book of Allah’ implies that which is not expressly prohibited by the Qur’ân. Thus things which are prohibited cannot be covenanted while mubah or permissible matters may be agreed upon and consequently they will be binding on both parties. According to Ibn Qudamah (d. 620 A.H.), any provision giving a woman the right to separation or khula does not restrict the legal privileges of either party because it is only used when one of the conditions in the marriage contract is violated. Moreover, it is also not correct to say that such stipulations change or distort the nikah agreement fundamentally; rather, these should be viewed as providing a basis for strengthening the conjugal relation.

Additionally, restraining a married man from taking a second wife, or maintaining a wife in her paternal home can never be regarded as ‘prohibiting the legal’ because such conditions were declared valid by ‘Umar since they are meant to provide the weaker party – mostly the wife – extra protection. Moreover, in furtherance of this objective, Islam allows a man to delegate the right of divorce either to his wife or to a third party, even though this is usually conceived as the man’s exclusive right. Finally, and most importantly, marriage is considered a civil contract which compels both parties to fulfil their mutual obligations as agreed.

Nevertheless, it is important to note at this juncture that the Hanafis are against the condition laid down by the wife which stops her husband from remarrying during her tenure as his wife. This point of view is best explained in following excerpt from Fatawa ‘Alamgiriah:

When anything is stipulated for in a contract of marriage which is contrary to law, as, for example, that the husband shall not marry another wife during the lifetime of the party with whom the contract is made, nor privately entertain a woman as his concubine, the condition is void, and the contract valid together with the dower. In like manner, if the husband should stipulate for the payment of the dower at a certain term, and that in the event of failure the contract shall be null, both contract and dower are binding and the condition void.

However, the Hanafis are not against other stipulations such as talaq al-tafwid’ as mentioned below (in Part 3).
The strongest argument of the *Jumhur* is number 2 above in the arguments against and the best authority of the Hanbali School is number 2 in the arguments for.

Ibn Rushd (d. 520 A.H.) testifies that both *ahadith* are authentic but, while the former is *general*, the latter is *specific* which must, under all circumstances, prevail according to the general principles of Islamic jurisprudence. Accordingly, the *hadith* regarding promises made to the wife ought to be given precedence, especially with regard to its application in the context of today’s social requirements.

### 2.2 State legislation

Section 38 of the Ottoman Law of Family Rights, the first ever official code of Islamic family law, which was enacted during the Ottoman Empire’s reign in 1917, though repealed in Turkey, remains applicable to all Sunni Muslims in Lebanon and provides:

> Where a woman stipulates with the husband that he would not marry another wife and that if he does so she or the second wife would stand divorced, the contract of marriage shall be valid and the condition enforceable.

On the other hand, the Syrian law of Personal Status (1975) adopts the Hanbali view. Article 14(2) specifies that:

> … 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.

Meanwhile, the Jordanian law of Personal Status No. 61 (1976) is the most specific on stipulations that are valid and binding in the Hanbali school of thought. Article 19(1) states that:

> … If the wife stipulates with regard to her husband a condition which is beneficial to her, which is not unlawful and which does not affect the right of any other person, such as if she stipulates that he should not take her out of the country, that he should take no co-wives, that he should give her the authority to divorce herself if she so wishes or that he should let her live in a specific country, such a condition shall be valid and binding. If the husband does not comply with the condition the contract shall be dissolved at the request of the wife who shall have claim to her remaining matrimonial rights.

The Moroccan Code of Personal Status (book 1 and 2 of *Mudawwanah*) of 1957 and 1958 has a similar provision. In Article 31:

> … A woman has a right to stipulate in the marriage contract that her husband should not take any co-wives, and that if the husband does not comply with that to which he has bound himself, the wife shall have the right to demand that the marriage be terminated.  

and the transaction is binding.” Such a stipulation was considered “*fasid*” (invalid) by the early Hanafi legalists as is mentioned in the Explanatory Memorandum of *Majalla* Amendment of *Shurut* Provisions, 1922. [See “A Sequel to the Book of Sales of the *Majalla*”, *Jeride-i-‘Adliyye*, a monthly publication of the Ministry of Justice (Ankara: Yani Gunn Press, 1922)], Vol. 2, pp. 94–96. “The addition of stipulations to the sale contract is inadmissible for the Hanafis. . . . Since in our times sales do not conform to [this] ruling . . ., it is incumbent to adopt the position of the Hanabis”, ibid., p. 95. Unfortunately the recommendation could not be implemented because the *Khalafat* was abolished in Turkey and a Western civil code was promulgated by the new Turkish Republic in 1926.

Article 6(4) of the Iraqi Law of Personal Status (no. 188) of 1959 also gives a woman the right to apply to court for a divorce if her husband fails to honour a stipulation agreed upon in the marriage contract.

Kuwaiti law differentiates between three types of stipulations that may be incorporated into the marriage contract as stated in Articles 40 and 41 of Law No. 51 concerning personal status:

Firstly, a condition that violates the very purpose of marriage shall render the marriage contract absolutely void.

A stipulation that runs counter to the implications of marriage, without contravening its principles, shall be void, but the marriage contract itself will remain valid.

But a clause that contravenes neither the roots nor the implications of marriage is not prohibited by Shariah, and thus shall be binding and enforceable, but only if it is included in the marriage contract.

Article 11 of Tunisian Code of Personal States, 1956, permits stipulations in a marriage contract. ‘If any stipulation is violated the aggrieved party may apply for dissolution of marriage.’

Article 22(1) of the Malaysian Federal Territory, Islamic Family Law Act, 1984, mentions that, if the parties have agreed to ta’aliq (stipulation sanctioned by suspended talaq), then the Registrar shall enter it (along with other particulars) in the Marriage Register. Such a woman may get ta’aliq certificate as well. The Family Law of Brunei Darussalam also recognises suspended talaq like the Malaysian law as discussed above.

Similarly, such stipulations have been accepted as valid by courts in the sub-continent. However, they did not adopt the Hanbali doctrine but iterated that a Muslim marriage is a civil contract, and as long as a stipulation does not contravene the Indian Contract Act 1872, it will remain valid and binding. In Muhammad Amin v. Amina Bibi, Addison J. put it this way: “marriage is a civil contract and the parties may contract in any way they wish to within certain limitations.”

During this survey on stipulations regarding talaq al-tafwid in Pakistan, for the purpose of this work, I have come across general but valid stipulations and other invalid stipulations that are made part of the nikahnama. For instance, in one case in Gujranwala, (Punjab province) the stipulation purported that if the wife moved to

42 For a comprehensive study of case law, see Lucy Carroll, “Talaq-e-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of a South Asian Muslim Wife”, in Lucy Carroll and Harsh Kapoor (Eds.), Talaq-e-Tafwid: The Muslim Woman’s Contractual Access to Divorce: An Information Kit (France: Women Living Under Muslim Laws, 1996), pp. 53–84. The article was originally published in (1982) 16 Modern Asian Studies, pp. 227–309 but was updated in 1996. It should be noted that most of the authors use the spellings “talaq-e-tafwid”, “talaq-i-tafwid”, or talaq-i-tafweez which are used in Persian and Urdu and not used in Arabic. I am very thankful to Mr. Arsalan of the Shirkat Gah library, Lahore for sending me a free photocopy of this book.
43 AIR 1931, Lahore.
44 For some interesting discussion whether marriage in Islam is a civil contract see my forthcoming article “Marriage in Islam: Civil Contract or a Sacrosanct?”.
her parents house because she was unhappy with her husband, he would pay her 10,000 rupees per month. In Islamabad two identical conditions by both wives stated that in case of divorce by their husbands, it would not be effective until it is justified by a committee of persons to be nominated by both parties. In another case in Islamabad, the wife stipulated that she was to have ‘the right of khul’a with revocable talaq’. In one other case in Rawalpindi, the relevant space in the nikahnama was filled in as ‘the wife has the right with the consent of the husband’. It shows the lack of knowledge on the part of the parties and in particular the moulavis.

3 DELEGATING DIVORCE TO THE WIFE
(TALAQ-AL-TAFWID) AND DEVOLVING THE
RIGHT OF DIVORCE TO A NOMINATED PROXY
(TAWKIL IN TALAQ)

3.1 Talaq al-Tafwid in theory

A Muslim woman may specify, either before or at the time of nikah, that she will have the right to divorce herself if her husband performs certain acts. Such acts may include, for example, if the husband takes another wife during the subsistence of their marriage, she will automatically be conferred the right to dissolve the marriage contract. Surprisingly, there is little disagreement amongst Sunni Muslim jurists in relation to the prerequisites of talaq al-tafwid. The majority of learned Islamic scholars (including all Sunni schools of thought with the exception of Ibn Hazm) agree that such provisions are valid, binding and irrevocable.

Most Sunni jurists interpret the Qur’anic verse, “O Prophet (Muhammad PBUH)! Say to your wives: If you desire the life of this world, and its glitter, then come! I will make a provision for you and set you free in a handsome manner (divorce) (33:28)” to mean that a woman can be delegated the right of divorce and that she may exercise it at her discretion. Meanwhile, others construe the above verse in its literal meaning, which does not devolve the power of divorce to a woman but instead gives her the “option”, since it mentions that if they [the Holy Prophet’s (PBUH) wives] do not want to live with Him (PBUH), he could divorce them. This view is supported by another Qur’anic verse: the Qur’an describes the man controlling the marriage tie, which implies that he may ‘release’ it by exercising the right of divorce.

However, the majority argues that the first verse quoted above allows a man to delegate the right of divorce to his wife. It is reported by ‘Aishah that when the above

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45 In both cases the Nikah Registrar was one and the same person who did not know whether such stipulations were valid or not.
46 For a detailed analysis of this topic, see Carroll and Kapoor (Eds.), Talaq-e-Tafwid op cit.
47 As mentioned in Part 2 the Hanafi School of thought is against such condition laid down by the first wife restraining her husband from taking a second wife during their marriage. The Hanafi scholars are not against talaq al-tafwid. See Ballie, Digest, p. 238; Burhanuddin al-Marghinani, al-Hidayah, Beruit: Dar Ihya al-Turath al-'Arabi, reprinted, 1995, Vol. 1, pp. 236–243.
49 Qur’an 2:237.
verse was revealed the Holy Prophet (PBUH) told her, “O ‘Aishah I am going to mention to you something but you should not make a hasty decision until you consult your parents” and then he narrated this verse.\footnote{Badruddin Abu Muhammad al-Aini, ‘Umdatul Qari Sharah Sahih al-Bukhari (Cairo: Idaratul al-tabat al-Muneria, 1930), Vol. 2, p. 237.} Qurtubi (d. 656 A.H.), the great commentator of the Holy Qur’an favours this opinion by detailing the Maliki school of thought’s exegesis.\footnote{See Qurtubi, Abkam al-Quran, Vol. 7, p. 111.} In his opinion when a woman exercises her delegated right of divorce it is considered like the third of the pronouncements of talaq because the word *tasrih* in the verse literally translated, means the third repudiation: “The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness.”\footnote{Qur’an 2:229. Qurtabi, *ibid.*, p. 112.}

A look at the Ithna Asharia (Shi’a) literature reveals that *talaq al-tafwid* is not allowed.\footnote{Abul Qasam Al-Hilli, *Al-Muktasar al-nafi fi Fiqh al-Imamia* (Tehran: Maktaba al-Islamia al-Kubra, 1402 A.H). In this work Imam Hilli does not mention “*talaq al-tafwid*” at all. Similarly one can not find the term *talaq al-tafwid* in Imam Ayatullah Kumaini’s book *Zubdatul ahkam* (Tehran: Munazamat-ul-Islam, 1404 A.H.). Moreover, Imam Hilli’s book *Sharaya-ul-Islam* also does not mention *talaq al-tafwid* specifically. This is interpreted to mean that Imam Hilli does not recognise it. See Carroll and Kapoor, *Talaq-e-Tafwid*, p. 41.} Muhammad Jawad Mughnia – a Shi’a scholar from Lebanon, confirms that “if [a husband] gave his wife the option intending thereby *talaq al-tafwid* and she exercised her delegated right to divorce herself, the divorce is not effective according to the learned scholars of Imamia.”\footnote{Muhammad Jawad Mughnia, *Al-Fiqha ala Mazahib al-Kamsa* (7th Edn. 1982), p. 413.} However, a deeper study of the Shi’a literature reveals that the jurists of the school are against unconditional (or absolute) delegation of this right to the wife but nevertheless agree with the essence of *talaq al-tafwid* if conditional. Thus conditional *talaq al-tafwid* is acceptable while unconditional is not. So if the husband agrees that his wife will stay in her native town, and then if he violates this stipulation his wife can pronounce *talaq* on herself because of this breach. Or that the husband should not marry any additional wives or else she would have the right to divorce herself. These are considered as valid and binding stipulations.\footnote{See Sayed Saeed Akhtar Razvi, *Islamic Laws Relating to Marriage, Dissolution . . . According to the Rulings of His Holiness Aqa Sayed Mohsin al-Hakim al-Tahatabi* (Mombasa, Bilal Muslim Mission, 1967), p. 23; Also see Abul-Fadl Ezzati, Shi’i Islamic Law and Jurisprudence (Lahore: Ashraf Press, 1976), pp. 152–153. This matter was discussed at length with Allama Zaini – a highly respected Shi’a scholar from Rawalpindi, who said that such stipulations are valid because of the contract between husband and wife, but otherwise any unconditional blanket delegation authorizing the wife to divorce herself at will without any valid reason would be void. It is important to note that according to the Shi’a school the special procedure for *talaq* has to be followed. According to Imam Khumaini if the parties agree on any stipulation “that is against the Shari’ah, for example, the husband cannot stop his wife from going any where she wants, or the husband should not fulfill his conjugal obligations he owes to another wife or that he should not marry another wife”, then all such stipulations are void, but the marriage remains valid. Strangely enough he considers an agreement between the husband and wife that the wife shall remain a virgin as valid and binding. See his *Tahreer al-Waseela* (Tehran: Moasisa-i-Tanzem wa Nashr Aa’ar Imam Kumaini, Shirkat Nairo Chap, 1413 A.H.) Vol. 3, p. 538. However, the last-mentioned stipulation, enabling the wife to remain a virgin is against Shari’ah and as such shall not be considered valid.}

The Hanafi texts discuss the topic of *talaq al-tafwid* thoroughly. For the purpose of this work some points are given in detail while others are summarised. A man is free to delegate the right of divorce to his wife or a predetermined proxy. The former is...
tafwid and the later is tawkil. The main difference between the two is that in tawkil the delegatee acts for his principal, while in tafsid the wife acts for herself. Moreover, in tawkil the principal can terminate at his will the agency of his agent, while in tafsid the husband cannot revoke the delegation. Kasani (d. 587 A.H.) of the Hanafi School has given reasons for this:

Firstly, if a person willingly transfers his possession to another, the latter will of course become the rightful owner and the former will not be able to revoke the transfer after its completion. Similarly, once a man has delegated his right of divorce to his wife, he cannot go back on his words and terminate the condition (if incorporated in the marriage contract).

Secondly, delegating the power of divorce makes it dependent upon the wife’s discretion which is similar to ta’liq al-talaq (conditional repudiation). Thus, making repudiation conditional and dependent (on the wife’s will) is automatically irrevocable that is analogous to taking an oath (which is also irreversible).

Now, when the wife exercises her right to divorce herself the resulting talaq will be either revocable (raj’i) or irrevocable (ba’in) depending on the intention of the husband and the words of delegation used by him. In the Hanafi texts the general principle is that an explicit (sarih) talaq is revocable, while one in ambiguous words (kinayah) is irrevocable. If the husband says to his wife: “Your business is in your hands”, it conveys the meaning of talaq metaphorically and will be one irrevocable talaq (if the wife exercises her delegated authority). The same rules apply to this statement: “You may choose thyself.” However, if the husband intended to delegate his wife the right of triple talaq in saying “Your business is in your hands”, it will be considered as three repudiations if she exercises that right.

On the other hand, if the word ‘talaq’ is expressly mentioned in the delegation, it will amount to one revocable talaq. Statements like “You are divorced, if you wish” or “You are divorced, when you wish” are explicit for talaq and it will lead to one

57 Ibid., p. 194; Marghinani, Hidayah, Vol. 1, p. 240. Abu Zahrah, Al-Ahwal al-Shakhsiyah (Beruit: Dar al-Fikr, al-Arabi, 1957), p. 379; Muhammad Ala-ud-Din Haskafi, Durr-ul-Mukhta, trans. and edited by B.M. Hayal, reprint of 1913 edn., p. 173. It should be noted that only chapters on family law are translated into English and not the whole book. The latest decision in Mehnaz Mehbub v. Ishtiaq ur Rashid reported as 2006 YLR 335, is very surprising, because the learned judge of the Lahore High Court, Muhammad Akhtar Shabbir, J has stated at page 337 (obiter) that “A temporary delegation of the power [to divorce herself] is irrevocable but a permanent delegation may be revoked” [italics are mine]. The learned judge has, however, not cited any authority for his opinion. His remarks are against the opinion of all the Sunni scholars as mentioned above.

59 Kasani, Bada‘i, Vol. 3, p. 187; Marghinani, Hidayah, Vol. 1, p. 240. The distinction between delegation in “express” and “ambiguous” words is analogous to that between pronouncements by the husband in “express” and “ambiguous” terms. In both cases, use of an “ambiguous” expression renders the resulting talaq irrevocable, while the use of an “express” term will be one revocable talaq. See Carroll and Kapoor, Talaq-e-Tafwid, p. 37, n.6.

61 Kasani, Bada‘i, Vol. 3, p. 190; Marghinani, Vol. 1, p. 237. The statement “You may choose thyself” should not be used without “thyself” otherwise its acceptance by the wife does not mean anything. Thus statement of the husband that “You may choose” even if accepted is void. See Muhammad Asad al-Daghazgi, al-Fiqha al-Hanafi wa adilatuhu (Karachi: Idaratul Qur‘an, 2000), Vol. 2, p. 206.

revocable *talaq* if she exercises this right. However, if he says: “You are divorced whenever you wish”, the wife will have the right to divorce herself thrice. If by his statement “Divorce yourself” he intends to give the power of three *talaq*, the wife may divorce herself thrice and this will create a “big gulf” *bainun al-kubrah* between the parties.

If the husband delegates the right to be exercised by her during the *majlis* (sitting or a meeting in which the option is given), the woman must nevertheless repudiate the *nikah* in the same *majlis*, unless her husband grants her an extended period of time in which to exercise it. A man may allow his wife to use her discretion to exercise the right of divorce upon the occurrence of a predetermined stipulated event. In Hanafi law it is neither mandatory for a woman to go to court in order to exercise her right of repudiation, nor is it necessary for her to pronounce the divorce before witnesses.

According to the traditional doctrine, if the husband has granted a conditional right of divorce the wife must exercise it as soon as she has knowledge of the breach of the stipulated condition(s), unless her husband has specified otherwise. The *Fatwa Alangiriah* states that if a man gives his wife the permission to exercise her right of divorce upon the arrival of a certain person, this will give her the choice to terminate the marriage at the stipulated *majlis*, after she comes to know of it (i.e. the person’s arrival).

In Pakistan, the typical expression of delegating the right of divorce to a wife in the *nikahnama* is: “I have delegated the right of divorce to my wife.” These words are explicit, thereby it will be one revocable *talaq* (if the wife exercises her right).

But the question that arises here is whether the husband may still be able to divorce his wife once he has delegated the right to his wife. The answer is most certainly yes because the husband does not devolve his entire right of divorce to his wife; rather, both share the right equally after delegation.

*Talaq al-tafwid* basically serves as a check on a man who may be cruel to his wife; one who may not maintain her in the appropriate manner; someone who neglects his children/wife; or, one who is away for long periods of time without providing his wife with the required finances to maintain the household, but still may not agree to give his wife the right to *khul’a* (separation) or refuse to divorce her. In the absence

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64 Kasani, *Bade‘i*, Vol. 3, p. 192; Marghinani, Vol. 1, pp. 242–243. According to Hanafis such *talaq* creates a “small gulf” (*bainun al-sughra*). Law allows the parties to bridge the “small gulf” by means of a fresh marriage without an intervening marriage. It is the same if the where a first or second *talaq* pronounced by the husband which is revocable is not revoked (expressly or by conduct) by the time the wife’s *iddat* expires – the marriage then stands dissolved. See Tahir Mahmood, “No more *Talaq, Talaq, Talaq* – Juristic Restoration of the True Islamic Law on Divorce”, *ICLR*, XII, 1992, p. 6.


66 Parties are allowed by law to bridge the “big gulf” by means of a fresh marriage only after an intervening marriage that must be consummated and lawfully ended.


69 I have come across the above typical expression written in Urdu.

70 The Pakistani Supreme Court ruled in *Khurshid Bibi v. Muhammad Amin*, PLD 1967 SC 97, that courts can grant *khul’a* (separation) to a wife without her husband’s consent. According to the doctrine of precedent and under Article 189 of the Constitution lower courts can always grant *khul’a* to desirous women. However, the above decision of the Supreme Court has been widely criticised by all *muftis* in
of such a stipulation a man may easily continue to abuse his authority leaving the wife without a remedy. It may also free a wife from a cruel husband (in the literal sense), or one who does not ‘live within his limits’. But if such stipulations are incorporated into the marriage contract, the wife may then freely exercise her right of divorce if her husband ever tries to abuse his authority or shirks any of his responsibilities towards his family.

3.2 State legislation

Legislation of some states is already mentioned and it is seen that they either mention *talaq al-tafwid* explicitly or implicitly. The Jordanian law of Personal Status No. 61 of 1976 is the most specific regarding *talaq al-tafwid*. The Iraqi law of Personal Status (1959) states that a husband may delegate the right of divorce to his wife or his proxy, and that the wife may have the discretion to divorce herself if she wishes to do so (Article 34). Article 31 of the Moroccan law (1957) says that if:

. . . A woman has the right to stipulate in the marriage contract that her husband should not take any more wives and that if the husband does not comply with that to which he has bound himself the wife shall have the right to demand that the marriage be terminated. 72

Article 11 of the Tunisian Personal Status law as amended in 1981 provides that:

It shall be valid for conditions to be stipulated in the marriage and if they are not met or are contravened there shall be a right to apply for separation by means of divorce. 73

In Malaysia, the prescribed conditions of *talaq al-tafwid* are generally included in the statutory *ta'liq* agreement discussed above. 74 In the Indo-Pak sub-continent the classical law found its way into the Contract Act 1872 which is still in place today. Section 23 provides that a marriage contract restraining a Muslim man from marrying a second time during the lifetime of his first wife is not void. 75 Tahir Mahmood argues that the Muslim law of *talaq al-tafwid* is fully applicable in India. 76 He refers to the Orissa Mohammedan Marriage and Divorce Registration Act 1949 as amended in 1954 to provide for *talaq al-tafwid*. He further argues that under parallel

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74 Also see Noriani Shah, N., *Marriage and Divorce* (Kuala Lumpur: International Law Book Services, 2000), p. 84.
75 I could not find a single instance about this in my survey given below.
laws in Assam, Bihar, Jharkand, Meghalaya and West Bengal talaq al-tafwid may be registered under their general provisions.\(^77\)

In Pakistan and Bangladesh section 8 of the Muslim Family Law Ordinance (MFLO) 1961 refers to talaq al-tafwid, but it is rarely invoked by women in practice.\(^78\) In Pakistan, the West Pakistan Rules were made under the MFLO in July 1961 but no express laws were enacted for this purpose in Bangladesh. A nikahnama is provided which accounts for “Whether the husband has delegated the power of divorce to his wife”\(^79\) in section 18.

Section 8 of the MFLO states:

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

Thus where a wife wants to exercise her right to dissolve the marriage under talaq al-tafwid, she is required to give a notice to the Chairman in writing and send a copy of the same to the husband after the pronouncement of talaq. The Chairman must constitute an Arbitration Council within 30 days of the receipt of such notice by the wife for the purpose of bringing about reconciliation between the parties. As mentioned above the Pakistani legislation considers talaq al-tafwid as revocable. It is important to note that under section 8, like section 7, no intervening marriage is required but talaq can be revoked.\(^80\) Lastly, under the MFLO divorce under section 8 will not be effective until the expiration of 90 days whether the marriage is consummated or not. Islamic law, however, considers divorce as effective instantaneously when the marriage is not consummated.

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

While interpreting and explaining the Shari’a the recognised principles of interpretation and explanation of the Holy Qur’an and [the] Sunnah shall be followed and the expositions and opinions of recognised jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.\(^81\)

Although, as pointed out by Tahir Mahmood: it is unclear what is meant by the word “prevalent”. One fails to find a single decision of the higher courts in Pakistan in which they have resorted to any non-Hanafi Sunni school of thought.

4 SURVEY OF TALAQ AL-TAFWID IN PAKISTAN

A random sample survey was carried out,\(^82\) consisting of interviews of hundreds of

\(^{77}\) Ibid.
\(^{78}\) For details see Part 3 section 3.2.
\(^{80}\) See section 7(6) of the MFLO.
\(^{82}\) To the author’s knowledge this is the first ever survey of its kind. Professor Lucy Carroll of Cambridge University had expressed her inability to conduct such a survey but claimed that it was necessary to
Nikah Registrars, and offices of numerous Union Councils across Pakistan regarding talaq al-tafwid. The research not only focused on the statistics on talaq al-tafwid of both the Sunni and Shi’a communities but also on the views of Nikah Registrars on this stipulation, as well as the social, economic and educational background of husbands (who granted this right to their wives) and the wives who asked for it.

Generally, throughout the rural areas of the country couples do not register nikah formally. Only those couples who wish to emigrate fill in the nikahnamas for the purpose of getting a passport or to fulfil the formalities of travelling abroad, mostly for hajj. In the urban areas amongst the working class the percentage is zero and most people do not even know about talaq al-tafwid. The Nikah Registrars of such areas are either completely against talaq al-tafwid or deem it un-Islamic and shameful.

Even in big urban centres, areas which are mostly populated by highly educated elite, the percentage of people who have delegated this right of divorce to their wives is extremely low. In such areas of Karachi, only about 8–10 per cent of husbands have done so. In similar areas of Lahore the percentage was 4–5 per cent, in Rawalpindi 2–6 per cent, in Multan about 1–2 per cent and in Jehlum 5–6 per cent. Only in Quetta one Nikah Registrar had the surprising data of 10 per cent talaq al-tafwid stipulations, while 12 other Nikah Registrars had three very odd instances mentioned below.

The survey in Islamabad was very interesting because one finds an interesting blend of elites, the white collar and blue collar working classes in a single city. Amongst the city’s general population, talaq al-tafwid is about as alien a concept as in the other cities. Nevertheless, it is 5–6 per cent in the ‘middle’ class and 11–13 per
cent in the elite. One Nikah Registrar claimed that according to his record 45 per cent of husbands have granted this right to their wives.\textsuperscript{90}

In the poor areas of big cities such as Karachi, Lahore, Rawalpindi, Multan, Quetta, Peshawar, and Islamabad the percentage drops even further and comes to less than one.\textsuperscript{91} Moreover, in other cities there are either no cases in which \textit{talaq al-tafwid} is granted to women or the number of cases is negligible. In the entire NWFP, there were only eight cases. Of these, two were in Swat,\textsuperscript{92} one in Dir,\textsuperscript{93} two in Nowshera,\textsuperscript{94} and three in Peshawar – the provincial capital,\textsuperscript{95} only one in Abbottabad,\textsuperscript{96} none in Haripur, Mansehra, Malakand Agency, Mardan,\textsuperscript{97} or the southern districts of NWFP. The survey in Chilas (Northern Areas), Bagh and Mirpur of Azad Kashmir could not identify a single \textit{nikah} with \textit{talaq al-tafwid}.\textsuperscript{98} The survey conducted among the Muslims of Pakistani origin in three areas of England revealed that they do not know about \textit{talaq al-tafwid} and none of those surveyed have granted this right in their marriage contracts.\textsuperscript{99}

Even amongst the general population in big cities, the concept of \textit{talaq al-tafwid} is little known. This is true for both Sunnis as well as Sha’is. But in most districts of Punjab, such instances are less than 1 per cent.\textsuperscript{100} Whereas in Sialkot, Wazirabad, Mandibahawuddin,\textsuperscript{101} Chakwal,\textsuperscript{102} Khanewal,\textsuperscript{103} Lodhran\textsuperscript{104} and Murree there was not a single case to be found. Nevertheless, four cases were found in areas inhabited by the ‘poor’ in Rawalpindi; four in Sargodha;\textsuperscript{105} two in Tobatek Sing;\textsuperscript{106} one

\textsuperscript{90} The Nikah Registrar was a learned scholar of Islamic law who revealed that normally the parties ask whether \textit{talaq al-tafwid} is allowed in Islam or not and only when they are assured that it is so will they stipulate it in the contract. Moreover, the people of such areas are very rich and very highly educated mostly abroad.

\textsuperscript{91} Only two \textit{nikahnamas} containing \textit{talaq al-tafwid} provisions were found after checking over 12,000 \textit{nikahnamas} in such an area of Karachi.

\textsuperscript{92} Both cases concern one family.

\textsuperscript{93} The husband did so only to facilitate his immigration to Canada along with his wife.

\textsuperscript{94} Both cases occurred in the same family.

\textsuperscript{95} Out of 24 Nikah Registrars, ten were surveyed in posh areas and 14 in the rest of the city. Out of the three cases found, one was in Hayatabad, one in Defence and one in Saddar. One of the Nikah Registrars considered \textit{talaq al-tafwid} good only if conditional while the others deemed it as un-Islamic and described it as an “imported idea”.

\textsuperscript{96} The people of Abbottabad are highly educated; nonetheless, I found only one instance of \textit{talaq al-tafwid} after searching data available with most of the Nikah Registrars of the city.

\textsuperscript{97} Five registrars were surveyed in Mardan. \textit{Talaq al-tafwid} provisions were found in \textit{nikahnamas} of two girls who are originated from NWFP but their parents migrated to other parts of the country. In one case the \textit{nikah} was solemnised in Rawalpindi and in the second case it took place in Islamabad.

\textsuperscript{98} The entire record of Mirpur was checked. It is important to note that unlike the \textit{nikah} form in Pakistan, the \textit{nikah} registration form in Azad Kashmir does not have a specific provision regarding \textit{talaq al-tafwid}.

\textsuperscript{99} The author expresses deep gratitude to his friend Inam Haqqani who arranged a random sample survey by giving a questionnaire to members of the Pakistani community.

\textsuperscript{100} The maximum number of people of all the districts/areas mentioned here are poor and uneducated.

\textsuperscript{101} The data of 12 Nikah Registrars was checked. One girl, who originated from Mandibahawuddin, had her \textit{nikah} solemnised in Lahore and was given the right to divorce herself.

\textsuperscript{102} Records of five Nikah Registrars were checked.

\textsuperscript{103} The data available with five Nikah Registrars were used.

\textsuperscript{104} The record of five Union Councils was checked.

\textsuperscript{105} The data of 19 Nikah Registrars were checked. The survey was conducted not only in the main city but also in other tehsils of Sargodha. Three instances of such stipulations were found in the city and one in tehsil Bhalwal. Out of the three cases in the main city one lady is a doctor while the other is a magistrate. The couple in the Bhalwal case is currently residing in Italy.

\textsuperscript{106} In both cases the couples also had English nationalities.
in Mianwali; one case in Vehari; two in Attock; and three each in Gujrat, Faisalabad and Gujranwala. The percentage in Raheem Yar Khan, a city of south Punjab is 0.5 per cent. None could be found in interior Sindh where the Nikah Registrars of Shikarpur, Sangar, and Hyderabad were surveyed. In Quetta – the provincial capital of Balochistan – only three instances were discovered in areas inhabited by the ‘common’ people, but none in the other districts. However, as described above, the percentage of Nikah with tafwid provisions with only one Nikah Registrar is currently 10 per cent. But the percentage seems to be higher in so-called ‘court marriages.’ The survey carried out in Karachi and Rawalpindi revealed it to be well over 5 per cent.

Despite the fact that Shi’a jurists do not agree with unconditional talaq al-tafwid, the survey in Islamabad and Rawalpindi revealed that in more than 1 per cent of marriage contracts husbands have delegated the right of divorce to their wives unconditionally. I found some nikahnamas of Shi’a community in which the delegation is absolute; however, it is subjected to the interpretation of ‘Fiqah Ja’ffaria’ school of thought. The parties involved, however, are elite as is the case amongst

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107 When the wife exercised the delegated authority her husband contested her right and thus she had to get khul from the local court.
108 Ten Nikah Registrars in Attock were surveyed.
109 Twelve Nikah Registrars were surveyed in Faisalabad.
110 In the case of Gujrat two of the couples have English as well as Pakistani nationalities.
111 All these cases involved conditional exercise of talaq al-tafwid. In one case the wife stipulated that her husband must maintain her parents, or else she would divorce herself, and she did it after 11 months of marriage when he failed to do so. In another case the wife stipulated that her husband must give her a bungalow in Karachi and half a kilo of gold every year and she divorced herself because the husband failed to keep his promise at the end of the first year of their marriage. In the third marriage it was stipulated that the husband had to fulfil any demand of his wife, or else she would divorce herself and she duly exercised her delegated authority within nine months of marriage.
112 In Karachi and Rawalpindi, there was quite a high percentage of recorded delegations of divorce with Nikah Registrars in both district courts. However, most of their entries concerned the so-called “court marriages”. Such a marriage is solemnised when a boy and a girl fail to convince their parents to allow them to marry each other. They will then consult a lawyer to arrange for their marriage who in turn will make arrangements with the Nikah Registrar and two witnesses. The ceremony takes place without the permission of the parents of both parties and without all the customary rituals. Even so, such a marriage fulfils all the required conditions, and so it is considered valid in the eyes of the court. Hence it is termed a “court marriage”. However, the wife in such a case may face harassment by her own parents who will normally either launch an FIR against her husband accusing him of abducting their daughter, or her husband’s relatives who will try to charge her of committing illicit sexual relations with the boy. Since lawyers arrange such marriage contracts; they tend to influence the otherwise opposing or reluctant Nikah Registrars to include the stipulation of talaq al-tafwid in such contracts.
113 There were five instances of unconditional talaq al-tafwid amongst over 400 marriage contracts. The author offers his sincere gratitude to Mr. Syed Mansur Hussain, Syed M. Saqalain Kazmi (Nikah Registrar of Fiqah Ja’ffaria Islamabad), Syed Murtaza Mousavi, Allama Madani (Nikah Registrar of Rawalpindi), and Mohammad Noman for their help in collecting data of Shi’a marriage contracts. Fortunately there is only one Nikah Registrar who collects marriage contracts solemnised from all Shi’a prayer leaders in Islamabad. This is also true of the capital’s twin city – Rawalpindi – where the entire record of the three Union Councils was checked because the Nikah Registrar had only 12 marriages registered with him with no instance of talaq al-tafwid since January 2006.
114 The Shi’a community usually call themselves “Fiqah Ja’ffaria” in Pakistan. For reported cases see below.
Sunnis. On average Shi'a scholars were found to be more knowledgeable on this subject than their Sunni counterparts.

Over all, the percentage of delegation in Pakistan is less than one. Why? Some common features seen in all urban centres where high percentages of delegated divorce is found are that such people are mostly rich, highly educated and in many cases, educated abroad and are aware of their rights or have British nationality besides the Pakistani nationality.\footnote{115} This was revealed when the Union Councils in Jhelum were surveyed. Around 50 per cent of couples whose nikahnamas was checked have dual nationalities – mostly British and Pakistani. An overwhelming majority of Nikah Registrars surveyed throughout the country are against \textit{talaq al-tafwid}.ootnote{116} In fact, they even go to the extent of crossing out the section in the nikahnama regarding \textit{talaq al-tafwid} (section 18) before issuing it to the parties for filling in. Moreover, they do not even inform the parties about the existence of this right. Lawyers seem to be more aware of \textit{talaq al-tafwid}; nevertheless, the majority of them are still against it. Those who advocate it through the media blame the ulama for the prevalent situation; however, they seem to be equally ignorant of this concept.\footnote{117} Almost all stipulations found during this study were unconditional, whereas Islam recommends conditional stipulations. Moulana Ashraf ‘Ali Thanawi, a great religious and spiritual scholar and a strong advocate of women’s rights in the sub-continent in the early 20th century, has also supported conditional \textit{talaq al-tafwid}.\footnote{118}

This work classifies Nikah Registrars surveyed throughout the country into four categories:

1. Those who consider \textit{talaq al-tafwid} as “haram” (prohibited or illegal) because of their narrow mindedness and ignorance of Islamic principles. This category also includes the so called “ulama” who either “don’t know” or those who “don’t want to know”. Such Nikah Registrars (moulavis) cross out section 18 of the nikahnama before issuing it to the parties. Hence, they may be labelled “The opponents”.

2. At the other end of the spectrum are those who understand the concept and favour it. And they are thus “The proponents”.

\textit{Articles}

\footnote{115}{The condition of dual nationality should be coupled with high academic qualifications as well because this survey for \textit{talaq al-tafwid} in Mirpur, Azad Kashmir (where most of the people have dual nationalities) revealed only one stipulation. Here the wife had stipulated that her husband, a dual nationality holder, would not take her away to England and that she shall never take the British passport.}

\footnote{116}{This is more relevant to areas where the percentage is zero or very close to it.}

\footnote{117}{See, for instance, Siddiqa, ‘Ayesha, “What could Brighten the Country’s Image”, \textit{Dawn}, 7 April 2006, p. 6. The author of this article presumes that women have an automatic right of divorce and that the “laws treat women almost on par with men”, and that the “right of divorce is a delegated right …”, and that the “state [of Pakistan] has allowed two types of laws to exist: family laws and Shari’ah laws …”. \textit{Ibid.} She takes the view of a Nikah Registrar who is against provisions on divorce, arbitration etc in the MFLO 1961 and does not accept them as Shari’ah law. If this is the level of education/of an advocate of \textit{talaq al-tafwid} who writes column in \textit{Dawn} – Pakistan premier English newspaper – then what can one expect from the common man?}

\footnote{118}{See Ashraf ‘Ali Thanawi, \textit{al-Hilat al-Najiza li’l-Halilat al-‘Ajiza} [A Successful Legal Device for the Helpless Wife] (Lahore: Al-Faisal Nashiran wa Tagiran Kutub, 1996), pp. 45–56 (hereafter Thanawi, \textit{al-Hilat}). The above is typically expressed in Urdu as, “I have delegated the right of divorce to my wife.” It is important to note that the delegation is always unconditional. This survey revealed only one case in Islamabad and two in which the delegation was conditional.}
Then there is a grey area consisting of those who understand it but do not encourage people to practise it because it is either against the social order or against patriarchy. Such registrars are usually reluctant to include it in the *nikah-nama*; they will only do so if requested by the parties. So this category may be adequately named “The hesitants”.

Those who are against it because they do not consider the *hadith* of ‘Aishah, discussed above, enough for authorizing a husband to delegate the right of divorce to his wife and think that the *hadith* only tells us that the Prophet (PBUH) was consulting ‘Aishah (his wife) rather than granting her the right of divorce. They follow some of the opinions of Ibn Hazm – the champion of the literal school of thought discussed above. They may be described as “The literalists”.

All the above are nonetheless Sunni *moulavis*, who represent the majority of Islamic thought in Pakistan. According to the data collected in this survey, Nikah Registrars or *moulavis* in the first category are mainly *Barelwis*; in the second and third categories are *Deobandis*; and in the fourth category *Ahl al-hadith*. The *moulavis* of the first category state that *talaq al-tafwid* is *haram* (undoubtedly prohibited),

119 Despite my best efforts I failed to find any book or article or *fatwa* of any *ahl al-hadith* scholar of the sub-continent about *talaq al-tafwid*. I had many discussions with numerous *ahl al-hadith ulama* of Islamabad and Lahore on this issue. They oppose *talaq al-tafwid* but have no convincing arguments and all they could do was to tell me to ask *Muhaddith* – their magazine published from Lahore. I sent my question in May 2006, that was duly acknowledged but despite many telephone calls to the relevant person did not get any reply until the beginning of December. In the course of my own research I found that *ahl al-hadith* scholars do not mention the term *talaq al-tafwid* at all in their discussions about stipulations in marriage contracts. All that I found was the answer to a question given by a leading *ahl al-hadith* scholar Hafiz Abdullah Ropri (d. 1964) in his *Fatawa Ahlihadith* where he states that “if a husband has stipulated that if he did not keep up his promise his wife will be divorced then [in case of violation of that stipulation] she will be divorced”. See Hafiz Abdullah Ropri, *Fatawa Ahlihadith* (Idara Ihya al-Sunnah, Sargodah, n.d.), Vol. 2, p. 441. All that is clear from his long answer is that he agrees with stipulations in general such as the wife will not travel with her husband but do not agree with *talaq al-tafwid* and does not mention it.

120 This sect was founded by Ahmad Raza Khan, *Barelwi* (1856–1921). They mostly oppose the *Deobandis* and the *Ahl-i Hadith* in each and every thing that might seem trivial or less important for the common man. For details of their faith and their staunch opposition to the *Deobandis* and the *Ahl-i Hadith* see Usha Sanyal, “Are Wahhabis Kafirs?” Ahmad Riza Khan Barelvi and his “Sword of the Haramayn” in Masood, K., Powers, D., and Messick, B. (Eds.), *Islamic Legal Interpretation: Muftis and their Fatwas* (Oxford: Oxford University Press, 1996; Karachi, reprinted Oxford University Press, 2005), pp. 204–220; and her *Devotional Islam and Politics in British India: Ahmad Riza Khan Barelvi and His Movement, 1870–1920* (Delhi: Oxford University Press, 1996). This sect has an established network of seminaries in Pakistan.

121 Followers of this fiction are the original mainstream *ulama*. They are called *Deobandis* because of their allegiance to the famous *Darul uloom* in Deoband (India) where most of its top scholars were educated. They have a widespread network of *mada’ras* (seminaries) in Pakistan. Both the *Deobandis* and the *Barelwis* are, nevertheless, Hanafis. For details see Metcalf, B.D., *Islamic Revival in British India: Deoband, 1860–1900* (Princeton: Princeton University Press, 1982).

122 These are a minority in Pakistan and because of their attitude towards juristic reasoning are called *Ahl-i Hadith*, or “supporters of Traditions”. This group opposes the legal method of both the Hanafi and Maliki schools and maintains that the use of juristic reasoning in any form is both illegitimate and unnecessary. Outside the Qur’an, they regard the *Sunnah* of the Prophet as the source of Islamic law. For them it was the job of the jurists to discover this *Sunnah*, through the *hadith*.
and that it is so in all schools of thoughts. Nevertheless, there exist a few exceptions, when some Nikah Registrars did not outrightly deem it *haram*, but their personal opinions tilt towards opposition.

Nikah Registrars of the second category seem very learned and profess knowledge of the concept of *talaq al-tafwid* from original Hanafi sources such as *Hidaya*, *Badai*i, *Durr al-muktar* (known as Shami). Such scholars were found in Islamabad, Lahore, Multan, and Karachi and one in Quetta. They have the high percentage of *talaq al-tafwid* instances with them. These *ulama* constitute less than 1 per cent of all Nikah Registrars in Pakistan whereas those in the first and third categories form the majority. This study also uncovered *ulama* who are well-versed in Islamic law and despite the fact that they are aptly qualified to do so they refuse licences from Union Councils for solemnising *nikahs* because they want to avoid the common practice of receiving a fee which may be 400–500 times higher than what Nikah Registrars are legally required to demand for their services. Nikah Registrars of the last category had no instances of *talaq al-tafwid* in general. Even if there were one or two cases out of hundreds of registered marriage contracts, it was only because the couple insisted.123

The *ulama* in general opposed the provisions of the MFLO 1961 when it was enforced, but the government managed to keep them quiet by issuing them licences for solemnising *nikah* under this very law and so the ill-educated *moulavis* of mosques were prevented from mobilising the masses against the Act. Indeed, various provisions of the MFLO 1961 are very controversial but the provision of *talaq al-tafwid* is accepted by all the main Sunni schools of thought. It is only the ignorance and the bigotry of the petty *moulavis* of the mosque that prevails over the true image of Islamic law in Pakistan.

If the government seriously aims at benefiting women it must inquire into why most of its authorised Nikah Registrars are against such delegation of divorce, even though it is not only accounted for in Islam but has also been enacted by the Pakistani legislature. In future, the State must act more responsibly towards this task and not simply issue licences blindly to all those so-called “Nikah Registrars”. It would also be advisable to conduct written as well as an oral tests on the essence of *nikah* and stipulations in general and *talaq al-tafwid* in particular to test their knowledge before such permission is granted. Meanwhile, the currently serving Nikah Registrars need to be educated on this concept in order to enable them to develop a broader understanding of, and greater tolerance towards, stipulations benefiting women. Moreover, the state ought to make provision to cancel the licence of any Nikah Registrar who is not willing to incorporate such conditions into the *nikah-nama*.124

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123 One such Nikah Registrar who had to agree to include *talaq al-tafwid* on one occasion went to the extent of saying that this idea is imported from England (because that couple came from England to solemnise their *nikah* and insisted on it forcing him to agree to their demand).

124 The licence currently granted to Nikah Registrars states that it will be revoked either in case of a breach of any of the provisions of the MFLO 1961, or the rules made thereunder or of any condition of this licence.
5 CASE LAW ON TALAQ AL-TAFWID AND OTHER STIPULATIONS

In Allah Rakha v. The Federation of Pakistan the Pakistani Federal Shari'at Court has declared subsections 3 and 5 of section 7 as repugnant to the injunctions of Islam. Under section 7 subsection 3 talaq shall not be effective until the expiration of 90 days from the day on which notice of it is given to the Chairman. What is important is that the above subsection is also applicable to talaq al-tafwid under section 8. There will be problems when a wife exercises her delegated authority to divorce herself but does not give any notice to the Chairman. The Pakistani Supreme Court had ruled in Syed Ali Nawaz Gardezi v. Muhammad Yusuf that failure to give notice of talaq amounts to revocation of the talaq. However, in Mst. Kaneez Fatima v. Wali Muhammad the Supreme Court has ruled that “failure to send notice of talaq to the Chairman of the Union Council does not by itself lead to the conclusion that talaq has been revoked. It may only be ineffective but not revoked”. By the same analogy failure by the wife to give notice of talaq to the Chairman would mean that talaq is not effective. It is hoped that the Shari'at Appellate Bench of the Supreme Court will also examine the applicability of section 7 to talaq al-tafwid mentioned in section 8 of the MFLO.

Section 8 of the MFLO also mentions that where a party to a marriage contract ‘wishes to dissolve the marriage otherwise than by talaq, the provisions of section 7 shall … apply’. It means that the procedure of section 7 applies to khula and mubarat as well. There have been conflicting High Court decisions on this point. In Princess Aiysha Yasmien v. Maqbool Hussain Qureshi it was held that proceedings under section 7 of the Ordinance were essential for khul’a and mubarat. However, in Chuhar v. Mst.

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125 I have noticed an alarmingly high rate of cases involving talaq al-tafwid in lower courts. Even in the High Courts there are plenty of such cases. Two such cases decided by the Rawalpindi Bench of Lahore High Court were reported by the press in the space of only five days. See Nawa'i Waqt, 24 June, 2006, pp. 2, 7; and 27 June, 2006, pp. 2, 5.

126 PLD 2000 FSC 1.

127 Ibid., at p. 62. The Pakistani Government has appealed against the decision of the Federal Sharı'at Court to the Shari'at Appellate Bench of the Supreme Court where the case is pending until the writing of this article. Section 7 of the MFLO has been the subject of fierce debates in the academic circles as well as amongst the superior judiciary in Pakistan. It is pointed out by some authors that because of the procedure laid down in section 7, Pakistani law abolishes triple talaq or talaq al-bid' at.

128 Syed Ali Nawaz Gardezi v. Muhammad Yusuf, PLD 1963 at pp. 74–75. Also see Abdul Mannan v. Safarun Nessa 1970 SCMR 845; Muhammad Salahuddin v. Muhammad Nazir Siddiqui, 1984 SCMR 583 and Junaid Ali v. Abdul Qadir 1987 SCMR 518. There are plenty of High Court decisions on the same point. It is important to mention that it was a dictum in the Gardezi case and not ratio.

129 Mst. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 901 at p. 916. However, one fails to understand the real difference between “revocation of talaq” in the Gardezi case and talaq being “ineffective” in Kaneez Fatima. As far as the practical effect of both is concerned there is no difference. “Revocation of talaq” means that the husband has exhausted one talaq and is now left with two declarations to exercise in the future. In my opinion, once a Hanafi husband has pronounced three talaq at a time with the intention of divorcing his wife thrice, then talaq (ba'in) will be effective morally but not legally because of the decisions of the Supreme Court. However, if the husband pronounced three repudiations in one sitting displaying no intentions to declare three repudiations, then it will be considered one pronouncement.

130 PLD 1979 Lahore 241.
Ghulam Fatima the Lahore High Court observed that in case of dissolution of marriage by mutual consent the question of revocation does not arise. In *Mst. Kaneeze Fatima v. Wali Muhammad*,131 which is a full bench decision, the Supreme Court of Pakistan held that the provisions of section 7 of the Ordinance had to be observed even where the parties had arrived at settlement for dissolution of marriage.

There is plenty of reported case law on *talaq al-tafwid* in the Indo Pak sub-continent. In *Hamidullah v. Faizunissa*,132 the legal principle regarding *talaq al-tafwid* was laid down in the following statement:

> We are aware of no reason, why an arrangement entered into before marriage between parties able to contract, under which the wife consented to marry on the condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mohammedan law, should not be carried out.

In another case, *Ayatunnessa Bibi v. Karam Ali*,133 a woman left her husband a year after his second marriage. In a suit by the husband for restoration of conjugal relations, her counsel’s argument was that it had been provided in the *nikah* that in the event of her husband taking a second wife during their marriage, she would be conferred the power to divorce herself, and that she had done so in accordance with its terms. It was consequently held that when a wife is given the right of *khula* by the marriage contract, she may exercise this option at her utmost discretion (i.e. whenever she may wish to do so) or if it is conditional, upon the occurrence of the stipulated event. The court held that the wrong done to her was a continuing one and thus it was reasonable in such circumstances to enable her to retain a continuing right to exercise this power.

The case of *Sainuddin v. Latifunnessa Bibi*134 had similar facts except that the agreement was post-nuptial and the delegated right of divorce was only to be exercised if the husband married a second time without his first wife’s permission. He subsequently did marry again and the wife divorced herself in accordance with the agreement. The husband contested the exercise of this option and put forward two arguments:

- That a post-nuptial delegation of the power of divorce was invalid; and
- That such a delegation, if it were acceptable, was revocable and the commencement of a legal suit amounted to one such revocation.

The court however, rejected both arguments and held that the wife was entitled to exercise the right of divorce and had done so in the appropriate manner.

An ante-nuptial agreement arose in *Sajuddin Sekh v. Mst. Soneka Bibi*,135 where a man’s third wife stipulated that if he ever brought any of his other two wives to live in the dwelling he shared with her without her consent, she would automatically gain the right to exercise the delegated power of divorce. The court accepted this provision since it did not, in any way, serve as an impediment to the marital relations

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131 PLD 1993 SC 901.
132 ILR 8 Calcutta (1881) 327.
133 ILR 36 Calcutta (1908) 23.
134 ILR 46 Calcutta (1918) 141.
135 AIR 1955 Assam 153.
between the man and his wives. This stipulation was therefore viewed as one that ensured peace and domestic happiness (since it correctly assumed that the wives could not be happy living together) rather than one which was opposed to public policy.

A woman may also lay down the condition that she would be entitled to live apart from her husband and still be maintained by him in the event of his taking a second wife. There is some authoritative case law on the wife’s right to separate residence and maintenance in such circumstances. One such case is *Mansur v. Mt. Azizul*,\(^{136}\) where a week after his second marriage the husband had agreed to pay his first wife maintenance even if she did not reside in his house. In a suit for recovery of maintenance arrears by the wife the husband denied his liability on the ground that the agreement was not in consideration in addition to being opposed to public policy. It was, however, held that if a Muslim man married a second time only to find that his first wife could not compromise by living with the second and if he could not also provide a separate residence for her exclusive use, then if for the sake of domestic peace and happiness he executed an agreement in her favour and maintained her adequately, even if she lived apart from him it would not be against public policy.

The court distinguished *Bai Fatima v. Alimahomed*,\(^{137}\) where a similar agreement was held to encourage future separation of spouses and was, accordingly, declared void as being against public policy. However, in the case of *Mt. Sadiqa Begum v. Ata Ullah*,\(^{138}\) where a husband executed a post-nuptial deed agreeing to give his first wife the right to divorce him or to live apart from him whilst receiving a monthly allowance of Rs. 75; the judge upheld the validity of the provision stating that:

> I am unable to see anything 'monstrous' or mad in the deed which, in my opinion, was a reasonable one for a husband to execute in favour of a wife who looks for treatment such as emancipated Indian women naturally consider they have a right to insist on.

Similarly, in *Buffatan Bibi v. Sk. Abdul Salim*\(^{139}\) an ante-nuptial agreement entered into by a Muslim husband to pay separate maintenance to his wife in case of any domestic dispute and giving her the power to divorce herself in case of his failure to pay this amount for a certain period was considered as not opposed to public policy and enforceable under Mohammedan law. Nevertheless, a wife exercising her powers under such an agreement must establish that the prerequisite conditions entitling her to use them must have occurred. In *Muhammad Kutbuddin Jaigirdar v. Nurjahan Begum*\(^{140}\) the husband divorced the wife on 21 May 1966 and registered the *talaqnama* with the Marriage Registrar. On 19 April 1967 he instituted a suit for restitution of conjugal rights. The wife contested the suit on the ground that the marriage had been dissolved by *talaq* pronounced by the husband about a year back. The court held that since no notice was served under section 7, therefore, the marriage was still subsisting. On 21 July 1967 the wife pronounced *talaq* on herself in exercise of her delegated power of *talaq* and served notice on the Chairman as well as the husband. The Court ruled that the marriage between the husband and the wife had been dissolved.

\(^{136}\) AIR 1928 Oudh 303.
\(^{137}\) (1913) ILR Bombay 280.
\(^{138}\) AIR 1933 Lahore 885.
\(^{139}\) AIR (1950) Calcutta 304.
\(^{140}\) 25 DLR (1973) 21.
In Pakistan, stipulations in marriage contracts came to light in the case of Muhammad Zaman v. Irshad Begum.\(^{141}\) There a marriage contract specified that in case of the husband remarrying, his first wife would be entitled to take up a separate residence as well as maintenance allowance. The husband gave an undertaking to be bound by this agreement. He eventually did remarry but neither honoured his promise nor had he originally paid the prompt dower. When the first wife decided to reside in her parental home rather than with her husband and filed a suit for maintenance, he counter-sued for restitution of conjugal rights. The Lahore High Court held at page 1109 that an agreement between husband and wife, allowing her to live separately from him in the event of his remarrying, cannot in any way be termed as opposed to public policy, either under Muslim law or the Contract Act of 1872 (section 23). As a result, the husband’s petition for restitution of conjugal rights was rejected.

Interesting cases involving *talaq al-tafwid* are those in which one party is Sunni and the other is Shi’a. In *Dr. Qambar Murtaza Bokhari v. Zainab Bashir*\(^{142}\) the husband, a Shi’a, contested his wife’s (a Sunni) notice of exercising her delegated right to divorce herself on the basis that he had not delegated her any authority to do so and since she was a Shia, therefore, *talaq* had to be exercised according to the Shi’a law.\(^{143}\) It was held that the wife being a Sunni Muslim had duly exercised her right to divorce herself.\(^{144}\)

The authority in *Tahazzad Hossain Sikdar v. Hossneara Begum*\(^{145}\) indicates when a wife should pronounce *talaq al-tafwid*, if she wants to exercise her right of divorce and whether this exercise would be reasonable or opposed to public policy. In this case a woman exercised her delegated right of divorce because her husband had not given her the prompt dower consisting of ornaments and clothes. In court, the husband refuted the validity of this pronouncement of *talaq*. The trial judge agreed and ruled in his favour, but the District Judge reversed the decision and held that the marriage stood dissolved. Nevertheless, the husband appealed to the High Court where he also contended that the delegated right of divorce could not be utilised in relation to non-payment of prompt dower and that such an exercise was unreasonable and against public policy. The court, however, rejected this argument and others based on the proposition that a valid pronouncement of *talaq al-tafwid* by his wife could only be communicated to him directly or in the presence of witnesses.\(^{146}\)

But, in the absence of such an agreement, can a wife seek judicial dissolution of her marriage on the ground that her husband has taken a second wife against her wishes? And what remedies would be available to a wife who is subjected to unequal treatment after the second marriage? All four Sunni schools unanimously agree that simply taking a second wife does not, in itself, constitute a ground for the first wife to petition for dissolution of marriage. But the Maliki School holds that where a first wife is not treated as equal to the second, this amounts to *darar*, or injury, and would

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141 PLD 1967 Lahore p. 1104.
143 Marriage in Shi’a law can be dissolved in presence of two witnesses of known probity in set form of Arabic words. *Ibid.*, at p. 195.
144 The court relied on *Deedar Hossein v. Zahoor-oon-Nisa* (1841) 2 MLA, 441, at p. 477.
consequently entitle the former to claim judicial termination of the marriage. This rule found its way into the Dissolution of Muslim Marriages Act 1939; section 2(viii) (f), which provides that a woman married under Muslim law, shall be entitled to obtain a decree for the dissolution of her marriage on the ground, *inter alia*, that the husband treats her with cruelty; that is to say, where he has multiple wives and does not treat her equitably (or equally) in accordance with the injunctions of the Qur’ān.

Case law reveals that the second wife may also complain against her husband on the same ground, although it is often the first wife who pleads unequal treatment. Nevertheless, in *Amena Khatun v. Serajuddin Sardar*,147 it was the second who sought dissolution of her marriage on this ground. The defendant had married the claimant in 1947 and undertook to have her stay in her parental home to enable her to look after her property, and to give her Rs. 12 per month for her maintenance in case he left her to live with his first wife. It so happened that in 1953 he actually left her and took up residence with his first wife. The claimant filed a suit for termination of the marriage in 1960, on the ground, amongst others, of cruelty resulting from unequal treatment. The court held that the husband was indeed unable to offer her equal treatment in comparison to his first wife and the marriage was, accordingly, liable to be dissolved on this ground.

As iterated earlier, the four Sunni schools of thought do not consider the act of taking a second wife alone as cruelty to the first. However, the Indian judiciary has departed from this belief to the extent that some judges have argued that the taking of a second wife does give rise to the presumption of cruelty thereby providing an appropriate ground for the dissolution of a marriage under the DMMA 1939.

This is illustrated by the case of *Itwari v. Asghari*,148 in which a husband brought a suit for restoration of conjugal rights against his wife who, accusing him of cruelty towards her refused to return to live with him after he had remarried. The trial court ruled that the mere fact that he had remarried did not raise the presumption of inequitable treatment towards her. However, on appeal, the District Judge was of the opinion that this was so and ruled in her favour. The husband persevered and went on to the High Court where his counsel argued that since every Muslim man had the basic right to keep four wives simultaneously, the mere fact that he had taken a second was no proof of cruelty alone. Judge Dhavan ruled that Muslim law allowed polygamy but never encouraged it. Accordingly, under the prevailing social conditions, the very act of taking a second wife during a subsisting marriage does give rise to the presumption of cruelty to the first.

Professor Tahir Mahmood of India warmly welcomes the decision of the *Itwari* case. He argues that:

Surely, it was not without a sound basis, since the way polygamy is practiced in this part of the world was not Qur’ān’s idea of polygamy when it permitted it subject to the condition of equitable treatment between co-wives.149

147 17 DLR (1965) 687 s.
The *Itwari* ruling seems to be influenced by the earlier case of *Moonshee Buszloor Raheem v. Shumsoonnissa Begum*\(^{150}\) that concerned restitution, in which it was held that a Muslim man has the right to take a second wife during the subsistence of his first marriage. However, if the first wife objected to the polygamous arrangement and refused cohabitation on this ground, can she treat her husband’s action of remarrying as cruelty to her and consequently refuse restoration of conjugal rights? It has been held that any conduct of a husband that causes bodily harm or mental pain to his wife is surely capable of amounting to cruelty. This concept was applied in *Hamid Hussain v. Kubra Begum*\(^{151}\).

However, the Allahabad High Court distinguished *Itwari* in *Syed Ahmad Khan v. Imrat Jahan Begum*\(^{152}\) where Nandan J. refused to accept a man’s multiple marriages as evidence of cruelty *per se*. This was, however, only due to the peculiar facts of the case in which the husband had married three times, with the claimant being the second. She had moved out of her husband’s residence, complaining of non-payment of her prompt dower, and when the case came to court, she resisted her husband’s claim for restitution of conjugal rights because she wanted to retain her job against his wishes. The court rejected her argument, stating:

> Since the wife did not live with the husband for a single day after his having married a third time, it cannot be said that the husband did not treat his wife equitably in accordance with the injunctions of the Qur’ān.\(^{153}\)

Indian law, therefore, entitles a wife to judicial remedies, but does not allow her to challenge the ‘basic’ right of the husband to practise polygamy.

Meanwhile, in Pakistan the position taken by the Allahabad High Court in *Itwari* favouring women has not gained acceptance. In *Resham Bibi v. Muhammad Shafi*\(^{154}\) a man married the claimant, his first wife, in 1950 and the second time in 1958. Three to four years after this event, the first wife left for her father’s house and consequently brought a suit for dissolution of the marriage. Her counsel pleaded the inference of cruelty from the circumstances in which the husband was living with his second wife while the claimant had taken up separate residence. But it was held that the mere act of remarrying during a subsisting marriage does not amount to cruelty to the first wife, since Islamic law allows a man to have four wives at any given time. It should be noted, however, that polygamy was only a minor issue in this case, since the wife had cohabited with her husband for several years after his second marriage and allegedly had not previously complained.\(^{155}\)

Nevertheless, the same High Court departed from this decision in the case of *Muhammad Khan v. Zarina Begum*,\(^{156}\) in which the court granted a second wife *khul’a*, but the suit here was not brought for cruelty resulting from a remarriage. The judges, however, criticised the husband since he already had five children from his first marriage and consequently was not economically stable enough to support a second

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\(^{150}\) MIA 1867 p. 551.

\(^{151}\) AIR 1916 AI at p. 235.

\(^{152}\) AIR 1982 AI at p. 155.


\(^{154}\) PLD 1967 A.J.K. p. 32.


\(^{156}\) PLD 1975 A.J.K. p. 27.
wife. The husband’s response was the same old Islamic justification, that is, a Muslim man is allowed to keep four wives simultaneously and with this argument he managed to persuade the learned judges that he had contracted the second marriage (with an orphan girl) with no malafide intention.

The protection that traditional law affords a wife in the event of her husband contracting a second marriage has been explained in detail above. Another mode of protection, albeit occasionally employed, is the agreement of ‘deferred’ dower which is a certain amount of the dower that is held back, only to be claimed by the wife in case of a divorce.

6 INCREASE IN AMOUNT OF DOWER IN CASE OF DIVORCE

One of the conditions of the nikah may state that if a divorce were ever to take place, his wife’s dower may be doubled, or tripled. For instance, if the original amount is Rs. 50,000, it may become Rs. 100,000 when and if the husband divorces his wife. So, in a way, this stipulation may be deemed to safeguard the wife’s financial status, so that she does not find herself economically crippled if her husband decides to divorce/abandon her. But will such a stipulation be valid and binding on the parties? In other words, can a wife rely on such an agreement when time warrants it?

Divorce is generally a condemned legal act and any condition restricting the husband’s exercise of it would be deemed acceptable. In fact, the very object of paying the dower money is to prevent a man from arbitrarily divorcing his wife. Looking at it this way, many men would be divorcing their wives for petty excuses if dower were not payable. Accordingly, therefore, the above stipulation is valid and binding.\(^\text{157}\)

The Hanafi jurists, in justifying its validity, compare this condition to a labour contract. For instance, if a man is hired to stitch a suit and is told that if he completes his work in one day, he will be paid Rs. 4,000; if he takes longer, he will get less, for instance, Rs. 3,000. But Imam Abu Hanifah states that he will actually be paid labour charges at the normal rate that is not less than half of the above-mentioned amount, that is, Rs. 4,000. The Sahibayn, Abu Yusuf and Muhammad ibn al-Hasan consider both rates conclusive, while Imam Zufar (one of Abu Hanifah’s disciples) deems both conditions void.\(^\text{158}\)

Concerning the increase in dower, Abu Hanifah is of the opinion that if a man agrees to pay his wife double or triple the original amount in the event of divorce, she will be entitled to what is known as mahr al-mithl, which is proper dower (meaning ‘dower of the equal’), while Zufar considers both conditions void and thus she will be entitled to mahr al-mithl or standard dower in both cases. On the other hand, Sahibayn accept both conditions as binding and that the husband must honour his promise in the event of divorce. Malik and Shafi’i endorse Abu Hanifah’s opinion, while Imam Ahmad ibn Hanbal tends towards the Sahibayn’s argument.


As observed above, there is considerable disagreement amongst the Hanafi scholars, but they have managed to resolve this conflict by adopting a defined set of principles. The great Hanafi scholar Ibn ‘Abidin (d. 1252) argues that the opinions of the Sahibayn ought to prevail in such a situation, particularly because they tend to rule in favour of the public interest.159 Allama Haskafi, another Hanafi scholar, emphasises that in case of any disagreement amongst Hanifites concerning the authenticity of a report, the customs, particular circumstances of the parties concerned and their convenience should be taken into account for selecting the ‘best’ of these opinions.160 He also seems to be saying that if a Hanafi judge seemed to prefer the opinion of the Sahibayn, he would, in fact, be accepting one of Abu Hanifah’s judgments.161

However, the above stipulations are very rarely used in practice. Nevertheless, in Raheem Yar Khan (Southern Punjab), the study identified a handful of similar looking provisions. In many marriage contracts there, women have stipulated that in case of divorce their husbands would provide them either with a house or some other property, or even a specific amount of money. In other cases some women stipulated that in case the husband remarried during the subsistence of their marriage, she would be given, say, half a million rupees. In Nankana, yet another area in Punjab, it was stipulated in many marriage contracts that the amount will increase many times in case of divorce.162

That said, it is, with regard to the contemporary social framework, more appropriate to follow the Sahibayn’s propositions, especially in relation to the increase in dower following divorce, since such a condition tends to protect women, as iterated above, from arbitrary divorce.

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162 In one case the amount on divorce was half a million rupees, while in another case the wife stipulated that she would be given a truck by her husband in case of divorce. In the latter case the wife was actually divorced and the court enforced the stipulation. However, the case is unreported since it was a lower court decision.