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The American University in Cairo

**A Critical Analysis of Dower (*Mahr*) in Theory and Practice in British  
India through Court Records from 1800 to 1939**

A Thesis Submitted by:

**Sunil Tirkey**

To the Department of Arab and Islamic Civilizations

**Spring 2020**

A partial fulfilment of the requirement for the degree of Masters of Arts

**Advisor:**

Professor: Dr. Mohamed Serag (Islamic Studies)

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Dr. Brian Wright (Islamic Studies)

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## Transliteration System

The *IJMES* (*International Journal of Middle Eastern Studies*) transliteration system will be followed throughout this thesis for Arabic words and names:

’ (except initial), ā, b, t, th, j, ḥ, kh, d, dh, r, z, s, sh, ṣ, ḍ, ṭ, ḏ, ʿ, gh, f, q, k, l, m, n, h, w/ū, y/ī.

Short vowels, *tā’ marbūta*, *alif maqṣūra*, and definite article: a, i, u, a/at, ā, al-.

For Hindustani and Urdu words and names, *IJMES* does not provide a transliteration scheme.

The transliteration style of the Library of Congress will involve complexity for the limited use of Hindustani and Urdu terms. To avoid such complexity, we will follow the Persian transliteration scheme of *IJMES*:

’ (except initial), ā, b, p, t, ṣ, c, ch, ḥ, kh, d, z, r, zh, s, sh, ṣ, ž, ṭ, ḏ, ʿ, gh, f, q, k, g, l, m, n, h, v/u/ū, y/ī.

Words and names that have a widespread common form will be provided with a scientific transliteration only the first time they appear.

## List of Abbreviations

ALL	Allahabad
BLR	Bengal Law Reports
BOM	Bombay
CAL	Calcutta
ILR	Indian Law Reports
LAH	Lahore
MAD	Madras
MIA	Moore's Indian Appeals
PC	Privy Council
PAT	Patna
SDA	Sudder Diwani Adalat

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## Introduction

In the year 1939, the Dissolution of Muslim Marriage Act was enacted to make divorce easier for women. However, no change in the law of instant *ṭalāq* was made to restrict the arbitrary power of man to divorce. Instead, such instantaneous divorce was recognized by the courts in British India. For Instance, in the case of *Rashid Ahmad v. Anisa Khatun*, the Privy Council gave its verdict stating that the triple *ṭalāq* becomes valid and irrevocable instantaneously when it is pronounced.<sup>1</sup> This form of instant divorce has been practiced in the Indian subcontinent for centuries and has caused a great deal of hardships to many Muslim women. To keep a check on such kind of instantaneous divorce, excessive dower was introduced in India to make divorce too expensive for husbands, since dower was usually paid either on divorce or death. The practice of excessive dower was probably introduced in the late medieval period. Sudha Sharma says that the dower price was not so high and was easily payable by the husbands at the beginning of the medieval period. However, in the later period, the amount of dower became expensive beyond the reach of husbands to pay.<sup>2</sup> The exact period is uncertain but was prevalent during the reign of Mughal emperor Akbar. Abū al-Faḥl ibn Mubārak (d. 1602) writes about Mughal emperor Akbar's disapproval of inflated dower, "The king disapproves of high dower, as they are rarely ever paid, but he admits that fixing of high dower is preventive against rash divorces."<sup>3</sup>

Supporting the view of inflated dower as a useful device, Sharafi,<sup>4</sup> in her article, "The Semi-autonomous judge in colonial India: Chivalric imperialism meets Anglo-Islamic dower and divorce law," argues that "Inflated dower and delegated divorce reduced the power asymmetry

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<sup>1</sup>*Rashid Ahmad v. Anisa Khatun*, ILR 4 ALL (1932), 52.

<sup>2</sup>Sudha Sharma, *The Status Muslim Women in Medieval Period* (New Delhi, California, Singapore: Sage Publications Ltd., 2016), 112.

<sup>3</sup>Abū al-Faḥl Ibn Mubārak, *The Ain Akbari*, vol. 1, trans. H. Blochmann (Calcutta: The Baptist Mission Press, 1873), 278.

<sup>4</sup>Mitra Sharafi is a modern historian of legal history of South Asia. She obtained her degree in law from the University of Oxford and Cambridge. She also holds her doctorate in history from the Princeton University, USA.

inherent in Islamic marriage law. The two mechanisms made the husband's power of *talāq* too expensive to use, or extended the same power of *talāq* to his wife by delegation." To prove her claim, she argues that British judges used these two mechanisms to protect Muslim women against the arbitrary power of men to divorce. According to her, the legislation of English rule was the practice of excessive dower due to the Oudh Laws Act of 1876, which allowed the courts to reduce the inflated dower within its province. However, this law was not applicable in the three major presidencies of Calcutta, Bombay, and Madras. Thus, Sharafi states, "The colonial judges pretended to apply Anglo Muhammadan law as it appeared in their law books; instead, they fashioned their own law in order to better the lot of Muslim wives." In other words, colonial judges departed away from the colonial legislation and Anglo Islamic law to crystallize the rights of women against the excessive authority of men. She states that the inflated dower is un-Islamic, according to Hanafi School. As a result, the judges ignored this Islamic opinion about inflated dower and considered it reasonable. Thus, the judges pronounced rulings in favour of a high amount of dower to protect the women against the arbitrary power of men to divorce them instantly. Besides inflated dower, she further argues that *talāq al-tafwīd* (delegated divorce) as a stipulation in the marriage contract allowed the women to divorce their husbands without their consent, and was encouraged by the British judges. To prove her claim, she uses the court judgments of 19 leading cases related to dower and divorce from the colonial period between 1855 to 1924.<sup>5</sup>

In my opinion, there are several weaknesses inherent in Sharafi's submission. The major drawback of her argument was that she firstly selected only leading cases of dower and delegated divorce from the case files of Indian Appeals to Privy Council, Indian Law Reports, and some weekly reports. There-in, she selected only some essential cases, whose judgments

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<sup>5</sup>Sharafi, "The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism meets Anglo-Islamic Dower and Divorce Law," *Indian Economic and Social History Review* 46 no. 1 (2009): 57-81.



were favourable to women. Secondly, she failed to admit the fact that the abolition of the office of Muslim legal experts from the colonial courts had a negative effect on the distortion of Islamic law. Sometimes, colonial judges preferred colonial legislations over Islamic law, claiming that English law guaranteed greater justice, equity for the appellants. However, certain court records point otherwise. For example, in some cases, Muslim women were deprived of their right to dower for delaying in filing their suits in the court, even though it was clearly expounded by Muslim legal experts that there was no time limit for demanding one's right to dower. J. F. Stephen (d. 1894), who was a British legal historian, judge, and reformist of criminal law in India, evidently notes that "Justice, equity and good conscience... practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English textbooks."<sup>6</sup> According to him, "British judges were supposed to act according to justice, equity and good conscience in the absence of written codes of legislations. However, these untrained lawyers were handicapped by an imperfect understanding of the intricacies of the law."<sup>7</sup> Besides, she did not deal with the subject of divorce extensively. She left out the issue of *khul'* divorce, which was extremely difficult for women to obtain in order to get out of their undesirable marriages in the early 20<sup>th</sup> century of colonial India. One of the only ways she could use to dissolve her marriage was through apostasy. Hence, there was a rise in the dissolution of Islamic marriages through conversion.

The thesis will attempt to investigate whether excessive dower and divorce law did help Muslim women and the British judges enhanced their rights to dower and divorce. The study will also examine the court practices and application of Muslim personal law by non-Muslim

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<sup>6</sup>Scott Alan Kugle, "Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South India," *Modern Asian Studies* 35, no. 2 (April 2001), 280.

<sup>7</sup>James A. Colaiaco, *J. F. Stephen and the Crisis of Victorian Thought* (London: Macmillan Press Ltd., 1983), 102.

judges. We shall analyze the judgments of the court cases of dower by colonial judges to know if the Muslim personal law was practiced within the spirit of the Islamic law. To do so, the methodology of the study will attempt to analyze a wide range of court cases related to dower, such as cases on divorce, interest on dower, apostasy, restitution of conjugal rights, and so on. The mix of various cases around dower will also determine both the theory and practice of Islamic law in colonial courts. The thesis will take into account around forty cases of dower from the colonial courts of British India, during the period between 1800 to 1939.<sup>8</sup> Our study of the rights of women based on the court cases of dower will not be studied in isolation but will take into consideration their relation to other instances of divorce (*khul'* and delegated), apostasy, restitution of conjugal rights, and interest on dower and so on. Therefore, the cases are randomly chosen without giving preference to any leading cases on dower, which shares similar trends of favouring women in the court judgments, as Sharafi did.

In order to garner an understanding of the milieu our thesis is concerned with, we shall give a cursory view and background of the relationship inherent in marriage with regards to Indian customs and Islamic heritage, and the complex dynamics played by Muslim personal law and colonial judiciary with regards to the cases of dower in relation to marriage and divorce. We shall also explore the development of the colonial judiciary briefly to make us familiar with the judicial system in Colonial India.

In the first chapter, the meaning and concept of dower will be discussed from the perspective of the Qur'ān and the Ḥadīth. This will examine the concept of dower against the backdrop of an idea of dower as compensation to have sexual intercourse, and describe it from the perspective of Qur'ān and Ḥadīth, that though dower (*mahr*) is considered to be a gift, it is not

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<sup>8</sup>The year 1939 was very significant due to the enactment of the Dissolution of Muslim Marriage Act, which provided Muslims with the prescriptions of law to follow while obtaining a divorce. This Act of Dissolution of Muslim Marriages was vital for women due to the reforms brought in Islamic law, paving the way for Muslim women to get a divorce, which was otherwise almost impossible, except through apostasy.

purely a gift, but a mutual exchange of something, arising as a result of a marriage contract made freely between two parties.

The second chapter will engage in the discussion of inflated dower so as to investigate if the commonly accepted norm of the practice of excessive dower introduced in India to prevent instant divorce served as a check against the husband's unilateral authority to divorce. The debate on excessive dower will address some of the questions, such as did excessive dower give protection to women against divorce? Did it protect women against an undesirable bond of marriage? Did colonial judges work to better the lives of Muslim women through verdicts in their favour? Besides, we shall discuss the social dynamics around dower between women and their relatives and heirs in the process of obtaining one's right to dower.

In the third chapter, we shall discuss some of the violations of Islamic law concerning dower in British India. For Instance, there were violations of Islamic law through the implementation of payment of interest on dower, application of the law of limitation, the precedence of customs over the law. This will expose us to the sad reality of caste discrimination among Indian Muslims. Furthermore, we will see a glimpse of a cultural practice of freeing husband from dower debt, seen as a virtuous act, and the application of the law of limitation, which deprived women of their rights to dower. This discussion will open our eyes to the reality of some of these practices, which were clear violations of Islamic law, and was unfavourable to women in their rights to dower.

### **Cursory View of the Cultural Background of Colonial India**

The diversity of India was undoubtedly tremendous. The difference in culture, customs, traditions, language, food, clothing, religion, and environment was found across the subcontinent. In a multi-religious country, Hindus, Muslims, Christians, Buddhists, Jains, and Sikhs had lived for centuries in close proximity influencing the lives of one another socially, religiously, politically, and economically. Change in religion brought about some change but

did not wholly take away the cultural practices and traditions of one's place. For Instance, the customary practice of widow burning (*Sati*)<sup>9</sup> among high castes, female infanticide, female seclusion (Purdah system) existed among a certain group of Indians, irrespective of their affiliation to a faith. Jawaharlal Nehru, the first Prime Minister of India, recounting the culture of the masses through his travel across India narrates,

Everywhere, I found a cultural background which had exerted a powerful influence on their lives. This background was a mixture of popular philosophy, tradition, history, myth, legend, and it was not possible to draw a line between any of these. Even the entirely uneducated and illiterate shared this background. The old epics of Ramayana and Mahabharata were widely known among the masses, and every incident and story and moral in them was engraved on the popular mind and give a richness and content to it.<sup>10</sup>

The reciprocal amalgamation of culture and tradition among the people of diverse faith was evident in the way people lived their lives. In other words, the difference between a Muslim and a Hindu was not so much about religious affiliation but geographical, i.e., to say, a Bengali speaking Muslim was much closer to a Bengali Hindu than a Punjabi Muslim in his way of life.<sup>11</sup> In the caste-based society of India, the upper-caste Muslims were mostly descendants of the ruling class from the Mughal Empire. The mass population of Muslims were converted from the lower caste of Indian society, who were counted among the poorest and disadvantaged.<sup>12</sup> Conversion to Islam did not take away their deep-rooted cultural practices.

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<sup>9</sup>*Sati* was a Hindu custom in India, whereby a widow sacrificed herself at dead husband's pyre either by force or voluntarily. The woman who immolated herself along with her deceased husband was considered a *Sati*, i.e. to say, a chaste woman or faithful wife. The practice of *Sati* was considered to be highest expression of wife's faithfulness or devotion to the deceased husband. In other words, the practice of *Sati* was known to be a meritorious act, as it was believed that burning of widow along with her dead husband guaranteed both the place in heaven. This practice was abolished in 1829, however its practice did not disappear immediately after 1829, and now its practice is very rare. Such practice existed especially among the upper castes and it was not widespread, as it is often thought.

<sup>10</sup>Jawaharlal Nehru, *The Discovery of India*, (Delhi, Oxford, New York: Oxford University Press, 1989), 67.

<sup>11</sup>*Ibid.*, 334.

<sup>12</sup>*Ibid.*, 345.

In the 19<sup>th</sup> Century, the influence of the West on Indian society was enormous. In the short span of about 50 years of rule, the British were able to introduce a new outlook of thinking, tastes, and preference for western things and more into the Indian way of life.<sup>13</sup> Rajan writes,

After four centuries of Muslim rule and less than a half-century of British rule Hinduism - 'this mighty banyan tree,'<sup>14</sup> as Swami Vivekananda called it - was stirred in its depths by the reforms introduced by the British and by the criticism of the Christian missionaries. The foremost leader of this movement of Indian protest and reform was the great Raja Ram Mohan Roy (1772-1833), who stood for preserving the past but also absorbing useful features of the West.<sup>15</sup>

Raja Ram Mohan Roy, having been influenced dramatically by Islam in his early life and later by Christianity up to some measure, worked vehemently to eradicate some of the deplorable practices within Hinduism. His advocacy and agitation against *Sati* contributed largely to its abolition by the British Government in 1829.<sup>16</sup> In the early nineteenth century, when middle-class Hindus were much more open to western education and reform movements, elite Muslims kept themselves aloof from the influence of the West. One of the possible reasons for their aloofness from the West was due to the deep-rooted resentment for being thrown out of power by the British.<sup>17</sup> It was only towards the end of the nineteenth century, Sir Sayyid Ahmad Khan (1817-1898) promoted western education with his ardent desire to reform Islam through the study of modern science and technology. Thus, he founded a Muslim college for men in 1877, where Islamic theology and modern science could be taught with the western system of education.<sup>18</sup>

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<sup>13</sup>M. S. Rajan, "The Impact of British Rule in India," *Journal of Contemporary History* 4, no. 1 (Jan. 1969), 97.

<sup>14</sup>For Swami Vivekananda, the Hinduism was like the banyan tree, which provides shade and protection to all without distinguishing anyone on the basis of their caste, colour and religion. He founded the Ram Krishna Mission in the year 1897, to promote unity of religions and service of humanity irrespective of caste, class, colour and religion. The followers of this reform movement believe in one God and hold that all the religions lead to the same eternal reality.

<sup>15</sup>Rajan, "The Impact of British Rule in India," 91.

<sup>16</sup>Nehru, *The Discovery of India*, 315.

<sup>17</sup>Bharati Ray, "A Voice of Protest: The Writings of Rokeya Sakhawat Hossain (1880-1932)," in *Women of India: Colonial and Post-Colonial Periods*, vol. IX, part 3, ed. Bharati Ray (New Delhi: Pauls Press, 2005), 428.

<sup>18</sup>Dushka Saiyid, *Muslim Women of the British Punjab: From Seclusion to Politics* (London: Palgrave Macmillan, 1988), 42.

However, concerning women's education, he believed that they should be schooled at home. He held the view that once men are educated, the education of women would follow consequently.<sup>19</sup> Moreover, according to him, if men are educated, they would restore the rights of the women, which have been denied over time.<sup>20</sup> Nehru says that Sayyid Khan's influence was mostly on the upper-caste Muslims. The masses of the Muslim population, who were converts from lower caste Hindus, were alienated from upper-caste Muslims and continued to remain far closer to their Hindu masses in their way of life.<sup>21</sup>

Rokeya Sakhawat (1888–1932)<sup>22</sup> was one of the earliest feminists in colonial India. She wrote articles and books in Bengali (except for the book titled *Sultana's Dream* in English) calling women to wake up and fight for their rights,

Mothers, sisters, daughters! Come, get up, and leave your comfortable beds; go forward. The *mu'addin* (an official who calls Muslims for prayer) calls you, can you not hear him, the summons from Allah? Do not laze in your beds, the night is over, it is now dawn, and the *mu'addin* is calling the faithful for prayers. Elsewhere in the world, the women have woken up; they are protesting against all social evils. Women have risen to become Education Ministers; there are now women doctors, philosophers, scientists, generals of the army, writers, poets, etc. And we women of Bengal are in a deep slumber, in a dark and damp room.<sup>23</sup>

Through her writings, she attacked the women seclusion (Purdah system) and the patriarchal structure of the society. She advocated for gender equality in the right to education, work, and dignity of life. Her words suggest that she was ahead of her time.<sup>24</sup> Though she had some

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<sup>19</sup>Ibid., 82.

<sup>20</sup>Ibid., 44.

<sup>21</sup>Nehru, *The Discovery of India*, 345.

<sup>22</sup>She was born in an upper-caste Muslim family of a distinguished landlord in the northern region of Bengal (present-day Bangladesh). Her father never allowed her to go to school and opposed her learning Bengali or English, as Bengali was considered a language of the commoners. Her father and other relatives favoured the Urdu or Persian since it was said to be the language of the Muslim elites. However, Rokeya had a greater interest in the Bengali language, which was spoken by the majority of Bengali Muslims. To her fortune, her brother, who was educated in St. Xavier's College, Calcutta, supported western ideas of Syed Khan and taught her sister to read and write.

<sup>23</sup>Ray, "A Voice of Protest," 443.

<sup>24</sup>She sought for women certain things, which seemed unrealistic during her time in the sub-continent, but her words are becoming a reality in a certain sense. For Instance, in modern history, all the three countries, India, Pakistan, and Bangladesh have had women Prime Ministers heading the country, and presently, it is once again a woman, who is the Prime Minister of Bangladesh. However, she made no mention of class divides between upper caste and lower caste and addressed the upper or middle class of her community.

limitations, she stands out to be a voice and role model for many Bengali Muslims.<sup>25</sup> Rokeya also spoke on the crucial issue of injustice done to women through a one-sided divorce:

Marriages in our community are contracted with the consent of both the bride and the bridegroom, as laid down by the tenets of our religion. That being so, God forbid, if there has to be a divorce, then surely this must also be with the mutual consent of both the husband and the wife. But in reality, that is not so; it is entirely a one-sided story, only the husbands being allowed to divorce. I have known many instances of marriage break-ups among middle-class families of north Bengal, and it is always the husbands separating from their wives on flimsy grounds.<sup>26</sup>

The law on divorce in India was favourable to men. The practice of instant divorce by men was prevalent in India for centuries. According to which, a man could divorce his wife instantly on pronouncing 'divorce' three times, and she was divorced irrevocably. In case of such divorce, the husband must pay the dower to his wife if it was unpaid during the continuance of their marriage. The 'dower' or bride-wealth is a fixed amount of money stipulated in a marriage contract to be paid by the groom to the bride, which consequently becomes her property. Moreover, the law states that dower is the sole right of the woman, and she has the right to either give it up or relinquish it during the continuance of the contract. When the husband divorces his wife, he is obliged to pay the unpaid dower or part with her justly.

In terms of divorce, women had limited options for divorce. The woman had the choice of *khul'* divorce, according to which she initiates divorce through negotiation with her husband, who consents to divorce her in exchange for compensation. However, this option of divorce also gives room for the manipulation of a wife: A husband could treat his wife with vindictiveness so that she initiates *khul'* divorce and forfeits her dower. He does this by forcing his wife to surrender her whole dower in exchange for his pronouncement of *ṭalāq*. *Khul'* divorce is entirely dependent on men and is unfavourable to women. The law also provides women the option of delegated divorce (*ṭalāq tafwīd*), according to which the husbands delegate the

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<sup>25</sup>The information is taken from the introduction of the book edited by Bharati Ray, *Women of India: Colonial and Post-Colonial Periods*, xi.

<sup>26</sup>Ray, "A Voice of Protest," 447.

authority to his wife in the marriage contract that if he breaches the contract of marriage, she can dissolve the marriage. However, the law of *ṭalāq tafwīd* is stringent on women; they should use their delegated authority of divorce instantly on the knowledge of the breach of contract unless it is specified in the contract that women can divorce whenever they choose to do.

At the dawn of the twentieth century in Colonial India, when it was almost impossible for Muslim women to get out of their undesirable marriage, helpless women began to use apostasy as a device to annul their marriage, as apostasy automatically dissolved the marriage. During the years between the 1920s and 1930s, the cases of apostasy among women increased, and it became a significant concern for Muslim *‘ulamā’* (“scholars,” singular *‘ālim*) to bring reforms in the Islamic law. In the year 1933, a well-known Muslim jurist, Thānvī, passed a *fatwā* (“juridical consultation,” plural *fatāwā*), according to which apostasy did not dissolve the marriage automatically.<sup>27</sup> Instead, he held that Hanafi law allows the *mufī* (“deliverer of formal legal opinions,” plural *mufīyūn*) to take recourse to Maliki School to dissolve the marriage in case of utmost necessity. He agreed that Muslim women could ask for judicial divorce due to the failure of the husband in his marital obligations of maintenance, long absence, cruelty, mental instability, and so on.<sup>28</sup> However, such judicial divorce was possible only at the discretion of Muslim *qāḍī* (“judge,” plural *quḍāt*). This option, too, was unattainable, since the colonial courts did not have an exclusive office for Muslim *qāḍī*. For the application of Islamic law in a strict manner, the Muslims demanded the Government for the appointment of Muslim judges in the courts.<sup>29</sup> Finally, *‘ulamā’*’s reform efforts through the call of Jam‘iyyat ‘Ulamā’ al-Hind for the legislation of Islamic law was enacted as the Dissolution of Muslim Marriage Act in 1939. This Act did not fulfil the particular demand for Muslim judges in colonial courts.

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<sup>27</sup>Ashraf ‘Alī Thānvī, *al-Hīla al-Nājiza li-l-Ḥalīla al-‘Ājiza* [in Urdu], (India: Maktabat Rāzī Deoband, n.d.), 326; Muhammad Qasim Zaman, *Ashraf ‘Ali Thanawi* (Oxford: One world Publications, 2007), 62.

<sup>28</sup>*Ibid.*, 63-64.

<sup>29</sup>Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton and Oxford: Princeton University Press, 2002), 27.



Still, it brought about a reform in the Islamic law of divorce, whereby apostasy was no longer legitimate for the dissolution of marriage and provided Muslim women several grounds for juridical divorce, such as impotence, failure of maintenance, lethal disease, habitual mistreatment, immoral life of the husbands, etc.<sup>30</sup>

Moreover, according to the Dissolution of Muslim Marriage Act of 1939, a woman's right to dower does not get affected by the dissolution of marriage.<sup>31</sup> Court records show that the fixation of dower in India was often expensive beyond the reach of husbands to keep a check against their unilateral power to instant divorce. However, the amount of the dower was also dependent on the status of the family and the customary practice of the family or the place. Ameer Ali states that in India, among Indian Muslims of the parallel position of an upper middle class of British society, the dower varied between Rs. 4,000 to 40,000 (£400 to 4,000). While in lower Bengal, the former, and in Bihar, the latter was a customary amount of dower. The dower of lower-class Muslims was between Rs. 25 and 400 (£2,10s. and 40). And the dower among the princely families was fixed in several Lacs (1 Lac = Rs. 100,000).<sup>32</sup> In my survey of court cases, I discovered that majority of the case reports on dower were amounting to over Rs. 20,000 (£ 2,000) up to several Lacs. Abhinav Chandrachud says that the amount of Rs. 20,000 was a hefty amount during the nineteenth century.<sup>33</sup> It is most likely that the majority of the cases were from the blend of upper-middle-class families, elites, and princely families, which can be inferred from the court descriptions such as the customary practice of

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<sup>30</sup>Zaman, *Ashraf 'Ali Thanawi*, 63; Muhammad Khalid Masud, "Apostasy and Judicial Separation in British India," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, eds. M. K. Masud et al. (Cambridge, Massachusetts, London: Harvard University Press, 1996), 196.

<sup>31</sup>The Dissolution of Muslim Marriages Act, 1939 is taken from the book compiled by M. M. Aliyar, *Muslim Personal Law: Applied by Courts of Justice in India* (Ernakulum: Pioneer Offset Printers, 2019), 347-349.

<sup>32</sup>Ameer Ali, *The Personal Law of the Mahomedans* (London: W. H. Allen & Company, 1880), 304.

<sup>33</sup>This was the sum required by an Indian student to study in England for the duration of three years. See, Abhinav Chandrachud, *An Independent Colonial Judiciary: A History of the Bombay High Court During the British Raj, 1862-1947* (New Delhi: Oxford University Press, 2015), 25.

high dower among respectable families<sup>34</sup>, members of the royal family<sup>35</sup>, and the lady of a respectable family.<sup>36</sup> Moreover, Justice Mahmood states in the court records that “Poor class of Muslim families hardly come to the courts for judicial justice.”<sup>37</sup> Yet, it cannot be wholly denied that the practice of high dower did exist in India to protect women against instant *ṭalāq* (divorce) by husband, as we read in the court records.<sup>38</sup>

Concerning prompt (payable at marriage or on demand) and deferred dower (payable on divorce or death), Ameer Ali states that it was customary in India to fix half the dower as prompt and the remaining half as deferred dower. However, Muslims had options to make stipulations. It was a general practice among Indian Muslims to allow deferred dower of a large amount unpaid in order to compel husbands in fulfilling the terms of the marriage contract completely.<sup>39</sup> In other words, a large dower was left unpaid so that the husband would think twice before executing a divorce due to his obligation of paying it. Unlike Ameer Ali, Thānvī says that both prompt and deferred dower were generally paid or received after divorce or death of the spouses among Indian Muslims.<sup>40</sup> It implies that the whole dower was often unpaid until the dissolution of marriage. Even though Thānvī did not mention that excessive dower was fixed to keep a check against the husband's arbitrary power to divorce, it is more likely that it was done so, as the whole dower was often allowed to remain unpaid until the dissolution of marriage. In other words, the amount of dower in India was often deferred to be paid at divorce or death to make the husband's unilateral power of instant *ṭalāq* an expensive affair.

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<sup>34</sup>*Mussamut Muleeka v. Mussamut Jumeela*, 11 Privy Council (1872), 380.

<sup>35</sup>*Umda Begam v. Muhammadi Begum*, ILR 33 ALL (1911), 294.

<sup>36</sup>*Mohammad Zahur Ahsan and Others v. Mamuna and Others*, Allahabad High Court (1928), accessed 23 August 2020, <https://indiankanoon.org/doc/136236/>.

<sup>37</sup>*Abdul Kadir v. Salima*, Allahabad High Court (1886), accessed 8 June 2020, <https://indiankanoon.org/doc/119342/>.

<sup>38</sup>*Zakeri Begum v. Sakina Begum*, ILR 19 Calcutta (1892), 698; *Abdul Kadir*, <https://indiankanoon.org/doc/119342/>; *Asha Bibi v. Kadir Ibrahim Rowther Ibrahim*, ILR 33 MAD (1910), 26; *Hamira Bibi v. Zubaida Bibi*, ILR 33 ALL (1911), 188.

<sup>39</sup>Ali, *The Personal Law of the Mahommedans*, 308.

<sup>40</sup>Ashraf ‘Alī Thānvī, *Bahishti Zewar* [in English] (Karachi: Darul Ishaat, 2009), 386.

In the classical legal texts of the Hanafi School, it is stipulated that the minimum amount of dower is ten dirhams (the equal value of Rs. 4). There is no limit in assigning the maximum amount of *mahr*, which could be fixed by the woman herself since it is her right.<sup>41</sup> Thānvī (d. 1943), one of the prominent religious scholars of the twentieth century, writes, “The woman has the right to stipulate the dower and can specify the dower as high as she wants. However, it is unreasonable to stipulate a very expensive dower.”<sup>42</sup> I agree with the opinions of Akbar, Tyabji, and Thānvī that expensive deferred dower is rarely paid and is often oppressive and unreasonable. Thus, it raises unanswered questions: Was expensive deferred dower a useful device to protect women against instant *ṭalāq*? Was it easy for women to obtain their right to dower either on divorce or death of their husbands? Did it (dower) really protect women against undesirable marriage?

## **Background of Judicial System**

Give me the words of the Koran... and out of them, I undertake to produce a code.

- Jeremy Bentham

The Mughal administrative system was officiated by two important high ranking officers, namely *nawāb* and *dīwān*. *Nawāb* acted as the head of the government and military with the responsibility of maintaining law and order in the province; whereas, *dīwān* was the head of the *Dīwānī*, who was not only responsible for the collection of the revenues, but also for deciding cases related to income and other civil matters<sup>43</sup>. In the year 1765, the British East India Company acquired authority from the Mughal emperor Shah Alam; in return, the Company promised him annual pay.<sup>44</sup> Following this arrangement, the Company became

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<sup>41</sup>Al-Qudūrī, *Mukhtaṣar al-Qudūrī* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), 147; al-Marghīnānī, *al-Hidāyah: The Guidance*, trans. Imran Ahsan Khan Nyazee (Bristol: Amal Press, 2006), 507.

<sup>42</sup>Thānvī, *Bahishti Zewar*, 383.

<sup>43</sup>M. P. Jain, *Outlines of Indian Legal History* (Delhi: University Press, 1952), 59.

<sup>44</sup>*Ibid.*, 58.

responsible for the collection of revenues, and the administration of justice (criminal and civil) was passed on to the British officers. In the beginning, the *quḍāt* continued with the responsibility of administering justice, but new changes were introduced since 1772<sup>45</sup> since the primary concern of collecting revenues and making profits did not meet its expected ends.<sup>46</sup> Moreover, there was no proper system of a judicial order, thus leading to a chaotic situation due to the cruelty and oppression by the Company officers.<sup>47</sup>

The British administrators, in particular Warren Hastings, the governor-general of Bengal, realized that application of English laws to Indians would establish disorder in the judicial system, and such a foreign policy would be complicated to apply to the natives.<sup>48</sup> Jain rightly says, “Warren Hastings very well realized that for a proper collection of revenues there should be peace and order in the country, and this to a great extent depended on a fair and effective administration of justice. Thus, he established the judicial system in 1772, not only for the collection of revenues but also for a proper administration of justice in the country.”<sup>49</sup> Under the Judicial plan of 1772, the legislation was passed by Hastings, “in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Quran for the Mohammedans, and those of the Shastras for the Gentoos (Hindus), shall be invariably adhered to.”<sup>50</sup>

Under Hastings’ scheme for the administration of justice, courts were set up in each district as *mofussil diwani* (*mufaṣṣil dīwānī*, civil) and a *mofussil foujdari* (*mufaṣṣil faujdārī*, criminal) court. The collector, who was an English civil servant, was responsible for the collection of

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<sup>45</sup>Zaman, *The Ulama in Contemporary Islam*, 21.

<sup>46</sup>Werner Menski, “Hindu Law in Modern Times: How Hindu Law Continues in Modern India,” in *The Oxford History of Hinduism: Modern Hinduism*, ed. Torkel Brekke (Oxford: Oxford University Press, 2019), 249.

<sup>47</sup>Raj Kumari Agrawala, “History of Courts and Legislatures,” in *Indian Legal System*, ed. Joseph Minattur (New Delhi: Indian Law Institute, 2006), 119.

<sup>48</sup>Menski, “Hindu Law in Modern Times,” 250.

<sup>49</sup>Jain, *Outlines of Indian Legal History*, 64.

<sup>50</sup>Menski, “Hindu Law in Modern Times,” 250; Zaman, *The Ulama in Contemporary Islam*, 21.

revenues. He, too, worked as a judge in the former court (civil court), and a Muslim judge presided the latter (criminal court) under the supervision of the collector. Above these courts were *Sudder Diwani Adalat* (*Şadr Dīwānī ‘Adālat*, the civil court of appeal) chaired by the Governor and his council, and *Sudder Foujdari Adalat* (*Şadr Fawjdārī ‘Adālat*, the criminal court of appeal) was carried out by Muslim judges under the supervision of the Governor and his councils for appeals from *mofussil* courts. Besides, there were some small cause courts for the speedy hearing of minor cases.<sup>51</sup>

Under the reforms brought by Lord Cornwallis as governor-general between 1786 to 1793, additional changes were made. Under Cornwallis’ leadership, the Islamic criminal justice system was considered too harsh and the *mofussil foujdari* (criminal) court as corrupt, which led to the introduction of circuit courts in Patna, Calcutta, Murshidabad, and Dacca.<sup>52</sup> *Foujdari* courts (criminal) were replaced by circuit courts to deal with the criminal offence of all sorts. It was imperative to note that in this instance, it was no longer a Muslim judge who presided under this new system of criminal justice. Instead, civil servants of the Company acted as judges, even though they were untrained in English law nor Islamic jurisprudence, and *muftiyūn* and *quḍāt* assisted them.<sup>53</sup> The provincial courts of appeals were set up just below *sudder diwani adalat*. Likewise, *munssiff’s* (*munşif*) courts were established below the *mofussil diwani* court.<sup>54</sup> High ranking jobs in the districts were occupied by the Indian Civil Servants of British origin.<sup>55</sup> In the hierarchy of courts, British administrative officers usually held important positions in the higher courts, and the natives were employed to work in the lower courts.<sup>56</sup>

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<sup>51</sup>Agrawala, “History of Courts,” 121.

<sup>52</sup>Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003), 146.

<sup>53</sup>Jain, *Outlines of Indian Legal History*, 155-156.

<sup>54</sup>Agrawala, “History of Courts,” 121.

<sup>55</sup>However, slowly with the progress of British rule, Indians too began to join Indian Civil Service to work for the British), and Indians mostly occupied low ranking jobs in the company's duty of collecting revenues and administering justice. Cf. See, Chandrachud, *An Independent Colonial Judiciary*, 23.

<sup>56</sup>M. Zubair Abbasi, “Sharī‘a Under the English Legal System in British India: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law” (PhD diss., Oxford University, 2013), 8.

During the early period of British rule, the judges of the colonial courts were not lawyers, so the Hindu pundits and Muslim law officers were sought to assist them through their opinions or interpretation of the law.<sup>57</sup> However, the British officials were unsatisfied with the administration of justice and questioned the authenticity of the law interpreted by the Muslim law officers and Hindu Pundits. One of the prominent orientalists, linguist and the judge under East India Company, namely Sir William Jones (d. 1794), remarked, “Pure integrity is hardly to be found among the pundits and Maulvis, few of whom give opinions without a culpable bias. I, therefore, ask them to produce original texts and see them in their own books.”<sup>58</sup> He, therefore, demanded the creation of the complete digest of Hindu and Islamic laws, so that British judges could rely more on the law texts than the law officers. And some of the most authoritative books were translated for the exclusive use in administering legal justice. They are al-Marghīnānī’s (d. 1196–97) *Hidāya* (Charles Hamilton translated it from Persian text to English in 1791), Sirāj al-Dīn Muḥammad al-Sajāwandī’s *Kitāb al-Farā’id al-Sirājiyya* (translated into English in 1792).<sup>59</sup> About fifty years later, some parts of *Fatāwā ‘Ālamgīrī* was translated into English by Neil B. E. Baillie, as *Moohumudan Law of sale* (1850), *The Land Tax of India* (1853), *A Digest of Moohumudan Law* (1875). Another Shī’ī law book *Sharā’i‘ al-Islām* of al-Muḥaqqiq al-Ḥillī from the Ja‘farī Shī’ī School, was partially translated into English by Baillie as *The Digest of Mohummudan Law* (1869)<sup>60</sup>. The project of legal texts was nothing more than a step forward towards complete governance of the judiciary.<sup>61</sup> However, the office of legal experts in the courts was not replaced immediately after the translation of the legal texts. The British judges still had to depend on the Indian legal

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<sup>57</sup>M. Zubair Abbasi, “Islamic law and Social Change: An Insight into the Making of Anglo-Muhammadian Law,” *Journal of Islamic Studies* 25, no. 3 (2014), 327.

<sup>58</sup>Zaman, *The Ulama in Contemporary Islam*, 21; Jain, *Outlines of Indian Legal History*, 494.

<sup>59</sup>Zaman, *The Ulama in Contemporary Islam*, 22.

<sup>60</sup>Abbasi, “Sharī‘a Under the English Legal System in British India,” 17.

<sup>61</sup>*Ibid.*, 16.

experts, as they did not know the local laws and customs, and not all of them could be found in the translated legal texts.<sup>62</sup>

After the Mutiny of 1857, the Company rule ended in India, and in the year 1861, the British Parliament passed an Act to establish High courts for the administration of justice.<sup>63</sup> The Act came into effect in the year 1862, establishing High courts in Calcutta, Madras, and Bombay. The High Courts replaced the Supreme Court of the Crown and the *sudder adalats*, and the new court absorbed all its documents, records, and judges.<sup>64</sup> During the British Raj (1858-1947), there was an increase in the number of lawyers in the colonial courts. However, many civil servants continued to work as judges in the courts.<sup>65</sup> These civilians did not hold any degree in law, but the study of law was a part of their syllabus for joining the Indian Civil Service. After their arrival in Bombay, they had to take some legal courses at law school and pass through the departmental test to secure a high ranking office in the courts. Surprisingly, all the barristers in Bombay too were not graduates in law, as the degree in law was not a requirement for being called to the Bar in England.<sup>66</sup> Gandhi, who went to England to obtain a degree in law to be a barrister recounts, “A student was required to fulfil two conditions before being called to the Bar. The first condition was to ‘keep terms’ meaning to say that one had to attend six out of about twenty-four dinners in a term, and there were twelve terms in total, equivalent to about three years. The second condition was to pass two examinations, one in Roman law, the other in the common law.”<sup>67</sup> He further says, “I could not see then, nor have I seen since, how these dinners qualified the students better for the Bar. The curriculum of the study was easy, barristers being humorously known as dinner barristers. Everyone knew that

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<sup>62</sup>Ibid., 8.

<sup>63</sup>Chandrachud, *An Independent Colonial Judiciary*, 22.

<sup>64</sup>Hussain, *The Jurisprudence of Emergency*, 148; J. K. Mittal, *Introduction to Indian Legal History* (Allahabad: Allahabad Legal Agency, n.d.), 225.

<sup>65</sup>Chandrachud, *An Independent Colonial Judiciary*, 23.

<sup>66</sup>Ibid., 223.

<sup>67</sup>M. K. Gandhi, *An Autobiography: The Story of my experiments with truth*, trans. Mahadev Desai (Ahmadabad: Navajivan Publishing House, n. d.), 96-97.

the examinations had practically no value.”<sup>68</sup> It is evident that barristers and civilians serving as judges of the colonial courts had zero training on Islamic law or Hindu law. Hence, it can be implied that colonial judges would have had a very different understanding of these laws, even when Islamic laws were expounded to them. Yet, they were the ones who passed verdicts with the help of local legal experts on the appeals from Muslims and Hindus, especially in the higher courts. The project of translations of Classical legal texts and codifications of law started by Jones continued, and we have seen that by the 1860s, different classical legal texts with an authority of legal code were translated to enable British judges to pass verdicts without any assistance taken from the local legal experts. Therefore, the office of both Muslim law officers and Hindu pundits were abolished in the year 1864. Now the judges of the colonial courts became the sole adjudicators of resolving any grievances brought by the natives.<sup>69</sup> With the abolishment of the office of legal experts, the plaintiff and the defendant could hire lawyers to represent them, get legal assistance, argue on their behalf and challenge the judgment by appealing to the higher courts.<sup>70</sup> Highlighting the seriousness of abolishing the office of Muslim legal experts from the courts, and replacing them by someone with no training on Islamic law, Zaman says,

The development of the new ‘Anglo-Muhammadan law’ was undoubtedly not the ‘ulama’s legal tradition but a hybrid of certain legal classics and English common law, as they were not part of this development. And ‘ulamas could only continue to function as muftis in giving fatwas on behalf of a particular madrasa, after having been stripped from the most distinctive aspect of their vocation of interpreting the law.<sup>71</sup>

Such was the political and judicial milieu surrounding Colonial India, during the period from 1800 to 1939, which our court data used in this thesis are concerned with. Concerning the

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<sup>68</sup>Ibid., 97.

<sup>69</sup>Zaman, *The Ulama in Contemporary Islam*, 25. Abbasi, “Sharī‘a Under the English Legal System in British India,” 8.

<sup>70</sup>The lawyers’ representation for their clients to argue on their behalf are found in the court descriptions. For instance, in the case of *Mussamat Rani Khijarannisa v. Rani Risannissa Begaum*, 5 BLR (1870), 84-99; *Amin Beg v. Saman*, ILR 33 ALL (1911), 90; *Mussamat Resham Bibi v. Khuda Bakhsh*, ILR 19 LAH (1938), 277.

<sup>71</sup>Zaman, *The Ulama in Contemporary Islam*, 25.



independence of the judiciary from the government, Crown courts and the supreme courts used to police the administration of the company rule. After the end of the company rule in 1858, the colonial government directly came under the Crown and the British Parliament. Thus, it was no longer the judiciary, which was to enforce checks and balances on the government.<sup>72</sup> Yet, the relationship between the judiciary and the administration was not free from scrambles and disputes. For instance, in the year 1910, the High Court judges received insults from the Governor of Bombay at the public event and were refused to stand by his right as per the customary practice.<sup>73</sup> Generally, the courts in British India adjudged the majority of the routine criminal cases independent of the government.<sup>74</sup> The verdicts on political cases like that of Tilak and Gandhi often favoured the government.<sup>75</sup> Bal Gangadhar Tilak (d. 1920)<sup>76</sup> and Mahatma Gandhi (d. 1948)<sup>77</sup>, the nationalist leaders of the freedom movement, were sentenced

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<sup>72</sup>Chandrachud, *An Independent Colonial Judiciary*, 256

<sup>73</sup>Ibid. , 257.

<sup>74</sup> Ibid. , 285.

<sup>75</sup> Ibid. , 282.

<sup>76</sup>He was a freedom fighter who is well known in his home state of Maharashtra for his advocacy for complete independence from the British rule. Tilak's trial of 1908 is one of the first prominent and famous trials for sedition in the legal history of colonial India. He was found guilty of sedition for his two articles published in Marathi newspaper, translated as 'The Country's Misfortune' and 'These Remedies are Not Lasting,' in which he condemned the repressive system of British rule for being inferior to Mughal reign in many respects. He endorsed total freedom from English administration and stated that there are three ways of securing independence from the oppressive British system, i.e., appealing to the British public, passive resistance, and the use of violence. However, he advocated for gradual, persistent, peaceful, and constitutional approaches in the freedom movements. See, Chandrachud, *An Independent Colonial Judiciary*, 267; S. S. Angadi, "Bal Gangadhar Tilak: A Study of His Role in The Indian Nationalist Movement," (Ph.D. diss., Karnatak University, Dharwad, 1992), 190-192.

<sup>77</sup>In the year 1922, Gandhi was sentenced to sedition charges for his three articles 'Tampering With Loyalty', 'A Puzzle and Its Solution' and 'Shaking The Manes,' which were published in the journal called "Young India." In 'Tampering With Loyalty,' he criticized the British government and condemned the massacre of innocent people in Jalianwala Bagh in Punjab. He called for disaffection against the British and urged people to spread Hindu-Muslim unity and non-violence in their struggle towards the attainment of freedom. In 'A Puzzle and Its Solution,' he wrote, "We are challenging the might of the government because we consider its activity wholly evil. We want to overthrow the government. We desire to show that the government exists to serve the people and not the people the government." Gandhi was never reluctant to criticize the British government. During his trial in the court, he said, "The British connection had made India more helpless than she ever was, politically and economically. She has become so poor that she has little power to resist famines. Before the British advent, India spun and wove in millions of her cottages. This cottage industry so vital for India's existence has been ruined incredibly by heartless and inhuman processes... Little do the masses realize that the government established by law in British India is carried on for the exploitation of the masses. The law itself in this country has been used to serve the foreign exploiter." Gandhi was sentenced for attempts to bring hatred or contempt to excite disaffection towards His Majesty or the Government established by law in British India. The judge stated in his verdict, "I do not forget that you have consistently preached against the violence and that you have on many occasions, as I am willing to believe, done much to prevent violence. But having regard to the nature of your political teaching and the nature of many of those to whom it was addressed, how you have continued to believe that the violence would not be the inevitable consequence, it passes my capacity to understand." It is clear that the British government used sedition

to sedition charges<sup>78</sup> for their advocacy for complete independence from British rule and their dissent against the British government. Such political decisions favorable to the government were perhaps due to the selfish-interest of the judges to receive favors from the government or their shared ideological beliefs.

Interestingly, the occurrence of sensitive political cases was a scarce phenomenon in the day to day court hearings. Therefore, the judiciary gained the reputation of being independent of the government.<sup>79</sup> However, it would not be wrong to hold a bridging view that colonial courts enjoyed some measure of independence from the government in all cases, inclusive of sensitive political matters.<sup>80</sup> In this work, we will be dealing with the civil issues of dower, whose juridical decisions were independent of the government.

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law to silence the dissenters, and the courts sided with the government in their judgments. The materials as mentioned above are taken from Gandhi's articles 'The Great Trial,' 'Tampering With Loyalty,' and 'A Puzzle and Its Solution,' which were published in the journal *Young India*, second edition (Madras: S. Ganesan Publisher, 1924).

<sup>78</sup>Section 124A of Indian Penal Code (IPC) deals with sedition. According to this code, "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine".

<sup>79</sup>*Ibid.*, 285.

<sup>80</sup>*Ibid.*, 257.

# Chapter One

## Concepts and Meaning

*Mahr* is a spontaneous gift and honour to be presented by the husband to the wife on marriage with a willing heart; by doing so, he makes a manifestation of his love for the wife and eagerness to respect her rights to his fullest possible capacity.

-Wani, M. A

The chapter will discuss the meaning and concepts of *mahr* from the viewpoint of the Qur'ān and the Ḥadīth. It will explain the obligatory nature of *mahr* in Islamic marriage from the lance of the Qur'ān and Ḥadīth with the assertion that dower is an essential bridal gift or reward offered by the bridegroom to the bride graciously only within the context of marriage. We shall argue against the extreme feminist view of the bride-wealth as compensation for sexual intercourse, and explain that it is an obligation on the part of the bridegroom to hand over the nuptial gift to the bride as a requirement of marriage. The chapter will also deal briefly with different kinds of *mahr*, and will finally present the secondary literature review.

### **Meaning of *Mahr***

Robertson Smith is of the view that the Arabic word *mahr* is synonymous with the Hebrew word *mōhar* due to its payment to the damsel's father (Dt. 22:29) and the Syriac *mahrā*, which Bar 'Ali defines, "Whatever the son in law gives to the parents of the bride."<sup>81</sup> Smith sees the use of these terms as 'purchase price.' However, the biblical word *mōhar* appears to have a variant meaning. It was not so much to do with purchase price<sup>82</sup> but compensation at the loss of a helper (Ex. 22:16-17; 1 Sam. 18: 25). This gift was deposited in the father's hands for

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<sup>81</sup>Robertson Smith, *Kinship and Marriage in Early Arabia* (London: Adam & Charles Black, 1907), 96; O. Spies, "Mahr," in *Encyclopaedia of Islam*, eds. C. E. Bosworth, E. Van Donzel, B. Lewis and Ch. Pellat, vol. 6 (Leiden: E. J. Brill, 1991), 78.

<sup>82</sup>To argue that bride-price was not so much to do with 'purchase price' due to other ways by which daughters were given into marriage. For instance, Jacob rendered his service for Laban fourteen years to get his daughters Leah and Rachel in marriage (Gen. 29). Saul, the first king of Israel offered to give his Merab to David not for dowry but a hundred foreskins of the Philistines (1 Sam18: 25).

future use in case of husband's death or other needs, as this can be seen in the complaints of Laban's daughters, who blame their father for using their bride-money for himself (Gen. 31:15). On the contrary, in Pre-Islamic Arabia, bride-money was seen as 'purchase price,' as it was paid to the male guardians such as father or brother or any other male relative.<sup>83</sup> The advent of Islam replaced the notion of bride-price with the idea of bride-wealth, which is under the sole ownership of the wife. The *mahr*, therefore, is a bridal gift offered by the husband to the prospective wife at marriage. Thus, *mahr* is considered to be an intrinsic and integral part of any Muslim marriage.<sup>84</sup>

According to Harald Motzki (d. 2019), "Dower (bride-wealth) is a compensation for the permission to have sexual intercourse."<sup>85</sup> Likewise, Kecia Ali holds that "jurists' central idea of marriage was that marriage contract granted a husband, in exchange for payment of dower, a form of authority or dominion over his wife's sexual and reproductive capacity."<sup>86</sup> According to her, dower is a payment to obtain a right over a woman's sexual organs. Paradoxically, classical texts of Islamic law use such kind of language, i.e., "The full dower accrues to the woman due to the intercourse, so in case, man divorces her after consummation, she is entitled to receive one half of the dower, as held by Al-Shāfi'ī."<sup>87</sup> Such a view of Muslim marriage also echoes within the Jewish marriage as purchase price due to the transfer of the financial transactions to acquire rights over women. Contending against the view of dower as purchase price at marriage, Greniman says,

Even though the transfer of money (dower) involves financial transactions and an integral part of marriage, it is not to say that man was buying himself a wife or he was her owner. It is also argued that *mōhar* was the price for the girl's virginity or a payment

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<sup>83</sup>Smith, *Kinship and Marriage in Early Arabia*, 96; Spies, "Mahr," 79.

<sup>84</sup>Rakesh Singh, "Law of Dower (*Mahr*) in India," *Journal of Islamic Law and Culture* 12, no. 1 (Routledge: Taylor & Francis Group, 2010), 59.

<sup>85</sup>Harald Motzki, "Bridewealth," in *Encyclopaedia of the Qur'ān*, ed. Jane Dammen McAuliffe, vol. 1 (Leiden, Boston, Köln: Brill), 258.

<sup>86</sup>Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, Massachusetts: Harvard University Press, 2010), 6.

<sup>87</sup>Al-Marghīnānī, *al-Hidāyah* (trans. Nyazee), 510.

of compensation for the loss of her virginity. But, in reality, even the non-virgins were paid a bride-price, though of a lower amount, indicates that payment of bride-price had other functions of recognizing the value of women, as one party gaining and the other was losing one's labour.<sup>88</sup>

On the other hand, the bride-price can also be seen from the perspective of customary practice. Historian Grosz writes about the customary practices of bride-wealth among the people of Nuzi in the second millennium BCE,

The transfer of bride-wealth is not considered a purchase. The transaction, even though includes economic aspects, is not seen in the same manner as the purchase of commodities or livestock, and a suggestion that woman is transferred as chattel is considered offensive in certain societies, where bride-wealth is in practice. The terminology used in the bride-wealth contracts does not include the words used for sale and purchase.<sup>89</sup>

The noun form of the word, *mahr* in Arabic is used for gift, which becomes due to be given by the husband to the wife on marriage. *Muhūr* is the plural of *mahr*, which stands for nuptial gift or portion to the wife on account of the effect of marriage.<sup>90</sup>

“Thus, it is appropriate to hold that the transfer of bride-wealth falls within the realm of the customary practice of giving gifts instead of sale/purchase.”<sup>91</sup> It is plausible to hold that the payment of *mahr* was a customary practice within marriage even before the advent of Islam. However, this conventional practice of paying *mahr* (bride price) to the male guardians was reformed through the Qur’ānic message of paying the bride-wealth to the woman herself (Q. 4:4). *Mahr* (dower) is a sum of money or property, by which the bride obtains sole ownership through marriage. It does not proceed from the husband as a consideration for the contract of marriage. Yet, it is considered as an obligation enforced by the law to show one's love and

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<sup>88</sup>Deborah Greniman, “The Origins of the Ketubah: Deferred Payment or Cash Up Front,” *A Journal of Jewish Women’s Studies & Gender Issues* no. 4 (Indiana University Press, 2001), 89.

<sup>89</sup>Katarzyna Grosz, “Some Aspects of the Position of Women in Nuzi,” in *Women’s Earliest Records From Ancient Egypt and Western Asia*, ed. Barbara S. Lesko (Atlanta: Scholars Press, 1989), 171.

<sup>90</sup>M. Wani, “A Study of the institution of Mahr in Islamic Law with special reference to the law and Practice in Kashmir Valley” (Ph. D. diss., University of Kashmir, 1993), 1.

<sup>91</sup>Greniman, “The Origins of the Ketubah,” 88.

respect towards one's wife as marriage becomes valid even without the specification of dower during the marriage.<sup>92</sup>

### **Kinds of Dower**

*Mahr Musammā*: It is a specified dower, i.e., to say that the amount of dower is defined in the contract of marriage.<sup>93</sup>

*Mahr al-mithl*: It is like a dower, in which the amount is unspecified.<sup>94</sup> In such cases, the husband offers the bride-wealth to his wife suitable according to her wealth, the social status of her family, and her qualifications.<sup>95</sup> *Mahr al-mithl* is applicable in all the circumstances when the exact amount of bride-wealth is not stipulated.<sup>96</sup>

Prompt (*mu'ajjal*) Dower: The verbal meaning in this context of the word *mu'ajjal* is to hasten. Therefore, the word *mu'ajjal* means that which is executed promptly or preceded in priority in terms of time. Prompt dower is due for payment to the bride immediately after marriage or whenever she demands it.

Deferred (*mu'ajjal*) Dower: There is a difference here from the above, and in this context, the verbal meaning of the word *mu'ajjal* is to delay or postpone. And here, the term *mu'ajjal* means that which is delayed or deferred. Deferred dower becomes due at the dissolution of marriage either through divorce or death. While fixing the amount of dower, it is usually divided into two parts as prompt and deferred, so that it becomes easier to distinguish between the two.<sup>97</sup>

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<sup>92</sup>Rubya Mehdi, "Danish Law and the practice of Mahr among Muslim Pakistanis in Denmark," *International Journal of the Sociology of Law* 31, no. 2 (2003), 116.

<sup>93</sup>Spies, "Mahr," 79; Asaf A. A. Fayzee, *Outlines of Mohammadan Law*, 4<sup>th</sup> edition (Delhi, Bombay, Calcutta, Madras: Oxford University Press, 1974), 136.

<sup>94</sup>Spies, "Mahr," 79.

<sup>95</sup>Fayzee, *Outlines of Mohammadan Law*, 137.

<sup>96</sup>Spies, "Mahr," 79.

<sup>97</sup>Fayzee, *Outlines of Mohammadan Law*, 139.

## Qur'ānic Concept of *Mahr*

In the Qur'ān, four different words: *ajr* (reward), *ṣadaqa* (marriage gift), *farīda* (legal obligation), *niḥla* (graciously) are used to define the concept of *mahr* (dower) at the marriage in Islam. In other words, dower is an obligatory bridal gift or reward offered by the bridegroom to the women graciously/with kindness, only within the context of marriage (Q. 4:4, 24, 25; 5:5, 33: 50; 60: 11). The word *mahr* is not used in the Qur'ān. However, the term *mahr* is equated with the Qur'ānic words like *ajr* (reward), *ṣadaqa* (marriage gift), *farīda* (legal obligation), as they are interchangeably used by the exegetes like Ibn Ashur (d. 1973), Rashīd Riḍā (d. 1935), and others. Interpreting the Qur'ānic term *al-ṣaduqāt*, Ashur says that it is a plural form of *ṣaduqa* with a *ḍamma* on the *dāl*, and *al-ṣaduqa* is *mahr* (dower) of a woman. It derives from the term *ṣidq* (honesty) because it is a gift preceded by a promise of a giver to give it, and he fulfils it.<sup>98</sup> On this note, the Qur'ānic verse 4: 4 says, “Give unto the women (whom you marry) gift of their marriage proportions.”<sup>99</sup> This is an obligatory command to offer the bride-wealth to the woman in marriage.

To emphasize the obligatory nature of dower and its necessity to be given to the woman in marriage, Ibn Kathīr (d. 1373) interprets the verse 4:4, with a report of tradition from Muḥammad ibn Ishāq, which was passed on to him from the chain of narrators al-Zuhrī, ‘Urwa, and ‘Ā’isha, saying, *Niḥla* is obligatory. Muqātil, Qatāda, and Ibn Jurayj stated that *niḥla* means obligatory. Ibn Jurayj added *niḥla* is specified. Ibn Zayd said *niḥla* in the Arabic language refers to what is necessary. This explains the mandatory nature of dower and God’s command as to not to marry a woman unless her right of dower is granted to her.<sup>100</sup> On the same note, Sahl al-Tustarī (d. 896), while interpreting 4: 4, emphasizes the significance of dower to be

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<sup>98</sup>Ibn ‘Āshūr, *Tafsīr al-tahrīr wa-l-tanwīr*, vol. 4 (Tunis: al-Dār al-Tūnisiyya, 1984), 230.

<sup>99</sup>The translation of the Qur'ānic verses will be taken from *The Meaning of the Glorious Coran*, trans. Marmaduke Pickthall (Beirut: Dar al-Kitab Allubnani, 1970), and *The Study Qur'ān: A New Translation and Commentary*, eds. Seyyed Hossein Nasr et al. (New York: Harper One, 2015).

<sup>100</sup>Ibn Kathīr, *Tafsīr al-Qur'ān al-‘aẓīm*, vol. 2 (Riyad: Dār al-Ṭayba, 2009), 213.

given to women as a gift from God in equivalence to religion (*diyāna*).<sup>101</sup> Similarly, for Ibn Abbas (d. 687), payment of dower to women at marriage is an obligation imposed by God.<sup>102</sup>

However, the woman may remit or relinquish a part of the dower with her own free will. Thus, 4:4b says, “If women of their own accord remit unto you a part of dower, you are welcome to absorb it.” The use of proposition *min* in verse implies that women may remit only part of the dower but not the whole of it.<sup>103</sup> Besides, this verse starts with a conditional clause *in* meaning that remitting of dower is entirely dependent on the free will of the woman. On the same note, Muḥammad ‘Abduh (d. 1905) says that there is no part for a man to take anything from a woman’s dower or her property, except when he knows that she released it willingly. If he asked from her part of it, which caused her coyness and fear of what is asked, then he is not allowed to take anything of it.<sup>104</sup> In other words, man cannot take any part of a woman’s dower/property when he sees unhappiness or sadness on her face while remitting part of her dower/wealth. However, some men allegedly intimidate the women into giving up their dower/wealth and justify it by saying that women have released their dower/their share of the property on their own accord.<sup>105</sup>

Moreover, even in the case of divorce, the Qur’ān says, “If you desire to take one wife in place of another, even if you have given to one of them a great sum, take back nothing from it. Would you take it by way of slander and manifest sin?” (4: 20). It is evident that man has no right to take anything back from the woman when he divorces her. Rashīd Riḍā rightly points out that man has no reason to justify his act of taking the property of a woman back. He cannot justify

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<sup>101</sup> Al-Tustarī, *Tafsīr al-Tustarī*, trans. Annabel Keeler and Ali Keeler (Louisville: Fons Vitae, 2011), 53.

<sup>102</sup> Ibn ‘Abbās, *Tanwīr al-Miqbās min Tafsīr Ibn ‘Abbās*, trans. Mokrane Guezzou (Jordan: Royal Aal al-Bayt Institute for Islamic Thought, 2007), 83.

<sup>103</sup> Rashīd Riḍā, *Tafsīr al-Manār*, vol. 2 (Cairo: al-Hay’at al-Miṣriyya, 1973), 308; Ibn ‘Abbās, *Tanwīr al-Miqbās min Tafsīr Ibn ‘Abbās*, 83; Al-Maḥallī and al-Suyūfī, *Tafsīr al-Jalālayn*, trans. Feras Hamza (Jordan: Royal Aal al-Bayt Institute for Islamic Thought, 2007), 84

<sup>104</sup> *Ibidem*.

<sup>105</sup> Riḍā, *Tafsīr al-Manār*, 308.



in saying that she has given it to him on her own; since divorce causes discord and sadness, and there is no way that woman would give up her dower/property with her own free will when she is distressed due to the divorce.<sup>106</sup> Thus, if he takes anything from her, it is through slander, which is sinful (4:20). Therefore, it can be said that the nuptial gift becomes the property of the woman and has the absolute right over it, even at the dissolution of the marriage.<sup>107</sup> And, if a man divorces his wife before the consummation, then he must provide her with fair means according to his resources, even when it is not specified.

In the case of designated dower, he has to pay half of the specified dower (2: 236 -237). The *Hidāya* states that when the woman seeks *khul'* divorce through negotiation, she pays compensation or gives the dower back to the husband to liberate her from wedlock.<sup>108</sup> This ruling is based on the Qur'ānic verse 2: 229, "There is no blame upon the two in what she may give in ransom," meaning that there is no blame either in the husband's acceptance of compensation or wife's giving of compensation to get freedom from her marriage.<sup>109</sup> However, it can be noted that even in such cases of *khul'* divorce, the woman pays compensation to the husband on the assumption of her aversion towards him and not because of the husband's negligence or mistreatment. On the contrary, if a husband mistreats her or becomes the cause for divorce, then he has no right to take anything (compensation/ bride-wealth) from her.<sup>110</sup> This is explicit from the first part of 2: 229, "It is not lawful for you (men) to take aught from what you have given (your wives), except that the two should fear they would not uphold the limits set by God. So if you fear that they will not uphold the limits set by God, there is no blame upon the two in what she may give in ransom." Exception in verse 2: 229b concerns *khul'* divorce initiated by the woman without any serious threat or mistreatment, wherein a

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<sup>106</sup>Ibid., 375- 376.

<sup>107</sup>Spies, "Mahr," 79.

<sup>108</sup>Al-Marghīnānī, *The Hedaya: A Commentary on The Mussulman Laws*, 2<sup>nd</sup> edition, trans. Charles Hamilton (Lahore: The Premier Book House, 1957), 112.

<sup>109</sup>Ibidem.

<sup>110</sup>Ibid., 113.

woman wants to be free from her wedlock, and makes a negotiation with her husband to divorce her with the payment of compensation or return of her bride-wealth.<sup>111</sup> Thus, it is fitting to say that the bride-wealth becomes the property of the woman. She continues owning it, even after the dissolution of marriage. Although, there is an exception to it, in the case of *khul'* divorce, when a woman seeks divorce from her husband without any valid reason, such as mistreatment or negligence by him.<sup>112</sup>

In pre-Islamic Arabia, *mahr* was more of a purchase price paid by the husband to the guardians of the girl, such as the father or male relatives. And the bride herself did not receive a penny from it.<sup>113</sup> It is interesting to note the claim of Spies that *mahr* was partly given to the woman shortly before the time of Prophet Muḥammad. But with time, *mahr*, in its contact with the Qur'ānic idea of *ṣadaq* lost its original meaning of *mahr* as a purchase price.<sup>114</sup> This seems entirely plausible due to the interchangeability of Qur'ānic term *ṣadaq* with the pre-Islamic word *mahr*, but with the meaning of *mahr* as bride-wealth.

Motzki sees avoidance of *mahr* in the Qur'ān as a shift from the purchase price to bride-wealth as compensation to the woman herself in obtaining her consent to have a sexual relationship.<sup>115</sup> However, I do not think that the bride-wealth is any sort of compensation for seeking permission to have sexual intercourse, as claimed by Motzki. I argue this due to the Qur'ānic verse 4: 24; 5: 5, which exhibits the obligation of men to give bride-wealth to women as married women and not as fornicators or as paramours.

Nevertheless, when Qur'ānic verse 4:24b (Those women whom you enjoy as a result of marriage, give them their bride-wealth, as an obligation) is read in isolation, it might appear

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<sup>111</sup>*The Study Qur'ān*, 100.

<sup>112</sup>Motzki, "Bridewealth," 258; Spies, "Mahr," 79.

<sup>113</sup>Spies, "Mahr," 78-79; Motzki, "Bridewealth," 258.

<sup>114</sup>Spies, "Mahr," 79.

<sup>115</sup>Motzki, "Bridewealth," 258.

that the bride-wealth is compensation to enjoy sexual intercourse. The translation of the same verse (4: 24b) by Sayyid Quṭb (d. 1966) is undoubtedly much more vivid, “To those with whom you seek to enjoy marriage, you should give the dowers due to them.”<sup>116</sup> This translation clearly illustrates that the bride-wealth is not a compensation to obtain consent for sexual intercourse, rather an obligation to hand over the nuptial gift to women as a requirement of marriage. Moreover, it is clear that Qur’ān upholds sexual intercourse within the bond of marriage and prohibits fornication, “Lawful unto you are all others whom you would seek in marriage with gifts from your property, in honest wedlock and not in fornication” (Q. 4: 24a). To expound the meaning of *mahr* and its relationship with marriage, Muḥammad ‘Abduh says, “*al-ṣaduqāt* is the plural of *ṣaduqa* with a *ḍamma* on the *dāl*. There are other linguistic variants: of them is *al-ṣadaq*, i.e., what is willfully given to the female before intercourse. This gift (‘*aṭā*’) has a greater meaning than the meaning of *al-ṣadaq* and *al-mahr* noted by so-called jurists as compensations (‘*iwad*’) for the marriage and the price of it. No, the bond (*ṣila*) between the couple is higher than the relationship between a man and his horse or his slave girl. For this reason, it must be noted that this gift is a sign among the signs of love, a connection between relatives, and strengthening and consolidation of love and mercy. And it is absolutely obligatory not to exhibit selectivity in it, as the one who buys something and the one who hires people do. Indeed, it can be seen that the customs of people do not suffice with this gift; rather, the husband compliments it with other gifts and presents.”<sup>117</sup>

The view of Muḥammad ‘Abduh makes it clear that the bride-wealth cannot be limited to the idea of compensation for sexual intercourse. But it carries the much higher meaning of exhibiting love and respect for the bride while establishing a marriage bond. Thus, the husband not only pays customary dower to his wife but gives many other gifts and presents. Besides,

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<sup>116</sup>Sayyid Quṭb, *In The Shade of The Qur’ān (Fī Zilāl al-Qur’ān)*, vol. 3, trans. and ed. Adil Salahi & Ashur Shamis (Leicester: The Islamic Foundation, 2001), 66.

<sup>117</sup>Riḍā, *Tafsīr al-Manār*, 308, our translation.

even though *mahr* is considered to be a gift, the Qur'ānic concept of *mahr* is not purely a gift, as a gift is given freely without expectation of anything in return and is not gifted as an exchange for something else. Instead, *mahr* involves a mutual exchange of something between two parties in the contract of marriage. Therefore, it appears to be more of an effect of a marriage contract, spontaneous to the Qur'ānic injunctions, as claimed by Ashifa Quraishi Landes.<sup>118</sup>

### **What does Ḥadīth<sup>119</sup> say about *Mahr*?**

We have seen in the Qur'ānic view of *mahr* that bride-wealth is obligatory on the part of the husband, who freely hands it over to his wife as a sign of love and respect to enjoy the bond of marriage. Even though the Qur'ān does not mention the minimum or maximum amount of dower to be paid to the woman, it does suggest that those who divorce their wives should grant them a fair provision according to one's ability (2: 237). It could imply that those men who want to get into wedlock should provide the bride-wealth based on their richness. This further becomes evident from the ḥadīth of the Prophet narrated by Sahl ibn Sa'd that a woman came and presented herself to marry her. The Prophet did not want her in marriage. So one of the companions of the Prophet said to him, "Marry her to me, O Allah's Messenger." The Prophet questioned him, do you have anything? He said I don't have anything. The Prophet said, "Not even an iron ring." He said, "Not even an iron ring, but I will tear my garments into two halves and give her one half and keep the other half." Then, Prophet said, "No. Do you know some of the Qur'ān by heart?" He said, "Yes." The Prophet said, "Go, I have agreed to marry her to you with what you know of the Qur'ān."<sup>120</sup>

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<sup>118</sup>Asifa Quraishi Landes, "A Meditation on Mahr, Modernity and Muslim Marriage Contract Law," in *Feminism, Law and Religion*, eds. Marie A. Failinger et al. (London and New York: Routledge, 2016), 190.

<sup>119</sup>We shall include Ḥadīth references in our study only from the six major canonical books of Ḥadīth, such as, *Sahīh al-Bukhārī*, *Sahīh Muslim*, *Sunan Abu Dawud*, *Sunan Ibn Mājah*, *Sunan an-Nasā'ī*, and *Jāmi' at-Tirmidhī*.

<sup>120</sup>*Sahīh al-Bukhārī*, Book 67: N. 5132, 5141, 5149; *Sahīh Muslim*, Book 16: N.3487; *Sunan Ibn Mājah*, Book 9: N. 1889; *Sunan an-Nasā'ī*, Book 26: N. 3341; *Jāmi' at-Tirmidhī*, Book 9: N. 1114.

Two things are evident from this ḥadīth: Firstly, the nuptial gift to the bride is obligatory. The dower might be any immaterial gain. For Instance, Anas narrated, “Abu Talhah married Umm Sulaim and dower between them was Islam. Umm Sulaim became Muslim before Abu Talhah, and he proposed to her for marriage. But she said I have become Muslim; if you become Muslim, I will marry you. So he became Muslim, and that was the dower between them.”<sup>121</sup> It can be seen that any benefit, either material or immaterial like memorization of the Qur’ān, the teaching of the Qur’ān, and the embrace of Islam can become dower, provided the women give their consent.

Secondly, the husband has to offer the nuptial gift according to his ability, and there is no minimum fixed amount of dower. If there is an excessive dower beyond one’s ability to pay, it will bring distress to the poor man, and he will not be able to enter into wedlock. This could be seen from the ḥadīth, in which ‘Umar ibn Khaṭṭāb said, “Do not go to extremes with regards to the dowers of women if that were a sign of honour and dignity in this world or a sign of *taqwa* before Allah. If that were to be the case, Prophet himself would have done it first. But he did not give any of his wives, and none of his daughters were handed over more than twelve *Uqiyyah*.”<sup>122</sup> A man may increase her dower till he feels resentment against her by saying, “You cost me everything I own or you bring me a great deal of hardship.”<sup>123</sup> Thus, it is explicit that dower, according to one’s ability, is better than inflated dower, as it causes pain and resentment to the men, instead of mutual love and respect for one another. And we have seen the view of Muḥammad ‘Abduh that dower and other gifts offered by husbands to the women show the love and respect for the women. So, to show his love for his wife, he will try to give the best possible dower or other presents to make her happy.

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<sup>121</sup>*Sunan an-Nasā’ī*, Book 26: N.3342.

<sup>122</sup>The value of one *uqiyyah* was equivalent to forty dirhams of silver, and twelve *uqiyyah* multiplied by forty is four hundred and eighty dirhams. The rounded figure is about five hundred dirhams.

<sup>123</sup>*Sunan Ibn Mājah*, Book 9: N. 1887; *Sunan Abu Dawud*, Book 12: N. 2106.

There is also another ḥadīth about the amount of dowers given by the Prophet to wives. In this narration, Abū Salāma asked ‘Ā’isha, "How much was the dower of the wives of the Prophet? She said, "The dowers he handed to his wives were twelve *Uqiyyah* and a Nash of silver. A Nash of silver is one half of *Uqiyyah* equivalent to five hundred dirhams."<sup>124</sup> This ḥadīth from ‘Ā’isha, a Prophet’s wife, conforms to the ḥadīth passed on from ‘Umar ibn Khaṭṭāb that dower should not be too excessive. However, it should be of a fair value based on the ability of a person.

In case of a husband’s death after marriage, if there was no consummation and the dower was not specified, in such circumstances, tradition says, "The dower and inheritance are hers, and she has to observe the waiting period." Such a ruling was passed by Prophet, as narrated by ‘Ā’isha.<sup>125</sup> Even though it does not specify the amount of dower and share of the inheritance, it confirms the right and ownership of women over her dower and wealth of inheritance. Likewise, the woman retains her dower even when her husband divorces her, except if she initiates *khul’* divorce without any reason. This is obvious from the ḥadīth narrated by Ibn ‘Abbās that Ḥabība bint Sahl, the wife of Thābit ibn Qays, came to the Prophet and said: "O Messenger of Allah, I do not find any fault with Thabit bin Qais regarding his attitude or religious commitment, but I hate *kufir* (she dislikes him and is unable to fulfil her duty as a wife) after becoming Muslim." The Prophet said, "Will you give him back his garden?" She said, "Yes." The Prophet said, "Take back the garden and divorce her once." Interestingly, the Prophet did not command her to give back the garden; instead, he asked her whether she would give it back. It implies that she had the freedom to either retain or return it, but she chose to give it back. This will be clearer from another ḥadīth with a different chain of narration, in which Ḥabība bint Sahl says to the Prophet, "I cannot live with Thabit bin Qais (her husband),

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<sup>124</sup>*Sunan Ibn Mājah*, Book 9: N. 1886; *Sunan Abu Dawud*, Book 12: N. 2105.

<sup>125</sup>*Sunan Ibn Mājah*, Book 9: N. 1891; *Sunan Abu Dawud*, Book 12: N. 2114.

and everything that he gave me is with me.”<sup>126</sup> It infers that she was ready to give up everything she had received from her husband to get a divorce. Thus, the Prophet said to Thābit ibn Qays, “Take it from her.”<sup>127</sup>

Besides, the issue of dower in *khul‘* divorce, the subject of dower, also occurs in other instances of dissolution of marriage through apostasy and *li‘ān* (accusation of adultery without witnesses). Concerning the payment of dower (*mahr*) in case of *li‘ān*, it is crucial to see the ḥadīth, in which Sa‘īd Ibn Jubayr asked Ibn ‘Umar about the verdict on the matter of husband’s accusation of wife for illegal sexual intercourse. Ibn ‘Umar said, “The Prophet separated (by divorce) the couple of Banā Al-‘Ajlān, and told them, one of you is a liar, so, will one of you repent? But both of them refused to do so. Thus, the Prophet separated them by divorce.” The man said, “what about my money, which I have given to my wife as *mahr*?” The Prophet said, “You have no right to restore any money. If you are speaking the truth, then you have consummated the marriage with her. If you are lying, then you are less rightful to restore your money.”<sup>128</sup> In this narration, the accusation is unproven and doubtful, so the man has no right to retain his money given as *mahr*. In other words, in the Instance of *li‘ān*, the dubious accusation of adultery is in favour of women, and man has no right to be entitled to any wealth from his wife.

On the other hand, a woman may have to surrender her dower when she seeks *khul‘* divorce without any valid reason. Besides, even the apostate women were not obliged to return their dower, as they had no obligation to abide by the Qur’ānic injunctions due to their disbelief. Instead, the Muslim community had to pay Muslim men the amount equivalent of what they had spent on their disbelieving women.<sup>129</sup> Moreover, the Qur’ān commands men to deal with

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<sup>126</sup>*Sunan an-Nasā’ī*, Book 27: N. 3492.

<sup>127</sup> *Ibidem*.

<sup>128</sup> *Sahīh al-Bukhārī*, Book 68: N. 5311; *Sunan an-Nasā’ī*, Book 27: N. 3505.

<sup>129</sup> This is based on the interpretation of the Qur’ānic verse 60:11. See, *The Study Qur’ān*, 1362.

women justly in case of divorce. For Instance, Qur'ānic verse says, 33: 49, “If you marry believing women and divorce them before touching them, provide for them and release them in a fair manner.” Thus, it can be seen that the Qur'ān and Ḥadīth, two of the primary sources of Islamic law, provide women with the rights of ownership of their wealth. However, the implementation of their rights in practice is a question of debate, which will be further debated in the paper with the analysis of court cases of dower from Indian British Courts.

### **Secondary Literature Review**

The subject of Dower (*Mahr*) is an intrinsic part of marriage, which falls within Muslim Personal Law. The Muslim Personal Law, as practiced in India, have been written down in various books. Some of them are *Muslim Law as administered in India and Pakistan* by Kashi Prasad Saksena, Macnaghten's *Principles and Precedents of Moohummudan Law*, *A Digest of Anglo Muslim Law* by Al-Haj Mahomed Ullah, *Custom and Law in Anglo-Muslim Jurisprudence* by Hamid Ali, Neil Baillie's book titled *A Digest of Mohummudan Law* (In two volumes), *An Introduction to Hindu and Mahomedan law: For the Use of Students* by William Markby, *Mahomedan Law Relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors According to Soonnees* (Tagore Law Lectures: 1891-92) by Mahomed Yusoof Khan, *The Hedaya: A Commentary on The Mussulman Laws*, 2<sup>nd</sup> edition, translated by Charles Hamilton, *The Principles of Muhammadan Jurisprudence: According to Hanafi, Maliki, Hanbali, and Shafii Schools* by Abdur Rahim, *Mohammedan Law in India and Pakistan* by Babu Ram Verma, etc. These are some of the books dealing with Muslim personal law, as it was administered from the time of British Rule. Even though these books outline regulations relating to dower, none of them discuss the subject in a way understood by Muslim jurists; instead, the way the judges of colonial courts viewed the Islamic law during the period of British India.



Sabiha Hussain, in her research article, “Unfolding the reality of Islamic rights of women: Mahr and maintenance rights in India,” explores the rights of Muslim women with the cases dealt by *Darul Qazas*, the Sharia Courts, the state, and the legal system within the realm of the rights of Muslim women (Protection of Rights on Divorce) Act of 1986.<sup>130</sup> Unfortunately, she, too, does not engage with the cases concerning suits of the women's rights from the colonial Courts. Instead, she deals with the matters of women's rights based on her research through the interviews of women who share the stories about their rights as being violated in a male-dominated society. Sabiha Hussain also writes that the primary purpose of *mahr* is to protect the woman against instant divorce used by men. However, she believes that law, in theory, is not always consistent with its practice in the patriarchal society.<sup>131</sup> Therefore, she concludes her article by quoting a woman aged 38 years, who says, “This is a male-dominated society; men since ages have always been more concerned about their rights by using religion for their own convenience, especially in matrimonial matters, but forget religion when it comes to their duty and obligation towards their women.”<sup>132</sup> Likewise, Radhika Singh, in her study of Islamic Criminal law, finds that the dominance of masculine authority was seen not only through violence and injury against female relatives, but the legal system under colonial powers strengthened the judicial competence of men over women.<sup>133</sup> On the same note, Durba Ghosh, in her investigation of the justice system, states that judges legitimized the sexual crimes of European men against natives, and thus, reinforced the patriarchal dominance in legal matters. However, it is distinct from the others, as it justified gender order based on race.<sup>134</sup> Unlike Sabiha Hussain, Radhika Singh, and Durba Ghosh, Lucy Carroll concludes that Colonial courts

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<sup>130</sup>Sabiha Hussain, “Unfolding the reality of Islamic rights of women: *Mahr* and maintenance rights in India,” *Pakistan Journal of Women Studies: Alam-e-Niswan* 20, no. 2 (2013), 30.

<sup>131</sup>*Ibid.*, 29.

<sup>132</sup>*Ibid.*, 46.

<sup>133</sup>Radhika Singh, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998), 167.

<sup>134</sup>Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (New Delhi: Cambridge University Press, 2006), 205.

protected the rights of Muslim women, who otherwise are in a vulnerable position under Islamic law.

Similarly, Muhammad Munir, in his discussion on *ṭalāq al-tafwīd* (delegated divorce) by women as a stipulation in a Muslim marriage, holds that modern Islamic states are open to adopting legislation to provide utmost protection to Muslim women against the arbitrary male power in the juridical matters, which could be exemplified through the rulings of the colonial courts in favour of women.<sup>135</sup> By the same token, Sharafi makes final remarks that “The colonial judges pretended to apply Anglo Muhammadan law as it appeared in their law books; instead, they fashioned their own law in order to better the lot of Muslim wives.”<sup>136</sup> In other words, colonial judges departed away from the colonial legislation and Anglo Islamic law to crystallize the rights of women against the excessive authority of men. She states that an inflated dower is un-Islamic, according to Hanafi School, yet the judges ignored this law and considered it reasonable. Thus, the judges pronounced rulings in favour of a high amount of dower<sup>137</sup> to protect the women against the arbitrary power of men to divorce them instantly.<sup>138</sup> Besides, inflated dower, she too argues that *ṭalāq al-tafwīd* (delegated divorce) as a stipulation in the marriage contract allowed the women to divorce their husbands without their consent. The rulings in a matter of delegated divorce by women too favoured them as claimed by Mitra.<sup>139</sup> However, there were also instances wherein women could not seek divorce without the man’s consent, except through apostasy for the dissolution of marriage.

Moreover, to obtain the permission of man to divorce, his wife decided to forgo her dower. Therefore, it is vital to investigate two extreme narratives of court rulings; one in favour of

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<sup>135</sup>Muhammad Munir, “Stipulations in a Muslim Marriage Contract with special reference to *Talaq al-Tafwid* Provisions in Pakistan,” *Yearbook of Islamic and Middle Eastern Law*, eds. Eugene Cotran et al., vol. 12 (Leiden/Boston: Brill, 2005-6), 235.

<sup>136</sup>Sharafi, “The Semi-Autonomous Judge in Colonial India,” 74.

<sup>137</sup>*Ibid.*, 72.

<sup>138</sup>*Ibid.*, 57.

<sup>139</sup>*Ibid.*, 74.

men, and the other in support of solidifying women's rights. Thus, the study will help arrive at the definitive agreements as to whether verdicts on inflated dower often favoured the woman, or it became the cause of her plight, as she surrendered her dower to acquire the consent of her husband to divorce her.

## Chapter Two

### Debates on Inflated Deferred Dower

The new judicial system introduced by the British became a thing of terror because of its complications and the ignorance of the judges of both languages and customs of the country.

-Jawaharlal Nehru

The colonial court records between 1800 to 1939 in India show the existence of excessive dower, which were usually paid at the dissolution of marriage to discourage divorce. Generally, women filed suits in the court for the recovery of dower at the death of their husbands. However, there were also few cases of lawsuits by women claiming their right to dower before the dissolution of their marriage, which accrued due to the negligence, mistreatment, unethical life of their husbands, and separation<sup>140</sup> between them. Surprisingly, minimal cases of divorce were reported in the court records. Does it mean that inflated dower payable at divorce was a preventive measure against divorce? I will argue that inflated dower did not protect the rights of women against divorce, undesirable marriage, and their right to dower at the dissolution of marriage. To prove so, we shall firstly argue from the court cases that it was challenging for women to prove divorce on the husband's denial of divorce in order to avoid the payment of dower. Secondly, it was almost impossible for women to get rid of their undesirable marriage, as divorce was totally dependent on their husbands. Besides, the dower payable on the dissolution of marriage did not guarantee women of their due right to dower, as they were either deprived of their right to dower due to the failure in proving the claim of it or had to go through a legal battle for long years against their children or the heirs of their husbands in obtaining their right to dower.

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<sup>140</sup>The key difference between divorce and separation is that divorce dissolves the bond of marriage, whereas, under separation, couples remain married but live separately.

## **Did Inflated dower (Deferred) give protection to women against divorce?**

To begin with, we shall first study the court cases between 1800 to 1864, as during this period, Indian Muslim legal experts and Hindu Pundits assisted the colonial judges (mostly British) in interpreting the laws concerning the suits brought by the Muslims and Hindus, respectively.

In my survey of 12 cases between 1800 to 1864,<sup>141</sup> I came across only one example related to dower and divorce. In this case of *Mussumaut Kureem-Oonissa v. Ruheem Ali*, the plaintiff claimed her dower of Rs. 21,000<sup>142</sup> on the allegation of divorce. The defendant denied having divorced the plaintiff. He also mentioned that both were minors at the time of the marriage. On coming of age, the defendant had not given his consent to the deed of dower. When asked for a legal opinion, the legal expert stated that the guardian was not only required to be present at the marriage of two minors but had to execute the deed of dower with his consent for its payment. Besides, the defendant, on coming of age, had to give his consent to the deed of dower. Based on the opinions of the legal expert, the plaintiff's claim for dower was turned down as the conditions for the recovery of dower were not met.<sup>143</sup> Though the verdict was unfavourable to the woman, it complied with the opinions of the law officer. In this case, the wife was helpless in obtaining her right to dower, as her husband had not acknowledged the deed of dower on becoming an adult, and had refused to accept the allegation of wanting any divorce. Even though the amount of dower was huge in this case, it did not protect woman against divorce. The husband evaded his obligation of paying the dower, not only because his guardian did not give his consent to the deed of dower, but also because he did not conform to the act of dower on coming of age.

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<sup>141</sup>It is to be noted that for about 60 years, there were so limited cases on dower. It implies that majority of Indian Muslim population did not take recourse of judicial system to get justice. It could also be assumed that often only the rich and affluent might have brought their suits to the courts, as we find that the dower amount of the cases in the courts were inflated.

<sup>142</sup>In the nineteenth century, a sum of Rs. 20,000 and above was a hefty amount.

<sup>143</sup>*Mussumaut Kureem-Oonissa v. Ruheem Ali*, 2 SDA (1817), 233-235.

Apart from the case of divorce, as mentioned above, there were two other cases in which women brought their suits to recover their dower at the instance of separation between the parties. In the case of *Omduton Nissa Begum v. Mirza Asud Ali*, the woman had brought the suit against her husband to recover Rs. 20,000 from the whole dower of Rs. 100,015. The excessive dower of Rs. 100,015 was a customary amount of the place and was registered in the marriage contract. However, the marriage had taken place with the verbal pronouncement of minimal dower of Rs. 500. The husband contested that amount of dower was Rs. 500, and not the sum of Rs. 100,015, which was just a customary amount usually given in that district. On being asked for the opinions of the law officers, the legal expert stated that the amount of Rs. 500 is the proper dower,<sup>144</sup> and the more considerable amount is not illegal, even though, according to some legal experts, it is improper to do so. Interestingly, in this case, the discussion was about what should be the actual amount of dower and not whether her dower should be paid only at the divorce or death of her husband. Here, the judges considered the written deed of dower enforceable and passed a verdict in favour of the woman due to the specification of the amount in the deed.<sup>145</sup> However, even though the inflated dower was used as a device to protect women against divorce, it was not favourable to the woman. For we see in this case, that this woman demanded the part of the enormous sum of dower only because they were separated due to some unknown reason. In this instance, the couple was not divorced but lived separately. So, it can be said that even though exorbitant dower might have worked as a check against men's power to divorce, but it did not protect women against unhappy marriage.<sup>146</sup> In another case of *Noorunissa Begum v. Nawaub Mohsin Allee Khan*, the wife sued her husband on separation for the recovery of her dower of Rs. 60,000. The amount of dower was

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<sup>144</sup>It is a dower alike, in which the amount is unspecified. In such cases, the husband offers the bride-wealth to wife suitable according to her wealth, the social status of her family, and her qualifications.

<sup>145</sup>*Omduton Nissa Begum v. Mirza Asud Ali*, 1 SDA (1809), 369-374; *Mussummaut Rahut Oonissa v. Heirs of Mirza Hizbur Beg*, 2 SDA (1816), 198-199.

<sup>146</sup>*Omduton Nissa Begum*, 369-374.

unspecified as to whether the amount of dower was prompt or deferred. However, it was also customary in India to fix half the dower as prompt and the remaining half as deferred dower.<sup>147</sup> Based on this customary practice, her husband argued that the law of limitation<sup>148</sup> barred the half of the amount of dower payable at marriage and the remaining was payable only on death and divorce. The court sided with the argument of her husband and barred her from recovering any amount of dower, as she failed to prove her claim of divorce.<sup>149</sup> In this instance, the inflated dower payable on divorce was not favourable to the woman, as she could not prove the divorce, even though they were separated. The husband used colonial legislation of law of limitation to avoid his obligation to pay the amount of dower payable at marriage or on demand. The colonial legislation of law of limitation deprived Muslim woman of her right to dower, even though in similar instances, Muslim legal experts were of the opinion that under Islamic law, there was no time limit to claim one's right to dower and was payable on demand.<sup>150</sup> We may say that expensive dower payable on divorce might have prevented men from taking recourse to divorce. Yet, it did not guarantee the felicity or bond of marriage, as the husband and wife were living separately with no evidence of divorce.<sup>151</sup> Besides, even if there was instant divorce, it was tough for women to prove it when the husband denied it.

Bereft of the cases of dower arising due to divorce and separation, the women filed their suits to recover their right to dower when they were mistreated or neglected by their husbands. In the cases of *Shekh Uzeez Oolla v. Ghufoor Beebee* and *Abdul Karim v. Mussumaut Fazilat Un Nissa*, two wives filed their suits in the courts against their husbands to recover their dower of Rs. 550 and over Rs. 40,000, respectively. Both cases show that no dowers (prompt) were paid at marriage, and the whole dower was left unpaid until divorce or death. However, in these

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<sup>147</sup>Ali, *The Personal Law of the Mahommedans*, 308.

<sup>148</sup>Law of limitation barred the suits, if they were not brought to the court within the specific period of time. The law will be expounded in detail in the following chapter.

<sup>149</sup>*Noorunissa Begum v. Nawaub Mohsin Allee Khan*, 7 SDA (1841), 46.

<sup>150</sup>*Meer Nujib Ollah v. Mussumaut Doordana Khatoon*, 1 SDA (1805), 137.

<sup>151</sup>*Noorunissa Begum*, 46.

instances, there was no divorce or death, yet they filed a suit against their husbands because their husbands either mistreated them or neglected them. So, they demanded their rights of dower, and law officers pointed to the obligation of these husbands involved to pay the dower promised and the right of both women to ask for it until its payment. In compliance with the opinions of the Muslim law officers, judgment was in favour of these women.<sup>152</sup> Thus, from the examples, it can be inferred that neither the minimal amount of dower nor the excessive dower really protected the rights of women. It appears that excessive dower might put a check against the arbitrary power of men to divorce, but not against his obligation to treat his wife with love and care. This is evident from the above examples that even though there were no divorces, mistreatment or negligence of the husbands existed, which eventually led the women to demand their rights of dower. The verdicts in these two cases of dower were favourable to women, as the judges complied with the laws expounded by the Muslim law officers. Yet, it is evident that neither the minimal amount nor the maximum amount of dower could protect women against the husbands' ill-treatment.

Other than the cases mentioned earlier, the remaining seven suits were filed by the widows for the recovery of their dower on the death of their husbands. Out of the seven claims for the recovery of dower, only in the cases of *Mussund Ali v. Khoorsheed Banoo* and *Wujih On Nisa Khanum v. Mirza Husun Ali*, the widows concerned were entitled to receive their husbands' property in lieu of dower.<sup>153</sup> In both these instances, the verdicts were passed in compliance with the opinions of the Muslim legal experts. The judgments in conformity with the views of the Muslim legal experts were much more favourable to women<sup>154</sup> than the verdicts based on

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<sup>152</sup>*Shekh Uzeez Oolla v. Ghufur Beebee*, 2 Court of Sudder Adawlut Bombay (1822), 284-290; *Abdul Karim v. Mussumaut Fazilat Nissa*, 5 SDA (1830), 90-92.

<sup>153</sup>*Mussund Ali v. Khoorsheed Banoo*, 1 SDA (1801), 69-73; *Wujih On Nisa Khanum v. Mirza Husun Ali*, 1 SDA (1808), 356-359.

<sup>154</sup>*Ibidem*.



the independent decisions of the colonial judges.<sup>155</sup> In the remaining five cases, the widows were deprived of their right to dower due to the failure in proving the claim of dower,<sup>156</sup> the objection by the heirs,<sup>157</sup> the application of colonial legislation of law of limitation,<sup>158</sup> and the allegation that widows had remitted the dower.<sup>159</sup> Thus, we can say that the amount of dower payable on the dissolution of marriage through death did not guarantee widows of their rights to dower. Moreover, the colonial justice system was complicated for women, as it was challenging for them to prove their claim of dower. And the application of colonial law of limitation on dower became a thing of terror for Muslim women, as it deprived them of their right to the complete dower.<sup>160</sup>

In my survey of cases from 1800 to 1864, twelve cases in total, seven of them were filed by widows to recover their dower at the dissolution of the marriage due to death. Does it mean that excessive dower left unpaid till divorce or death prevented divorce and protected the bond of marriage until the dissolution of marriage due to death? This is unjustifiable because generally, more marriages last than break irrespective of the minimum amount of dower or the excessive one. However, the rare phenomenon of divorce in the colonial court records does indicate that it was extremely difficult for women to provide the evidence for divorce on the refusal by the husband. Moreover, the divorce was dependent on men even when women wanted to get out of undesirable marriage. Therefore, we have seen in the court records that though there was a separation between husbands and wives, it was hard to provide evidence for divorce.

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<sup>155</sup>*Beebee Saheebun v. Beebee Hingun and Beebee Boodhun*, 7 SDA (1841), 36; *Mussamaut Wuzeerun v. Mahomed Hossain Khan and Mussamaut Khyrun and others*, 7 SDA (1841), 40.

<sup>156</sup>*Ibidem*.

<sup>157</sup>*Mussamaut Wuzeerun*, 40.

<sup>158</sup>*Noorunissa Begum*, 46; *Meer Nujib Ollah*, 138.

<sup>159</sup>*Beebee Munwan v. Meer Nusrut Ali*, 1 SDA (1803), 46; *Ahmud Ollah v. Behar Ullah*, 1 SDA (1809), 381.

<sup>160</sup>*Noorunissa Begum*, 46; *Meer Nujib Ollah*, 138.

In the years between 1865 to 1939, too, the cases of divorce were extremely low in the court records. Does it mean that not many divorces occurred? Can it be said that excessive dower served as a device to protect women against the arbitrary power of man to divorce? This shall be further investigated.

In one of the suits for the restitution of conjugal rights, the wife argued that her husband divorced her instantly, and was adjudged that his claim for restitution of conjugal rights failed due to the validity of divorce.<sup>161</sup> This was an exception because it was often tough to prove the claim of divorce. In another suit of the husband for conjugal rights, it was argued that the husband had stipulated in their marriage contract to live in his father in law's house. Besides, the prompt dower was not yet paid, so he had no right for the restitution of conjugal rights.<sup>162</sup> Moreover, the lawyer for the wife argued on the authority of Ameer Ali, "If it is agreed that a husband shall allow his wife to live always with her parents, he cannot afterward force her to leave her father's house for his own. However, if the wife once consent to leave the place of residence agreed at the time of marriage, it is presumed that she has waived her right acquired under the stipulation of marriage."<sup>163</sup> The argument was clearly in favour of the woman. But the judges gave their verdict in support of the husband that non-payment of dower did not suffice the evidence in the given case after the consummation of the marriage, and allowed for the restitution of conjugal rights. The decision on the restoration of conjugal rights may be based on Macaghten's work, *Principles of Mahomedan Law*, as the judges quoted his work in their discussion, "Under Islamic law husband acquires dominion over the person of his wife."<sup>164</sup> Tahir Mahmood says, "The concept of restitution of conjugal rights is foreign to Islamic legal ideology and has been engrafted by Anglo-Indian judicial decisions."<sup>165</sup> It can be

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<sup>161</sup>Asha Bibi, 30.

<sup>162</sup>Hamidunnessa Bibi v. Zohiruddin Sheik, ILR 17 CAL (1890), 671.

<sup>163</sup>Ali, *The Personal Law of the Mahommedans*, 287

<sup>164</sup>Hamidunnessa Bibi, 672.

<sup>165</sup>Alamgir Muhammad Serajuddin, *Cases on Muslim Law of India, Pakistan and Bangladesh* (New Delhi: Oxford University Press, 2015), 17.

seen that the understanding of Islamic law by British judges was very different than Muslim jurist Ameer Ali, on whose authority a valid argument was made that Islamic law does not favour one over the other. So, a wife cannot be forced against the agreed stipulation without her consent.

In case of pleas for restitution of conjugal rights, the colonial judges usually gave verdicts in favour of husbands. Nonetheless, if the wife were able to prove the cruelty of her husband and the judges perceived that sending the wife to her husband would endanger her life, then they would disallow the cohabitation.<sup>166</sup> In one of the cases, a certain woman had refused to live with her husband on the plea that he is keeping a mistress, he maltreated her and had not paid her prompt dower. On the perception of threat to her life, the judgment was passed with conditions: the husband could avail the restitution of conjugal rights only if he fulfils the terms of paying her dower, keeping a mistress away from his house, and providing his wife with residence and two servants (one male and one female) of her choice.<sup>167</sup> The plea for the restitution of conjugal rights by a certain husband arose when the wife refused to live with him mainly because of the cruelty, mistreatment, negligence, non-fulfilment of the agreed stipulation, and immoral life of the husband.<sup>168</sup> In fact, such circumstances led her to demand her prompt dower; otherwise, it was left to be paid at divorce or death of the husband. It is quite evident from the case study that during the years from 1865 to 1939, when widows brought their suits to recover their right to dower, the courts often passed verdicts in their favour, even if the amounts were inflated.<sup>169</sup> This was not the case in the years from 1800 to 1864, when widows could be deprived of their claims to dower either because of the failure to prove the

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<sup>166</sup>*Abdul Kadir*, <https://indiankanoon.org/doc/119342/>.

<sup>167</sup>*Anis Begam v. Muhammad Istafa Wali Khan*, ILR 55 ALL (1933), 774.

<sup>168</sup>*Ibid.*, 746.

<sup>169</sup>*Mussamut Bebee Bachun v. Sheikh Hamid Hossein*, 10 Privy Council (1871), 55; *Musammut Mulleeka*, 375-391; *Majidmian Banumian v. Bibi Saheb*, ILR 40 BOM (1915), 34-50; *Zakeri Begum*, 689-699; *Hamira Bibi*, 182-195; <https://indiankanoon.org/doc/962828/>; *Umda Begam*, 291-295.

claim of dower<sup>170</sup> or implementing the stringent law of limitation.<sup>171</sup> During this period, especially up to 1862, the majority of the colonial judges were untrained lawyers with no knowledge of either English law or Islamic law. We have seen that the British judges had biased views about the opinions of the Muslim law officers, and thus, they had some Islamic legal texts translated into English. Nonetheless, it was beyond their understanding to assess the diversity of opinions found in Islamic law.

Moreover, they were utterly ignorant of the local laws of the natives. This made them dependent on the opinions of the Muslim law officers to pass judgment on any given case. However, the judges were independent in complying with the opinions of the legal experts in passing the verdicts on any given case. One thing is evident from the case study that the decisions based on opinions of Muslim legal experts were much more beneficial to Muslims than the judgments bereft of legal opinions. But with the abolishment of the office of legal experts in 1864, the natives could not avail the facility of legal opinions by the local legal experts.

After 1864, the colonial judges used different classical legal texts of the Hanafi School, which were translated into English to enable British judges to pass verdicts without any assistance taken from the local legal experts.<sup>172</sup> During this period, when women brought their suits to the courts to recover their dower, their appeals were often dismissed because the common practice of payment of dower in British India was either on divorce or death of husbands. For instance, an old and respectable lady had brought her suit to the court to claim her dower on the allegation that her husband married a younger woman and began to mistreat her. On her demand for maintenance, he was enraged and divorced her. Through the process of investigation, the

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<sup>170</sup>*Beebee Sahebun*, 36.

<sup>171</sup>*Meer Nujib Ollah*, 138.

<sup>172</sup>Zaman, *The Ulama in Contemporary Islam*, 25. Abbasi, "Shari'a Under the English Legal System in British India," 8.

judges were of the opinion that there was no concrete evidence of habitual ill-treatment from a respectable older man of a civilized society. They presumed that there was a probable discord arising due to the natural love of a man for the younger and attractive wife, and there was no divorce. Her plea for dower was dismissed, as she could not prove the alleged divorce.<sup>173</sup> Likewise, another woman sued her husband to recover her remaining dower from the total dower of Rs. 125,000. She alleged that her husband began to mistreat her from the time he had an affair with another woman. She admitted to having received a substantial amount of dower but claimed that the whole amount was prompt payable on demand. On the issue of a considerable amount of property (about 72% of total dower) already transferred, the judges adjudicated that even if her husband has taken a third wife, the amount discharged is to be considered as prompt dower in the absence of expressed agreement, and her claim was dismissed.<sup>174</sup> The case study clearly shows that women usually sued their husbands for dower either because they mistreated them or had contracted a second marriage. However, it was extremely difficult for a woman to claim her total dower, which was usually paid at the instance of divorce and death.

Moreover, we find that it was fiendishly difficult for a woman to prove the case of divorce in order to recover her dower. The husband could easily deny his pronouncement of instant *talāq* to escape from the obligation of paying the dower. Besides, the power to divorce was unjustifiably dependent on the husband, and the woman was helpless, even if she wanted to get rid of her bond of marriage. In my opinion, the helplessness of a woman to divorce and the unwillingness of a man to divorce to escape the dower were two significant reasons for the limited cases of divorce. Therefore, in view of the aforementioned observation, we shall attempt to discuss the helplessness of women to divorce and the men's role in obtaining a

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<sup>173</sup>*Bibi Sogra v. Mohammad Sayeed*, Patna High Court (1917), accessed 24 August 2020, <https://indiankanoon.org/doc/107527/>.

<sup>174</sup>*Muhammad Subhan Ullah v. Saghir Un-Nissa Bibi*, ILR 41 ALL (1919), 562, 564, 566.

divorce. Our primary concern with such an investigation is to address the question, whether or not excessive dower protects women against undesirable marriage.

### **Did Inflated Deferred Dower Protect Women Against Undesirable Bond of Marriage?**

According to Hanafi law, an adult Muslim woman is entitled to get into marriage at her will, but her authority to get rid of an unhappy marriage is extremely difficult. She may initiate *khul'* divorce through negotiation with her husband in return for compensation, but this is possible only on the consent of the husband to execute it. Of course, the law provides other possibilities for women to obtain a divorce at the instance of their husband's failure, either at the maintenance of his wife or at his impotency. Any minor, who was given in marriage by anyone other than her father or grandfather, can seek divorce at the time of attaining the age of adulthood. However, these possibilities of divorce were to be obtained from the Muslim *qāḍī* through the application of Islamic law. Unfortunately, the colonial courts in British India did not have such provisions specifically for Muslim judges.<sup>175</sup> Thus, a woman's power to divorce was exceedingly limited. The only other possibilities left for women were the ability to divorce on authorization (delegated divorce), and apostasy, which terminated the marriage automatically. We shall next investigate into court cases of delegated divorce, *khul'* divorce, and apostasy to know if women were protected against unhappy marriages.

Through the survey of cases occurring after the 1860s, we find that there were rare cases of delegated divorce (*ṭalāq al-tafwīd*), whereby Muslim women could specify in a marriage contract that she will be allowed to divorce herself under certain contingencies. Some of these contingencies included that their husbands should not take in a second wife during the lifetime of their married life<sup>176</sup>; the husband should not mistreat or beat her without reason and should

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<sup>175</sup>Zaman, *Ashraf 'Ali Thanawi*, 58.

<sup>176</sup>*Badarannissa Bibi v. Mafiattala*, 7 BLR (1871), 442.

pay her monthly maintenance as specified etc.<sup>177</sup> According to the law, when the husband delegates his wife the authority to divorce during the *majlis* (meeting during which delegation is authorized), she must use her delegated authority to divorce in the *majlis* as soon as she knows of the stipulated conditions breached. If she delays in exercising her authority to divorce for a day or more, she loses her authority, except if the husband lays down additional statements, such as “divorce yourself when you want or whenever you want.” In case of such additional stipulations, the wife is authorized to exercise her power of divorce without the *majlis*, and the husband has no authority to revoke his given authorization.<sup>178</sup> The law allowing women to use the power to divorce was very stringent, as they had to use it immediately on knowing any breach of conditions. However, in my survey of cases related to delegated divorce, I found that colonial judges did not consider the stringent time limit given to women in executing divorce reasonable. Instead, the judges’ opinion in one of the cases was, “when a woman is given the power to divorce herself on her husband’s second marriage, she is not bound to exercise her authority as soon as she knows of the offense. The injury inflicted on her continues to exist, and so it is reasonable to hold that she continues to have her right in order to exercise her power.”<sup>179</sup> In the case of delegated divorce by women, colonial judges favoured women and ignored the Islamic law of imposing a strict time limit in exercising such authority. Therefore, it cannot be denied that delegated divorce did protect some women against the cruelty, mistreatment, and negligence by their husbands, as they could use their power to free themselves from an unhappy marriage. Unfortunately, such cases of delegated divorce were minimal. It may be implied that most people were unaware of the law of *ṭalāq al-tafwīd*, and such practice was perhaps prevalent only among few elites and educated people. Rightly, Muhammad Munir points out that even today in the Urban areas of Pakistan, the practice of

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<sup>177</sup>*Sainuddin v. Latifannessa Bibi*, ILR 46 CAL (1919), 141-142.

<sup>178</sup>Ibn ‘Ābidīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār*, vol. 4. (Riyadh: Dār al-Kitāb al-‘Ilmiyya, 2003) 553-554.

<sup>179</sup>*Ayatunnessa Beebee v. Karam Ali*, ILR 36 CAL (1909), 26.

authorizing women to divorce (*ṭalāq tafwīd*) is prevalent in meager numbers, even among highly educated and elites. Surprisingly, in Islamabad, amid the mixed population of the middle class, rich, elites, and educated people, the concept of *ṭalāq tafwīd* is generally unknown.<sup>180</sup> The extremely low number of cases of *ṭalāq tafwīd* in modern times implies that the practice of authorizing women to divorce might have been a very rare phenomenon among some elites and educated people during the British rule of India, as then, people were even less educated and were unaware of their rights. Hence, it is plausible to hold that the practice of *ṭalāq tafwīd* protected only a scarce number of Muslim women and not their general population.

Besides, *ṭalāq tafwīd*, Muslim women had limited options to seek divorce as compared to men. The Hanafi law allowed women to avail of divorce through the judicial process only in case of the impotence of the husband. The other option was to seek *khul'* divorce, for which women negotiated with men to divorce them in exchange for compensation. However, even this option favoured the man more than the woman, for he could either force a woman to surrender her whole dower or refuse to pronounce *ṭalāq*. For instance, a certain man married the rich widow with a promise that he will leave his first wife. After his second marriage, he began to torture his first wife so that his wife initiates *khul'* divorce by renouncing her right to dower. He continued mistreating her with cruelty, not allowing her to see her mother and refused to provide her with maintenance. At last, he was successful in obtaining the execution of *khul'* divorce with the use of force and forgery. When the first wife brought her suit for the recovery of her dower on the allegation that the husband divorced her and *khul'* divorce was obtained through force and forgery, he refused to own up for his divorce but *khul'* divorce on her initiation. The deed of *khul'* was found to be with fraud, and the verdict was passed in favour of women allowing her right to dower.<sup>181</sup> In this case, even though the judgment favoured the

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<sup>180</sup>Munir, "Stipulations in a Muslim Marriage contract," 249.

<sup>181</sup>*Moonshee Buzul-ul—Raheem v. Luteefut-oon-Nissa*, 7 MIA (1861), 379-399; See also, Serajuddin, *Cases on Muslim Law of India*, 27-28.



woman, but it exposes that men could easily misuse the option of *khul'* divorce to their own advantage, either by forcing women to seek divorce or giving their consent for *khul'* divorce on the forfeiture of complete dower by women. Hence, it can be implied that when the *khul'* divorce was unfavourable to women, the only option available for them to dissolve their marriage was apostasy.<sup>182</sup> From the early twentieth century, we begin to see cases of apostasy by Muslim women to get rid of their undesirable marriage. According to Hanafī law, if one of the spouses apostatized, the marriage was dissolved automatically.<sup>183</sup> In one of the cases dating 1910, a Muslim wife converted to Christianity to dissolve her marriage, and the husband brought a suit to the court demanding the restitution of conjugal rights. The lawyer for the husband argued, relying on the work of Ameer Ali, the learned jurist. According to Ali, in such matters, diverse opinions existed among jurists on the effect of marital status due to apostasy. His statement clarified that the jurists of Bokhara took a narrow understanding of the law. In contrast, the jurists of Balkh and Samarkand pointed out that when a Muslim woman converts to scriptural religion like Judaism or Christianity, her marriage remains undissolved. However, the judges dismissed this view and passed judgment in favour of the dissolution of marriage due to apostasy.<sup>184</sup> Similarly, in the year 1913, a Muslim husband had approached the colonial court to appeal for the restitution of conjugal rights, when he was denied of his cohabitation with his wife by his in-laws on the ground that she had become an apostate. The judge demanded for the *fatwā* from the jurist to know about the status of his marriage. The husband sought the *fatwā* from *mawlānā* Ashraf 'Alī Thānvī (d. 1943), who gave his ruling that the marriage was dissolved due to apostasy.<sup>185</sup> M. K. Masud states that the apostasy of women was not seen as a threat to Muslims initially, including Thānvī. However, the number of Muslim women's conversion to Christianity increased in the 1920s and 1930s, as apostasy was the only

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<sup>182</sup>Masud, "Apostasy and Judicial Separation in British India," 200.

<sup>183</sup>Al-Marghīnānī, *al-Hidāyah* (trans. Nyazee), 544.

<sup>184</sup>*Amin Beg*, 90-93.

<sup>185</sup>Masud, "Apostasy and Judicial Separation," 193.

means to escape their unhappy marriage. Moreover, the colonizers encouraged suffering women's conversion to Christianity as a part of their missionary activity, particularly in Punjab.<sup>186</sup> At the same time, there were reform movements initiated by women themselves. In the year 1929, the resolution was passed by the All India Women's Conference, which demanded the Government to look into the matter of Muslim women's right to inheritance, polygamy, and their right to divorce in particular.<sup>187</sup> Such a reform initiative by women might have brought awareness to women folks about their rights. When there were no means available to dissolve their marriage through judicial legislation, they were perhaps forced to take an extreme step of apostasy to do so. Zaman states that, according to Thānvī, thousands of women apostatized to end their marriage; however, the exact number is unknown.<sup>188</sup> Such conversions became a matter of great concern for the Muslim scholars, as the British judges passed verdicts in favour of apostasy to end the marriage. Surprisingly, I have not come across any case of apostasy, in which British judges asked the women the motive behind their apostasy. M. K. Masud rightly says, "British judges discouraged investigations into whether conversions in those cases were genuine or not."<sup>189</sup> In contrast, Indian judges sometimes did try to prove the genuineness of a woman's apostasy. Interestingly, in one of the cases, Lala Ghanshyam, a Hindu judge of the district court in Layllpur, asked an apostate Muslim woman to eat pork in the court to prove the genuineness of her conversion. She willingly accepted the offer to eat pork in court. However, when the pork was presented to her, she refused to eat it. When she declined to eat the pork, the district judge declared her conversion invalid by saying, "I am quite convinced that she is simply telling lies in order to secure the annulment of her marriage under the influence of her love for some other man and that she has not given up her Islamic

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<sup>186</sup>Ibid., 195.

<sup>187</sup>Rohit De, "Mumtaz Bibi's broken heart: The many lives of the Dissolution of Muslim Marriage Acts," *The Indian Economic and Social History Review* 46, no. 1 (2009), 113.

<sup>188</sup>Zaman, *Ashraf 'Ali Thanawi*, 62.

<sup>189</sup>Masud, "Apostasy and Judicial Separation," 199

religion.”<sup>190</sup> It shows that judges in the lower courts who were mostly natives knew much better than British judges about the cultural and religious practices of native Indians. In the case mentioned, it was most likely that the judges knew that apostasy was not genuine, but a device to escape an undesirable marriage. However, in the higher court, the English judge declared her conversion genuine and asserted with emphasis, “Even the devil himself knoweth not the heart of man. Renunciation of one’s faith, therefore, requires no other proof than a person’s declaration.”<sup>191</sup> Moreover, the conversion from Islam to Christianity was seen by British judges as an act done in good faith (*bona fide*).<sup>192</sup> It can be implied that for English judges, the motive of Muslim woman’s conversion was immaterial, and they encouraged such conversions. Therefore, it is quite obvious to hold that if British judges did not care to know the motives behind Muslim women’s apostasy, then how they would even work to better the lives of Muslim women when they did not know their real pain and suffering. It appears that British judges’ encouragement to apostasy was a waking call for Muslim scholars to bring reformation in Islamic law to protect the rights of women. We have seen that Muslim women took an extreme step of apostasy to get out of their undesirable marriage. It clearly shows that no amount of dower could protect women against their undesirable marriage unless it was backed by mutual love and respect.

A well-known Muslim jurist, Thānvī might have regretted his first *fatwā* on the dissolution of marriage due to apostasy, as he reissued his *fatwā* in his lengthy Urdu treatise, *al-Ḥīla al-Nājiza li-l-Ḥalīla al-‘Ājiza* (The Lucrative Judicial Tactic for Powerless Wives) in the year 1933. In this *fatwā*, he asserted that apostasy of a Muslim wife did not dissolve the marriage, and she had to reconvert to Islam and remarry her previous husband.<sup>193</sup> Instead, he opined that Hanafi

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<sup>190</sup>Mussammat Resham Bibi, 278-279.

<sup>191</sup>Ibid., 286.

<sup>192</sup>Ibid., 288.

<sup>193</sup>Thānvī, *al-Ḥīla al-Nājiza*, 326; Zaman, *Ashraf ‘Ali Thanawi*, 62.

law allows the *muftiyūn* to take recourse to Maliki School to dissolve the marriage in case of utmost necessity. He agreed that Muslim women could ask for judicial divorce due to the failure of the husband in his marital obligations of maintenance, long absence, cruelty, mental instability, and so on.<sup>194</sup> However, such judicial divorce was possible only at the discretion of Muslim *qāḍī*. In the absence of Muslim *quḍāt* in colonial courts, *muftiyūn* were of the opinion that undesirable marriage could also be dissolved by the *quḍāt* of Muslim ruled princely state of Bhopal (outside British India). For the application of Islamic law in a strict manner, an appeal was made to the Muslims that they demand the Government for the appointment of Muslim judges in the courts.<sup>195</sup> To bring about reform in Islamic law, Deobandi ‘*ulamā*’ showed unity despite their political differences. Ḥusayn Aḥmad Madanī, who was the leader of nationalist ‘*ulamā*’ and lived in Medina for several years, assisted Thānvī in his reform movements by obtaining *fatāwā* from Malikis of Medina. Finally, ‘*ulamā*’s reform efforts through the call of Jam‘iyyat ‘Ulamā’ al-Hind for the legislation of Islamic law was brought into enactment as the Dissolution of Muslim Marriage Act in 1939. This Act did not fulfil the special demand of Muslim judges in colonial courts. Still, it brought about a reform in the Islamic law of divorce, whereby apostasy was no longer legitimate for the dissolution of marriage and provided Muslim women several grounds for juridical divorce.<sup>196</sup> Some of the grounds on which Muslim woman could seek divorce through the legal process were: the unknown absence of husband for more than four years, husband’s failure for her maintenance up to two years, imprisonment of a husband for over seven years, impotence, insanity for two years and any other lethal disease, habitual mistreatment, and immoral life, etc., which was otherwise extremely difficult.

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<sup>194</sup>Ibid., 63-64.

<sup>195</sup>Zaman, *The Ulama in Contemporary Islam*, 27.

<sup>196</sup>Zaman, *Ashraf ‘Ali Thanawi*, 63; Masud, “Apostasy and Judicial Separation,” 196.

Moreover, according to this Act, a woman's right to dower does not get affected by the dissolution of marriage.<sup>197</sup> Therefore, I do not think it is appropriate to hold the view that British judges worked to better the lives of Muslim women. Instead, it is plausible to hold that the distortion of Islamic law by British judges and the women's call for the protection of their rights triggered Muslim scholars to bring reformation in Islamic law of marriage. Such a call for reform in Islamic law through its enactment not only made the dissolution of marriage easier but also confirmed women's right to dower even at the termination of the marriage. Furthermore, it can be implied from the case study that it is not the inflated dower payable at divorce that protects the bond of marriage, but the prevalence of love and respect that unites spouses in their marital life.

### **Social Dynamics Around Dower**

We have already seen that divorce was mostly dependent on the husband, and it was difficult for women to prove it even when the husband refused to admit it. Hence, it will be interesting to investigate the social dynamics between women and their husbands or relatives or heirs in the determination of the dower and the recovery of it.

In the case of *Noorunissa Begum v. Nawaub Mohsin Allee Khan*, the wife sued her husband on separation for the recovery of her dower of Rs. 60,000. The amount of dower was unspecified as also whether the amount of dower was prompt or deferred. The whole amount was left to be paid at the dissolution of marriage. However, when separated, she claimed to recover her dower. In defence, her husband argued that the law of limitation barred the half of the amount of dower payable at marriage and the remaining was payable only on death and divorce. The court sided with the argument of her husband and barred her from recovering any amount of dower, as she failed to prove her claim of divorce.<sup>198</sup> In another case, the widow sued her

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<sup>197</sup>The Dissolution of Muslim Marriages Act, 1939 is taken from the book compiled by M. M. Aliyar, *Muslim Personal Law*, 347-349.

<sup>198</sup>*Noorunissa Begum*, 46.

husband's heir to recover her total dower of Rs. 80,000 from the property of her late husband, which was under the ownership of the heir. One-third of the amount was fixed as 'prompt,' and the remaining two-thirds were deferred payable on divorce or death. However, the prompt dower was left unpaid. Therefore, she claimed for the recovery of her whole dower. But the court allowed her to recover only the deferred dower and barred her from the recovery of her prompt dower due to the lapse of time of 40 years after the marriage, even when the Muslim legal expert argued that the prompt dower unpaid at wedlock was equally recoverable at the death of her husband.<sup>199</sup> In India, it was a general practice to keep the prompt dower outstanding until the dissolution of marriage to discourage divorce. But the Privy Council's stand on prompt dower was different. The Council had opined that the prompt dower need not be demanded during the continuance of the married life of spouses, as such demand could destroy the domestic felicity between husband and wife. However, the Council was also alarmed at the danger that if prompt dower was not paid within the fixed period during the lifetime of the husband, the heirs could falsely plead that the lapse of time barred the woman's right to her prompt dower.<sup>200</sup> It is evidently clear from the cases as mentioned above that it was not only the husband, but heirs used the colonial law of limitation to deprive the women of their rights to prompt dower, which, in fact, was payable on demand and was not barred by lapse of time according to the Muslim legal experts.

In the case of *Beebee Saheebun v. Beebee Hingun and Beebee Boodhun*, the daughters (Beebee Hingun and Beebee Boodhun) took possession of their late father's estate. Their mother, now widow, claimed her unpaid dower of Rs. 35,889, but was dismissed by the court due to her failure to produce the evidence against her daughters, who claimed that their late father had already paid her mother's dower of 10 dirhams.<sup>201</sup> In another instance, the court refused the

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<sup>199</sup>*Meer Nujib Ollah*, 136-138.

<sup>200</sup>*Mussamat Rani Khijarannissa*, 94-95.

<sup>201</sup>*Beebee Saheebun*, 36.

widow to take possession of her late husband's property in satisfaction of her dower due to the objection brought by the heirs of her late husband.<sup>202</sup> It appears that it was not so easy for women to recover their right to dower not only during the lifetime of their husbands but also after their death. On husbands' death, they had to battle for their rights to dower against their own children or the heirs of their husbands or relatives through judicial procedures.

It cannot be entirely denied that the court did grant women their rights to dower in some cases, but their rights to dower were not easily obtainable. In the case of *Wujih On Nisa Khanum v. Mirza Husun Ali*, one of the heirs (the brother of the deceased) brought a suit against his late brother's widow in the district court. He claimed his share in his brother's estate, which was under the ownership of the widow to satisfy her unpaid dower. The heir pleaded that the dower was too excessive and illegal. Then, legal opinion was sought by the judge. In response, the legal expert stated that "the right to dower precedes right of inheritance; that, if the dower of the wife exceeds the whole estate left by the husband, his heirs have no claim at law."<sup>203</sup> The judge complied with the opinions of the Muslim legal expert and dismissed the heir's claim for his inheritance.

Unsatisfied with the verdict, the heir appealed to the Provincial court. The court gave its ruling against the opinion of the law officers and asked to reduce the excessive dower. It also directed the claimant and other heirs to receive their share of inheritance from the property acquired by the widow in lieu of her dower.<sup>204</sup> The widow was not satisfied with the decision, so she appealed to the higher court of appeal (*Sudder Diwani Adalat*). The widow pleaded that even though the respondent called himself a Sunnī Muslim, he was a Shī'ī Muslim. She argued the

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<sup>202</sup>*Mussamaut Wuzeerun*, 40.

<sup>203</sup>*Wujih On Nisa Khanum*, 356.

<sup>204</sup>*Ibid.*, 356-357.

respondent has no right to inherit as an heir based on the Shī'ī code of law and his conversion to Hinduism.

On the other hand, the respondent challenged the legality of excessive dower and claimed his right to inherit as an heir. When asked for opinions from the Muslim legal experts, they opined that the excessive dower is improper but not illegal. The recovery of dower from the property of the husband precedes the claim of any heir. According to the Shī'ī code of law, the brother of the deceased does not inherit anything if there is a widow with her daughter.

Furthermore, in the case of apostasy, the brother of the deceased does not stand as an heir because his late brother was Muslim and died as a Muslim. Apart from the brother of the dead, no other heirs objected to the ownership of the property by the widow, and the reason for excessive dower did not make it illegal. Therefore, the court gave judgment in favour of the widow and dismissed the claim of the respondent.<sup>205</sup> This case was first filed in the district court in the year 1794; by the time the widow won her right to dower in the higher court of appeal, it was already 1808. It took her almost 14 years to rightfully own the property of her husband in lieu of dower through legal legislation.<sup>206</sup>

In the case of *Zakeri Begum v. Sakina Begum and others*, the widow (Plaintiff) had first filed a suit in the provincial court of Patna against her late husband's nephew and other relations as heirs (defendants) to recover her deferred dower of Rs. 50,000. The defendants alleged that the amount of dower was Rs. 5,000, and had already paid during the lifetime of her late husband. Besides, they claimed that marriage took place in Lucknow under the jurisdiction of Oudh and if the amount was Rs. 50,000, it was too expensive, and the court could reduce the amount based on the position of the husband. To support the claim of the plaintiff, ten witnesses were called, out of which seven of them had witnessed the marriage. All of them testified that the

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<sup>205</sup>Ibid., 357-359.

<sup>206</sup>Ibid., 356.



amount of dower was fixed at Rs. 50,000. The given amount was a minimum dower of the family, and her sister had received a much higher amount of dower. Besides, a copy of the marriage register with the amount of dower was presented in the court. The pleader on behalf of the defendants objected and asked the court for inspection on the allegation that the amount registered was Rs. 5,000, but was modified to Rs. 50,000. One of the witnesses representing the plaintiff looked at the document and said the original amount of Rs. 50,000 was changed to Rs. 5,000. Amid this debate, the original register was presented in the court, which proved that the amount written in the record was Rs. 50,000, which had been later altered.

For the defendants, among four witnesses, three were said to have attended the marriage. One of them was nephew to the deceased, who claimed that his uncle told him of having paid the dower amount fixed at Rs. 5,000. The servant of the deceased also gave his testimony, saying, “I do not know the position of the plaintiff. I saw her house. It was in a very dilapidated state. Her dower was fixed at Rs. 5000.”<sup>207</sup> A professional storyteller was also called in to provide evidence, who said that the fixed dower was Rs. 5,000. He also said, “The imam asked the plaintiff’s husband at marriage, the dower of your wife is Rs. 5,000; do you agree to this? The husband replied, ‘I agree.’ The other witness, too, claimed that the dower amount was Rs. 5,000.”

On examining the shreds of evidence presented by both the parties, the subordinate judge gave his conclusive verdict saying, the amount of dower was fixed at Rs. 50,000. It was within reach of the deceased, so the amount was not excessive based on his position, and the law of Oudh was no way to be applied in the given case.<sup>208</sup> Dissatisfied with the verdict, the defendants

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<sup>207</sup>*Zakeri Begum*, 695.

<sup>208</sup>In the given case, the wedding had taken place in Lucknow under the jurisdiction of Oudh. According to the Oudh Laws Act, the court had the power to dwindle the price of excessive dower, if it was beyond the means of the husband. In this case, though the amount of dower of Rs. 50,000 was expensive; it could not have been reduced, as the given amount was proved to be within the means of the husband to pay.

brought the suit to the High Court, and the judges reversed the decision of the subordinate judge without verifying the evidence of the case.

Finally, the plaintiff had to appeal it to the Privy Council at the decree of the High Court in the year 1886. The lordships studied all pieces of evidence presented in the case and complied with the decision of the subordinate judge. They reversed the verdict of the High Court in the year 1892.<sup>209</sup> The plaintiff had first brought her suit to the provincial court in the year 1883. After a long battle for about nine years, she finally obtained her right to dower through juridical legislation from the highest court of appeal, the Privy Council. The dower in India was often left unpaid until the dissolution of the marriage. However, even after the dissolution of the marriage through death, it was extremely difficult for widows to obtain their rights to dower from the property of their husbands due to the claims made by other heirs of their rights in the property. Moreover, the heirs could manipulate the case to make it difficult for widows to attain their rights to dower. Furthermore, when these helpless widows received their right to dower through judicial legislation, it took them long years of over nine or more for the final justice. Such kind of legal battle for widows was probably equivalent to 'justice delayed is justice denied.'

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<sup>209</sup>Ibid., 689-699.

## Chapter Three

### Violations of Islamic Law

The assumption that the law of Islam is incapable of developing and expanding on the lines of justice, equity, and good conscience, is no less danger for the Muslim community as a whole.

-F. B. Tyabji

The chapter will discuss some of the violations of Islamic law like the precedence of custom over the law, interest on dower, and the colonial law of limitation on dower. We will argue that the release of dower as a religious or benevolent act and the divorce due to caste discrimination were influenced by the cultural practices of India, were not within the spirit of Islamic law of equality and justice. Similarly, the application of interest on dower and law of limitation were based on the colonial legislation of British India. We shall assert that practices like the release of dower as a meritorious act, caste discrimination, and rigorous application of the law of limitation could deprive women of their rights to dower.

#### **Precedence of Customs over Law**

In one of the cases, *Nurunnessa Khanun*, a widow of high rank, had released her dower on the death of her husband as her female relatives told her to do so in place of mourning and weeping at her husband's death. It was duty-bound to release the dower of her husband as a religious act. Moreover, she did it because she knew from her family custom that the release of dower was considered to be a virtuous act.<sup>210</sup> The concept of dower release as a meritorious act appears to have been influenced by the Hindu custom of *Sati* performed by the Hindu widow at her husband's death. Interestingly, there is another similar instance of a Muslim woman who gave up her right of dower at the deathbed of her husband. She renounced her right of dower due to the belief of her sick husband, that if he died without paying the dower debt, he would

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<sup>210</sup>*Nurunnessa Khanum v. Khaja Muhammad Sakru*, Calcutta High Court (1919), accessed 24 August 2020, <https://indiankanoon.org/doc/1582903/>.

not attain salvation. Her husband was a pious man and was anxious that he should be freed from all the obligations before his death. So, she released the ownership of her dower for the religious benefit of her husband, as it was also considered to be a benevolent act.<sup>211</sup> In both cases, widows had released their dowers against their husbands, as it was considered a meritorious act in their society to free their husbands of all their obligations before or at their death. Nevertheless, after the demise of their husbands, both of them approached the court to demand their right of dower, and verdicts were passed in their favour. In the former case, the judgment favoured the widow, as she was not a free agent to make a deliberate judgment in giving up of her right to dower since she was saddened at the loss of her husband and was mourning. In the latter case too, the verdict came in favour of the widow on the basis that she was still a minor (15 years), according to the Indian Majority Act,<sup>212</sup> when she released the ownership of her dower. However, according to Islamic law, she was no longer a minor at the age of fifteen, as she had already attained puberty.<sup>213</sup> The judges in the colonial courts did not always follow Islamic law, even when it was explicit in the texts of Islamic law. Nevertheless, the apparent common factor prevalent in both the cases was that the widows' giving up of their dower was influenced by customary practices with a certain amount of coercion. Thus, there was no free agency in decision making.

Moreover, dower is an obligation accorded by law in a contract of Muslim marriage, and it becomes a woman's right; however, she may release it of her free will.<sup>214</sup> In the cases seen above, the release of the dower by two different widows was not completely done out of one's free will; it was somewhat influenced by the customary practice of releasing dower, which was

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<sup>211</sup>*Abi Dhunimsa Bibi v. Mahammad Fathi Uddin*, Madras High Court (1917), <https://indiankanoon.org/doc/1005918/>. See also, ILR 41 MAD (1918), 1026-1032.

<sup>212</sup> According to Indian Majority Act, 1875, a person attains the age of majority at eighteen.

<sup>213</sup> Al-Marghīnānī, *al-Hidāyah* (trans. Nyazee), 492.

<sup>214</sup>*Ibid.*, 509.

seen as a benevolent act. Besides, both widows were requested by the family members and the husband, respectively, to free their husbands' obligation of paying dower.

The release of dower seen as a meritorious act is purely customary practice because such a view is absent in the Qur'ān, Ḥadīth, and the texts of Islamic law. Instead, we have already discussed about the obligatory nature of dower from the perspective of the Qur'ān and the Ḥadīth, and they entail that *mahr* is freely handed over by the man to woman as a sign of love and respect in a bond of marriage. Though we do not have many cases of this sort, whereby the release of dower is seen as a benevolent act, it is plausible to hold that such practice did exist among some Muslim communities. Surprisingly, these two cases come from two distinct courts of Calcutta and Madras, respectively. But the details about the place of their residence are absent in the case description. Therefore, it may be inferred that both widows either belonged to one region or completely distinct region, but launched a suit for dower in the High Courts belonging either to their own province or different provinces. Nevertheless, the practice of releasing dower by a woman seen as a benevolent act with religious significance might have existed among some Muslim communities, even though such action is not prescribed by Islam.

In the discussions of customs or cultural practices among Muslim communities in India, there is another notable case of *Qasim Husain Reg v. Bibi Kaniz Sakina*,<sup>215</sup> which highlights the practice of the caste system. Sakina (plaintiff) had first filed a suit against Reg (defendant) to recover half of her dower due to divorce with no consummation. Reg, then, appealed to the court against Sakina. The defendant claimed that he wanted to reject the marriage because his wife's maternal aunt was of a lower caste. Moreover, he claimed that the *khul'* divorce was executed for the relinquishment of the whole dower, which she refused to admit. In defence, he argued that there was an agreement of *khul'* divorce by the wife, which was mediated

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<sup>215</sup>*Qasim Husain Reg v. Bibi Kaniz*, ILR 54 ALL (1932), 806-811.

through the plaintiff's father in the presence of *maulvīs* (from the Arabic *mawlawī*, learned teacher of Islamic law).

The case turns out to be a complex one due to the discussion of the judges on the validity of the *khul'* divorce and relinquishment of dower, because she was a minor according to the Indian Majority Act, but was an adult according to Muslim personal law, as she had attained the age of puberty. Though judges often took into consideration the Indian Majority Act to determine if a person is a major or minor, in this case, they opined that a person who is a minor under the Indian Majority Act but is a major according to Islamic law could relinquish the dower for the purpose of obtaining *khul'* divorce. This was argued on the ground that even if a person who is a minor under the Indian majority Act can marry but not fix the amount of dower. This was not a valid argument because here, in reality, they are following Islamic personal law, according to which she was already a major and had the capacity to seek *khul'* divorce with the consideration of dower. On the other hand, they went against the law of the Indian Majority Act, which they were supposed to comply with. Thus, it can be seen that there were inconsistencies and conflicting approaches of the judges towards the laws pertaining to Muslims and Hindus of India.

The court dismissed Sakina's reclaim for dower on the ground that she claimed for the dower after three years of divorce, which should have been done during the period of *'idda*.<sup>216</sup> The question here is not about the lapse of time in reclaiming the dower, but the way the *khul'* divorce was obtained. According to the law, the *khul'* divorce is initiated by a woman to seek the consent of her husband to divorce her in exchange for compensation. However, if the man becomes the cause of hostility leading to *khul'* divorce, he has no right to take any

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<sup>216</sup>This judgement was based according to Shia law in reference to the book by Faiz Badruddin Tyabji, *Muhammadan Law: The Personal Law of Muslims*, 3rd edition (Bombay: N. M. Tripathi and Co., Law Publishers, 1940), 159.

compensation from her.<sup>217</sup> In contrast, in this case of *Qasim Husain Reg v. Bibi Kaniz Sakina*, it appears that there was coercion on Sakina for *khul'* divorce by Reg, as he wanted to get rid of her due to her affiliation with the lower caste.<sup>218</sup> Surprisingly, there is no discussion on the cause of divorce by the judges in the court. Moreover, the defendant Reg accused Sakina's father of fraud and misrepresentation by hiding the caste identity, and thus he declined the claim for any dower. I do not think that hiding one's caste was a fraud, as Islam does not believe in the caste system or racial discrimination; rather, it upholds equality of all humankind before God. On the subject of equality in the Qur'ān, Noah Feldman says that "The concept of Equality is not systematically treated in the Quran, but the equality of persons before God is an ideological tenet, which is explicit in the Quranic texts."<sup>219</sup> One of the sermons attributed to Prophet Muḥammad evidently speaks against the hierarchy based on ethnicity, "No Arab is superior over non-Arab, nor non-Arab over Arab. And no White is superior over Black nor Black over White" (ḥadīth N. 23489).<sup>220</sup> Even though Islam is against the superiority of one ethnicity over another or caste system, it is evident from the case of *Qasim Husain Beg v. Bibi Kaniz Sakina* that though the defendant was a Muslim, he believed in the Hindu caste system rather than the Islamic principle of equality. In case of divorce without consummation, thereby, the plaintiff was entitled to half the dower of the total amount. But the defendant refused to pay any amount of dower through his coercive negotiation of *khul'* divorce, which was a clear violation of Islamic law.

In this case, it can be seen that the Qasim Reg gave precedence to the cultural practice of the Hindu caste system over the Islamic principle of equality. Besides, the judges appear to favour

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<sup>217</sup>Al-Marghīnānī, *al-Hidāyah* (trans. Nyazee), 30.

<sup>218</sup>Sudras are the lowest among the four castes. There are also people known as "Untouchables" or "Dalits". For centuries, they have been the victims of oppression and injustice by the higher caste. Thus, majority of the people from this group continue to remain backward in the Indian Society.

<sup>219</sup>Noah Feldman, "Political Equality and Islamic State," *Philosophical Topics* 30, no. 2 (University of Arkansas Press, 2002), 260-261.

<sup>220</sup>Aḥmad Ibn Ḥanbal, *Musnad Aḥmad Ibn Ḥanbal*, vol. 38 (Beirut: Mu'assasat al-Risāla, 2001), 474.

the defendant rather than the plaintiff. Even though the judges, namely Suleiman and Iqbal Ahmad, were Muslims, they did not object to the caste system. Instead, it is more likely that they too belonged to a higher caste like that of Qasim Reg and favoured him because of probable belief in the caste system. Chandrachud rightly points out that even though some of the Indian judges were British-trained barristers, their belief in the caste system did not disappear entirely.<sup>221</sup> The case implies that the caste system did exist among some Indian Muslims during the colonial period and does continue to exist even today. For instance, Stalin K., in his documentary, “India Untouched: Stories of a People Apart,” narrates the stories of Muslims from the States of Bihar and Jharkhand. Muslims recount that sheiks and imams are of the higher caste,<sup>222</sup> and they do not allow Muslims of lower caste to enter their houses. However, they allow all Muslims to pray in the mosque due to the fear of God. Here, Muslims experience oneness only in the mosque, but once they step out of the mosque, they encounter inequality and caste discrimination. Besides, there are separate graveyards for Muslims based on their caste.<sup>223</sup> Stalin also recounts a saying of an elderly Muslim, “There is no caste discrimination in Islam, but there is among Muslims.”<sup>224</sup> However, in the case of *Qasim Reg v. Bibi Kaniz Sakina*, one may argue that just with one example related to divorce due to caste discrimination, how you can generalize its practice among Muslims during the colonial period. Here, this one case of divorce due to the caste system evidently proposes that the Muslims of

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<sup>221</sup>Chandrachud, *An Independent Colonial Judiciary*, 26.

<sup>222</sup>Yoginder Sikand points out that Shaikhs, Sayyeds and Pathans in India claim their foreign descent as Arabs, Mughals, Iranians or Central Asian settlers and call themselves noble (*ashrāf*) or superior as against Dalit Muslims, who are considered ‘lowly’ (*ajlāf*). See, Yoginder Sikand, “A New Indian Muslim Agenda: The Dalit Muslims and the All-India Backward Muslim *Morcha*,” *Journal of Muslim Minority Affairs* 21, no. 2 (2001), 288.

<sup>223</sup>Stalin K., *India Untouched: Stories of A People Apart*, India (2007), accessed 11 June 2020, <https://www.documentarystorm.com/india-untouched/>.

<sup>224</sup>He mentions it on the discussion of the topic, in the documentary by Aamir Khan *Casteism and Untouchability* in the social awareness TV Series: *Satyameva Jayate*, accessed 12 June 2020, <http://www.satyamevjayate.in/untouchability/untouchability.aspx>. Meenakshi Ganguly, a Director of South Asian Human Rights Watch, also says, that many Dalits embrace Islam due to its preaching of equality, but unfortunately the traditional practice of caste system does not overcome as they continue to exist as Dalit Muslims and not Muslims (See Documentary Film, *Dalit Muslims of India*, accessed 24 August 2020, <https://contentsales.aljazeera.net/al-jazeera-world-dalit-Muslims-india>).



lower caste hardly came to the courts to seek justice,<sup>225</sup> and thus, it does not rule out that such practice did exist. Even though caste discrimination is against the Islamic ethos of equality, one of the rarest cases of divorce due to caste in the court records shows the traditional practice of the Hindu caste system even among Muslims.

### **Interest on Dower**

In one of the cases, a Muslim widow named Zubaida Bibi had owned her husband Inayat-Ullah's property in place of dower. However, in the absence of any agreement to recover her dower debt from the profits of her husband's estate, she claims to acquire this compensation in the form of interest on the dower. On the other hand, Hamira Bibi, a plaintiff, who is a sister of Inayat-Ullah, brought the suit to the court to recover her share of inheritance from her brother's estate, which was legally possessed by the widow for her dower. Plaintiff claimed that the defendant had already recovered her dower debt through her ownership of the estate for 14 years and was willing to pay the amount of difference remaining of the total dower. The Subordinate Judge dismissed her appeal on the ground that the defendant was rightfully in possession of her husband's estate in satisfaction of her dower. So, she was granted the right of interest to be paid on her dower at the rate of 6 percent per annum. Unsatisfied with the judgment, the plaintiff appealed to the larger bench of judges in the High Court to question the validity of the dower together with interest.

In the full bench of judges, one of them was Sundar Lal (with *maulvī* Abdul Raof) for the plaintiff.<sup>226</sup> Sunder Lal argued on behalf of the plaintiff, saying that Islamic law does not allow interest, and thus, no Muslim can claim for interest on dower. In defence, Mr. W. Wallach

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<sup>225</sup>In the description of court cases we read that the poor seldom brought their suit to the courts, and Muslims of lower caste or Dalit Muslims have remained socially and economically poor, disadvantaged and oppressed in the Indian society for centuries. Thus, there is no reason to doubt that Dalit Muslims hardly came to the court. The suit by Bibi Kaniz Sakina suggests that she was either affiliated to a quite well off Dalit Muslim family or was an educated woman.

<sup>226</sup>From the case description it appears that though there was presence of Muslim *maulvī* on behalf the plaintiff, he had no say in the court, and he could only give his opinion to the judge. Finally, it is the judge who speaks on behalf of the appellants with the help of the *maulvī* by taking his view on the concerned case.

(with *maulvī* Muhammad Ishaq) counter-argued on behalf of the defendant, saying that Islamic law was not applicable in case of dower, as Muslim marriage is valid even without it. Therefore, he argued that this case of dower would be judged not based on Islamic law but rules of equity, justice, and good conscience. Moreover, the woman as a regular creditor has every right to claim for interest in any transaction.

Another judge Karamat Husain, taking into consideration the arguments for and against interest on dower put forth by the judges as mentioned above, gave his views on the issue of interest on dower. In one of his arguments, he said, “The rules of the court based on equity justice and good conscience, apply the Hanafi law with the rule of equity, justice, and a good conscience; and when it is applied to Muslims concerning pre-exemption or gift, the dower-debt due to Hanafi wife does not carry any interest.”<sup>227</sup> However, the judge considered this argument unsound based on the quotes of the Muslim jurist and judge, Ameer Ali,

Dower is a debt like all other liabilities of the husband and has preferences over legacies bequeathed by the testator and the rights of the heirs. A partition of the estate cannot take place until the dower debt has been satisfied. When the wife is alive, she can recover the debt herself from the estate of her deceased husband. If she dies, her representatives stand in her place and are entitled to recover the same. Dower is a debt due to the wife by the husband, whether it be a prompt or deferred dower.<sup>228</sup>

Surprisingly, the judge argued that no interest on the dower debt, according to Islamic law, was unsound based on the quotes from Ameer Ali, even though he did not say that interest on dower was permissible. Instead, he stated that the dower is debt to be paid by the husband. In other words, dower is the obligatory payment to the wife, and in case of non-payment, she has the right to claim it lawfully from the estate of her husband. Her right of dower from her husband’s estate takes precedence over the rights of other heirs. It appears that the judge Karamat Husain

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<sup>227</sup>Hamira Bibi, 187.

<sup>228</sup>Ali, *The Personal Law of the Mahommedans*, 316-317.

thought dower is a debt in terms of debtor and creditor in business transactions (because of the mention of dower being a debt like any other liabilities of the husband), rather than an obligation of the husband in a marriage contract. There is nothing from the statement of Ameer Ali to validate the permissibility of interest on dower, as claimed by the judge. Besides, Ameer Ali says, “The widow’s claim for dower is an only debt against the husband’s estate and has priority over legacies and heirs. However, she has to take the possession of husband’s estate lawfully in satisfaction of her dower, and she will be entitled to retain possession until the debt is satisfied with the usual liability for the account to the heirs”.<sup>229</sup> From this, it is evident that the widow can retain the husband’s property in the satisfaction of her dower till its complete payment; however, no statement of Ameer Ali justifies the payment of dower from the interest on the property held in a place of dower.

Further, the judge Karamat Husain said that in case of dower payment based on the principle of equity, justice, and good conscience, he would be the last person to deprive the Muslim widow of interest on her dower to her advantage because of her helpless situation.<sup>230</sup> Finally, he is of the opinion that

Dower is a debt, and as debt, it is to be governed by the Municipal law of British India and not Hanafi law. It would be extremely inequitable to make a Muslim widow in possession of her husband's property in place of dower liable to account for the profits of the property without giving her a right to claim interest upon her dower. The rulings which are in favour of interest, he would without the least hesitation hold that a Muslim widow in possession of her husband's estate in lieu of her dower claim interest on it, and the courts in British India should not grant her a decree on the ground that Islamic law forbids usury.<sup>231</sup>

The chief justice Stanley and judge Banerji agree with the opinion of Karamat Husain on allowing interest on dower, dated 11 August 1910. In the year 1913, with the decrees of the

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<sup>229</sup>Ibidem.

<sup>230</sup>*Hamira Bibi*, 187-188.

<sup>231</sup>Ibid., 183.

High Court of Allahabad, the plaintiffs appealed to the Privy Council on the contention whether interest should be allowed on the amount of dower during the period of a widow's possession of her husband's estate in lieu of dower.<sup>232</sup> On the arguments of whether a Muslim widow should be allowed interest on dower, the lordships referred to the case of 1868 concerning *Woomatul Fatima Begum v. Meerunmunnissa Khanun*.<sup>233</sup> According to this case, the plaintiff, who had owned her husband's property in lieu of dower, was deprived of it by order of the court. So, she brought a suit against one of the heirs to recover a proportionate amount of her dower. In defence, the defendant argued that she should account for her dower from the profits of the estate during her possession of it. While analyzing this case, the bench of chief justice Barnes Peacock and other judges Jackson and Macpherson remarked that the plaintiff did not demand interest on her dower, but the profits of her husband's estate might not have been given to her to account for the amount of her dower during her possession. Further, it was discovered that the amount incurring through the reasonable interest was more than the annual rents and profits of the estate. Thus, the lordships thought that it would be unjust not to allow her interest on her dower to recover her amount of dower. They allowed the plaintiff to recover her dower through interest on her husband's estate and prohibited the recovery of dower through the profits of the estate, with their consideration of being it just and in accordance with the law. In the case of *Hamira Bibi v. Zubaida Bibi*, the defendant was allowed by Indian courts to account for her dower through the interest on her husband's estate at the rate of six percent per annum.<sup>234</sup> Here, the lordships did not find any reason not to allow interest on dower and dismissed the case for the contention that no interest should be permitted on dower, as dated 30 May 1916. It is evident that both judges in the colonial courts and lordships of the Privy Council did not always follow the Islamic law pertaining to the cases of Muslims in India,

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<sup>232</sup>*Hamira Bibi v. Zubaida Bibi*, ILR 38 ALL (1916), 582.

<sup>233</sup>This case is cited in the discussion of the case of *Hamira Bibi v. Zubaida Bibi* dating to 1916 as cited in the previous footnote.

<sup>234</sup>*Hamira Bibi*, 183.

whenever they thought that Islamic law did not stand to the rules of equity, justice, and good conscience. It could also imply that they thought of Islamic law differently and gave preference to the Municipal law of British India over Islamic law, even when dealing with cases of Muslims.

Similarly, there is another notable case of *Maina Bibi v. Wasi Ahmad* dating to 12 March 1919. In this case, the widow, Maina Bibi, was in possession of her husband's property in lieu of dower, and Wasi Ahmad and other plaintiffs brought a suit into the court with the claim of their share of inheritance as heirs from the property held by Maina Bibi. According to the judge, it was held that Wasi Ahmad and others as heirs could not prove their relationship with the deceased. So, the judge gave his verdict in favour of the widow that the property of her husband was possessed by her not as a gift, but in lieu of dower and should be allowed three percent interest per annum on her husband's property to account for the dower.<sup>235</sup>

The glaring difference between the two cases as mentioned above of *Hamira Bibi v. Zubaida Bibi*, and *Maina Bibi v. Wasi Ahmad* was that in the former case, it was challenged in the court of non-permissibility of interest on dower according to Islamic law; whereas in the latter case, there was absolutely no discussion about the rule of Islamic law on the matter of interest, as the plaintiffs themselves did not demur it in the court proceedings. The difference of years between these two cases is about three years. It can be assumed that by then, Muslims knew that there was no use of challenging court's rulings regarding interest on dower based on Islamic law, as the judges of the colonial period did not give heed to Islamic law on non-permissibility of interest in any transactions; instead, they preferred the municipal law of the land over Islamic law. Thus, allowing interest on dower was a clear violation of Islamic law. It implies that

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<sup>235</sup>*Maina Bibi v. Wasi Ahmad*, ILR 41 ALL (1919), 538-553.

allowance of interest on dower was seen at par with interest on any business transactions in colonial courts of India.

### **Application of Law of Limitation<sup>236</sup> on Dower**

A widow, Doordana Khatoon, had brought a suit in the provincial court of Patna to claim the recovery of her dower-debt from the property of her husband, a large share of which was owned by the son of her husband. She claimed to recover the whole of her dower, one-third of which was payable at marriage (Prompt dower), and the remaining two-thirds was to be paid at the death of her husband (Deferred dower). In consultation, the law officers opined that according to Islamic law, there was no time limit to claim one's dower, and both prompt and deferred dower were payable on demand. However, according to the opinion of the city judge, the law of limitation restricted the payment of prompt dower. Nevertheless, in this case, he said that a limit of twelve years should be counted from the death of her husband and not from the date on which the execution of deed took place at marriage.<sup>237</sup> Thus, the judge gave his verdict in declaring that the widow had the right to recover her entire dower from her husband's property.

However, the verdict of the city court was modified by the *Sudder Diwani Adalat*. In its final judgment, only two-thirds of dower (deferred) was payable, and one-third of dower (prompt) was barred due to the lapse of twelve years, as dated 21<sup>st</sup> August 1805.<sup>238</sup> Likewise, in one of the judgments dating back to 1841, a Muslim wife was barred from the recovery of any amount of dower on the ground that the law of limitation restricted the recovery of prompt dower due

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<sup>236</sup>According to the law of limitation under the judicial regulation act of 1772, any suit older than 12 years should not be enforceable in the court of law. See, Tirthankar Roy, and Anand V. Swamy, *Law and the Economy in Colonial India* (Chicago, and London: Chicago University Press, 2016), 169. According to the Act No. XIV of 1859, under section 1 of clause 9 or 10, Muslim woman could bring her suit to recover her dower within the period of three years. Under section 1 of clause 16, the period for law of limitation in filing suits was six years. See, Ninian Hill Thomson, *Act XIV of 1859 Regulating The Limitation of Civil Suits in British India*, 2<sup>nd</sup> edition (Calcutta, Bombay, London: Thacker and Co., 1870), 218, 226.

<sup>237</sup>The city judge's opinion suggests that he preferred to abide by the colonial law of limitation and not the Islamic law. The time period of the deed of marriage settlement had exceeded by forty years beyond the time limit of twelve years. When applied, this barred the payment of prompt dower. However, in this case, the judge gave his judgment in favour of the woman by taking into consideration the time limit of twelve years not from the time of marriage contract, but her husband's death.

<sup>238</sup>*Meer Nujib Ollah*, 138.

to the lapse of time. Besides, her claim for deferred dower was rejected due to the lack of evidence of their divorce, even though they lived separately.<sup>239</sup> However, in the case of *Ameer-oon-Nissa v. Moorad-oon-Nissa*,<sup>240</sup> a Muslim widow took possession of her husband's estate to satisfy her dower. During the lifetime of her husband, she never asked for her dower. The court held that the widow had the right to retain her husband's property to satisfy the amount of her dower claimed. Besides, the court decided that the woman did not need to demand dower during the lifetime of her husband. Therefore, even though the time of the deed settlement had passed over twelve years since its claim, the law of limitation was not applied from the time of the deed of dower, but from the time she claimed for her dower at her husband's death.<sup>241</sup> Likewise, in the case of *Musssamut Mulleeka v. Mussamut Jumeela*, a Muslim widow (Jumeela) had married Syud Mahomed in the year 1833. After living together for three years, they were separated due to disputes between them. At her husband's death in 1854, the widow acquired her husband's property in lieu of dower, and the suit was brought before the court in the year 1860. In defence, it was argued on behalf of the defendant (Musssamut Mulleeka) that the widow was divorced, and all her dower was prompt, which should be barred due to the law of limitation. However, the claim of divorce was conflicting, and the time for the payment of dower so as to whether it was 'prompt' or 'deferred' was not specified. So, the court held that the law of limitation for prompt dower begins to run from the time of its demand and not from the time of its deed. Hence, the widow was entitled to her full dower.<sup>242</sup>

In the cases of *Meer Nujib Ollah v. Musssumaut Doordana Khatoon* and *Noorunissa Begum v. Nawaub Mohsin Alee Khan*, prompt dower was disallowed due to the law of limitation, whereas, in the cases of *Ameer-oon-Nissa v. Moorad-oon-Nissa* and *Musssamut Mulleeka v.*

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<sup>239</sup>*Noorunissa Begum*, 46.

<sup>240</sup> This is case from the Sudder Diwani Adalat of Agra, which was further appealed to Privy Council. The latter affirmed the decision of the former court.

<sup>241</sup>*Ameer-oon-Nissa v. Moorad-oon-Nissa*, 6 MIA (1855), 211-231.

<sup>242</sup>*Musssamut Mulleeka*, 376-377, 382.

*Mussamut Jumeela*, it was allowed on the ground that the law of limitation for prompt dower begins to run from the time it is demanded and not the time of settling the deed at marriage. In the former instance, it was unfavourable to the rights of women, whereas in the latter case, it did favour women. Nevertheless, it was not in accordance with Islamic law, for it does not recognize the time limit for the recovery of one's dower. Concerning the payment of dower, Ashraf 'Alī Thānvī (d. 1362/1943), one of the renowned Islamic scholar of the Hanafi School, says that the general practice of payment of dower among Indian Muslims was either on divorce or after the death of one of the spouses. During the continuity of the marriage, neither husbands paid the dower, nor the wives asked for it.<sup>243</sup> In the cases discussed above, we have seen that generally, women filed suits to recover their dower at the death of their husbands or on the ground of divorce. Thānvī also says that in case of a general practice of paying complete dower at divorce or death, the husbands' obligation of paying prompt dower at marriage does not apply. However, the wife is entitled to claim it until its payment through the refusal of sexual intercourse.<sup>244</sup> We have seen that when a husband died without paying the amount of dower that is due, the wife took possession of her husband's estate in lieu of dower. Besides, it was at divorce that she claimed her dower. As per the practice of dower payment in India, the whole of the dower was usually paid at the dissolution of marriage. Therefore, in no way, the prompt dower (payable at marriage or on demand) was barred by lapse of time and was recoverable at divorce or death according to the Muslim jurists like Thānvī. Moreover, we have seen the opinions of Muslim legal experts in the court records of colonial India that there is no time limit to recover the whole amount of dower according to Islamic law. Though the Muslim jurists of all the four schools of Islamic law accept the law of limitation on civil matters,<sup>245</sup> the

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<sup>243</sup>Thānvī, *Bahishti Zevar*, 386.

<sup>244</sup>*Ibid.*, 386-387.

<sup>245</sup>Sajidur Rahman Siddiqui, *Studies in Islamic Jurisprudence: The Concept of Limitation in Islamic Law* (Beirut: Dar al-Kotob al-Ilmiyah, 2006), 26.



application of the law of limitation on dower in the Indian colonial courts was based on colonial legislation and not the Islamic law that deprived the rights of women of their whole dower.

## **Conclusion**

Through the survey of dower related cases, it is quite evident that the price of dower was inflated throughout the period from 1800 to 1939. In India, the common practice of payment of dower to the woman was either at divorce or death of the husband. Nevertheless, in the cases of mistreatment, second marriage, negligence, and immoral life of the husband, the women demanded from their husbands their rights to dower. From the court cases taken from the period from 1800 to 1864, two wives filed their suits against their husbands for the recovery of their dower amounting to Rs. 550 and over Rs. 40,000, respectively. The lawsuit arose not because of the divorce, but because of their husbands' mistreatment or negligence. When legal experts were sought for their opinion, the law officers opined that husbands must pay the dower as promised, and it is also the right of women to ask for it until its payment. In compliance with the opinions of Muslim law officers, judgments were in favour of women.<sup>246</sup> However, the cases of dower arising after 1862, in particular after 1864, in similar situations of husbands' mistreatment or second marriage, when women sued their husbands for dower, they were barred from their claim of total dower without divorce or death of the husbands. During the lifetime of their husbands, they could claim only for unpaid prompt dower, unless they were divorced. Even the unpaid prompt dower was often barred due to the rigorous application of the law of limitation by colonial judges. Besides, it was challenging for women to get out of their undesirable marriage, as the divorce was dependent on men. The only way left with women to dissolve the unhappy marriage was apostasy, which was on the increase during the 1920s. And, it was encouraged by the colonial judges, even though Hanafi law allowed to take recourse to Maliki School to dissolve the marriage only in case of utmost necessity. However,

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<sup>246</sup>*Shekh Uzeez Oolla*, 284-290; *Abdul Karim*, 90-92.

such judicial divorce was possible only at the discretion of Muslim *quḍāt*, which could not be availed in the colonial courts.<sup>247</sup> Thus, the helplessness of women amplified not because of Islamic law being unfavourable to them; instead, it was hostile because of the way the colonial judges applied it. Moreover, the abolition of the office of Muslim legal experts from the colonial courts in 1864 deprived Muslim women not only to avail the interpretation of Islamic law but to benefit from the diversity and flexibility of Islamic law. Besides, the British understood Islamic law very differently. Kugle says, “In the eyes of British, the interpretation of law violated the very ethos of Islamic law, which had been defined as static, unchanging, waiting only for the fair application.”<sup>248</sup> Likewise, Kozlowski rightly said, “British Judges identified the Quran and the Sunnah (example) of the Prophet and the writings of the Muslim religious scholars as the sources of Islamic law. While the scholars of Islamic law of the eighth-ninth centuries became ‘legal authorities,’ Muslim counterparts of Coke and the Blackstone. Written treatises of these religious scholars became the ‘legal textbooks’ and their fatwas (opinions) ‘precedents.’”<sup>249</sup> Such view of Islamic law as being fixed and static is evident in the statement of the Privy Council that if the rulings are to be applied from the classical legal texts commentaries of ‘great antiquity and authority,’ in such case, even without being specialized in Islamic law, anyone with his training in British law would be able to apply them.<sup>250</sup>

After the removal of Muslim legal experts from the courts, colonial judges applied the written legal texts without even understanding the spirit of Islamic law. For instance, in one of the court cases from the first part (1800-1864), the husband argued that the wife’s demand for dower arises only on the occasions of divorce or death. When opinions were sought, the Muslim

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<sup>247</sup>Thānṣī, *al-Hīla al-Nājiza*, 63-64.

<sup>248</sup>Kugle, “Framed, Blamed and Renamed,” 300.

<sup>249</sup>Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 2008), 97.

<sup>250</sup>Zaman, *The Ulama in Contemporary Islam*, 25.

legal expert gave his opinion saying, dower must be paid immediately on demand, unless the contrary was specified in the marriage contract. Here, the Muslim law officer did not emphasize whether the dower was prompt or deferred. Instead, he declared that it must be payable on demand if it is not specified in the contract.

In contrast, in the cases of dower arising after 1864, the colonial judges were independent of the Muslim legal experts and emphasized on distinguishing between prompt and deferred dower. The British judges adjudicated that deferred dower must be paid only on divorce or death. Generally, it was the suffering women who claimed for dower before divorce or death. But, whenever these suffering women sued their husbands for the recovery of their dower, judges barred them from their whole dower, unless they were able to prove the divorce. Sometimes, the judges also banned them due to the law of limitation, which was applied based on colonial legislation. In fact, they always linked the dower to divorce. However, the idea that inflated deferred dower was fixed to prevent divorce does not fall within the spirit of the Qur'ān and the tradition of the Prophet, as it is not maintenance to be given at divorce or death. Instead, the *mahr* is an obligatory payment of husband to his wife, which is given to her freely as a result of marriage. It is evident from these cases that British judges did not really work to better the lives of Muslim women, and it was not always the case that excessive dower was in the interests of women, as posited by Sharafi. While the inflated deferred dower may make the divorce an expensive affair for the husband, it does not guarantee his love and care for the woman. One of the Hindu judges, Krishna Iyer, has said it very aptly about *mahr*,

The quintessence of *mahr*, whether it is prompt or deferred, is clearly not a contemplated qualification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focusses on marital happiness and is an incident of conjugal joy. Divorce is farthest from the thought of the bride and the bridegroom when *mahr* is promised. Moreover, dower may be prompt and is payable during marriage and cannot,

therefore, be a payment for divorce too distant and unpleasant for the bride and bridegroom to envision on the marital bed.<sup>251</sup>

Though the expensive dower may be a preventive measure against instant divorce, it does not guarantee a woman against husband's mistreatment, negligence, and instant divorce, as it might be rarely paid. Moreover, in case of instant divorce, the husband can easily deny his pronouncement of instantaneous triple *ṭalāq* to avoid the payment of dower. The fixation of inflated dower is not the best solution to restrict rash divorces, as it is rarely paid. Moreover, inflated dower can be oppressive to the husbands and the heirs. Tyabji remarked that "excessive *mahrs* are often oppressive to creditors and unfair to heirs, especially to children of predeceased wives."<sup>252</sup> He also believed that the frequent practice of a high amount of dower existed in India as a mere form to show one's reputation, even if the amount was beyond the reach of husbands. The fixation of high dower payable at divorce or death is not the best of solutions to prevent instant *ṭalāq*. Thus, there have been other measures taken to restrict the arbitrary power of men to use instant divorce. For instance, in the year 1961, Pakistan introduced reforms on instant *ṭalāq* to limit the arbitrary power of men to divorce under Muslim Family Law Ordinance 1961. According to this Ordinance, the instantaneous triple *ṭalāq* is ineffective in Pakistan and also in Bangladesh, formerly East Pakistan, which was separated from West Pakistan after the Indo-Pak War in 1971.<sup>253</sup> For the last few decades, progressive Muslim women and the victims of instant *ṭalāq* in India have been demanding reforms in the Traditional Muslim Personal law,

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<sup>251</sup>*Fazlunbi v. K. Khader Vali*, Supreme Court of India (1980), accessed 24 August 2020, <https://indiankanoon.org/doc/1530507/>. See also, Furqan Ahmad, "Understanding Islamic Law in India: An Assessment of the Contribution of Justice V. R. Krishna Iyer: A Tribute," *Journal of the Indian Law Institute* 57, no. 3 (July-September 2015), 313.

<sup>252</sup>Tyabji, *Muhammadan Law*, 174.

<sup>253</sup>The legislation of *ṭalāq* based on the Muslim Family Ordinance 1961 is also applicable in Bangladesh (See: The Muslim Family Laws Ordinance 1961, accessed 11 July, <http://bdlaws.minlaw.gov.bd/act-305.html>). According to this Ordinance, as soon as the husband pronounces *ṭalāq*, he must send the notice in writing of his pronouncement of *ṭalāq* to the Chairman of the Council appointed by the Government; and also provide a copy to his wife. After having received the notice of divorce, the Chairman appoints arbitration council within thirty days for the purpose of bringing about reconciliation between the parties. In case of impossibility of reconciliation, the pronouncement of *ṭalāq* becomes effective after 90 days of its first notice of *ṭalāq*. See, The Muslim Family Law Ordinance 1961, accessed 11 July 2020, <https://www.refworld.org/pdfid/4c3f1e1c2.pdf>.

which validates instant triple *ṭalāq*. But the Muslim clerics in India have been very reluctant to bring about changes in the legislation of triple *ṭalāq*. Tahir Mahmud, the legal expert on Muslim law, has been very vocal about the misuse and misinterpretation of Islamic law by Muslim leaders and clerics in India. In one of his interviews with the news media, he said, “Ignorance, obstinacy, blind belief in religion and morbid religiosity are undoubtedly the reasons why Muslims clerics in India are resistant to change in the Traditional Muslim Personal law.”<sup>254</sup> In the absence of reforms in the legislation of instant triple *ṭalāq* by the Muslim Personal Law Board of India, and the inaction of the Muslim clerics to reform the traditional law led the five helpless Muslim women (victims of instant *ṭalāq*) to file a plea in the Supreme Court of India (Highest Court of Appeal) to ban instant triple *ṭalāq*. In the year 2017, the Supreme Court passed the judgment terming instant *ṭalāq* unconstitutional,

Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters of their families, which is essential to save the marital tie, cannot ever take place. This form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation to save it. This form of talaq must, therefore, be held to be a violation of the fundamental rights enshrined in the Indian Constitution.<sup>255</sup>

Many Muslim women in India have been advocating for a ban on instant *ṭalāq*, as Muslim men often misuse it, and it is the woman who suffers the most. Therefore, there is not only a need for reforms in the law of instant *ṭalāq* but also a need to educate people about their rights to equality and justice sanctioned by the Qur’ānic teaching and Islamic law. For Taslima Yasmin, a scholar of law from Bangladesh says even though reforms have been made under Muslim Family Law Ordinance to restrict the arbitrary power of a man to divorce, the majority of

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<sup>254</sup>This is taken from the interview of Prof. Mahmud with the news media: accessed 11 July 2020, <https://scroll.in/article/724902/ban-triple-talaq-and-abolish-muslim-personal-law-board-says-former-minorities-commission-chairman>.

<sup>255</sup>*Shayara Bano v. Union of India and Others*, Supreme Court of India (2017), accessed 11 July 2020, <https://indiankanoon.org/doc/115701246/>.

Muslim women from rural Pakistan and Bangladesh think that new provisions in the legislation of instant *ṭalāq* are un-Islamic, and they are to be ignored.<sup>256</sup>

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<sup>256</sup>Taslina Yasmin, “The Ban on Triple Talaq: The Legal Context of Bangladesh and Pakistan,” accessed 11 July 2020, <http://southasiajournal.net/the-ban-on-triple-talaq-the-legal-context-of-bangladesh-and-pakistan/>.

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