

Draft Version

Land Rights for Muslim Women: Review of Law and Policy

Women's Land Rights

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About the Project

Women's land ownership and control have important connections with their empowerment in Pakistan's agricultural context. However, the link between these has largely remained unexplored; and there has been negligible research to determine how many women own or control land in Pakistan. SDPI carried out a multiple part research to fill this knowledge gap and to examine the causality behind women's land ownership and empowerment. This research focuses on women's rights vis-à-vis the inheritance framework of private agrarian land; it does not encompass private residential or commercial property, neither does it cover other possible means of land acquisition by women like purchase or gift.

The research spans rural areas across all four provinces of Pakistan, drawing on national laws, existing policies, literature review and field work. The qualitative data has been gathered through interviews, surveys, focus group discussions, life histories, narratives and case studies.

Land Rights for Muslim Women: Review of Law and Policy

This document is in two parts: the first section of the paper describes the laws applicable to property rights in Pakistan, the procedural application of these laws through the Court system and examines through a review of decisions of the superior judiciary whether these laws substantively or in application discriminate against women. The second part of the paper is dedicated to the review of Government policy in this area in order to analyze the government's approach towards the issue of women's land rights.

A. Review of Law

1. Introduction

In Pakistan property rights are governed by a complex mix of Civil Law having its genesis in the English Common Law principles, Islamic Law and Customary Laws. These laws are however administered by the Common Law Court system (inherited from British India) established under the Constitution of Pakistan. The civil laws dealing with ownership and transfer of property are gender neutral however inheritance rights are subject to Muslim Personal laws. The analysis of laws and case law shows that though the Courts have enforced Sharia law for inheritance purposes, they do not generally inquire as to whether their decisions are implemented. Similarly, the courts have not taken up the issue of the differential rights accorded to women under Muslim Personal law. Very few cases dealing with women's property rights under the Civil Laws have been decided by the Superior Courts. This seems to indicate that women are hesitant to claim their rights through the Court system. The same trends are evident in the Government policy; it generally avoids the issue of implementation of land rights and specifically that of women's land rights.

2. Methodology

The review undertaken for this paper is based on primary and secondary sources. Relevant laws, policy pronouncements and case law have been examined.

The cases reviewed are attached as Annexure "A". These are mainly decisions of the High Courts and the Supreme Court with regard to ownership of property and inheritance rights of women. The conclusions reached rely on analysis of the case law as well as a review of the substantive law in this area. The laws appraised are listed in Annexure "B" of this paper. Separately a review of international legal instruments and Government policy documents has also been undertaken. These are listed in Annexure "B". The conclusions of this analysis are in part 2 of this paper "Review of Policy."

3. Constitutional Provisions

The Constitution of Pakistan pursuant to Article 23 provides that “every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by Law in the public interest.” Article 24(1) further states that “no person shall be compulsorily deprived of his property save in accordance with Law”.

The words, “ in the public interest” have been used in the context of property rights so far to justify the compulsory acquisition of land under various land acquisition laws if such acquisition is deemed to be in the public interest. Petroleum Companies for example acquire land under this head. Though not used to date, the words are sufficiently broad to allow law makers to justify other types of restrictions depending on circumstances, agrarian land reform being one example. In fact Article 253 (1) (a) of the Constitution enables Parliament to prescribe “the maximum limits as to property or any class thereof which may be owned, held, possessed or controlled by any person.” This provision and the words “in the public interest” do therefore dilute the absolute nature of the right granted by Article 23. In order to regulate this provision, the Courts have taken a view that the test with regard to what is in the public interest would have to be objective.¹ These provisions also mean that the State is allowed to get involved in issues of holding or dealing with property. Therefore the right granted under Article 24 is not a purely private right; it can be interfered in by the State under certain circumstances. The significance of this is that since the State is also under a duty to protect the rights of women and children, it could, it is submitted interfere in areas of ownership and devolution of property where women are being clearly disadvantaged. However, such pro-active involvement has not been evidenced either in the case law reviewed or the codified laws.

Inheritance to property is governed by the Personal law of the deceased which in the case of Muslims as contended in this paper provides differential rights to women. The Courts have not considered whether application of Muslim Personal law in any way violates the fundamental right to equality as stated in Article 25 of the Constitution.² However given that the Constitution under Article 2 declares that “ Islam shall be the State religion of Pakistan”, and Article 227 states that existing laws shall be brought in conformity with the Injunctions of Islam and no new laws enacted which would be repugnant to these Injunctions a challenge under Article 25 would probably not be upheld. Additionally in interpreting Article 25 the Supreme Court has stated “that a law applying to one person or class of persons may be constitutionally valid if there is sufficient basis or reason for it”.³

1 2006 PLC 307. Public Interest must include a purpose or aim in which the general interest of the community as opposed to the particular interest of an individual, is directly or vitally concerned.

2 Article 25 (1) “ All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.”

3 1991 SCMR 1041; also see PLD 2003 SC 163 “ equal protection of law envisages that no person or class of persons shall be denied the same protection of laws, which are enjoyed , by other person or persons or class or classes in same circumstances.”

4. Applicable Civil Laws

In Pakistan adult women have the right under law to hold, acquire, transfer, sell or dispose of property whether for consideration or as a gift and can contract for under any terms or in any manner whatsoever in the same way as a man can. Women as owners of property also have the right to mortgage such property to obtain financing. The law recognizes the independent property right of a married woman if she has written title to that property. It is decided by the Court that both the husband and wife have independent property rights.⁴ The Court held that if a female was shown as the owner of land in the Revenue Record, there was no presumption that she was a limited owner of that property and therefore she had the right to deal with that property.⁵ She would therefore as owner of any property have the unfettered right to gift that property according to her own wishes.⁶ She would also become the absolute owner of property received from her husband as part of dower or as a gift and the husband would then lose his right to deal with that property.⁷

The Civil Laws governing property transactions e.g. the Contract Act 1872 , the Transfer of Property Act 1882 or the Registration Act 1908 do not make a distinction based on gender for adult persons (over 18 years of age).

5. The Law Relating to Minors

Minors are able to contract through their legal guardian. Women though not natural guardians can become legal guardians if so appointed under the Guardians and Wards Act 1908. The Privy Council had set down the principle which is still followed. In the case of Imam Bundi V Mutassadi (ILR 45 Cal 878) it was stated “under Muhammedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian. The father alone or if he be dead his executor (under Sunni Law) is the legal guardian. The mother has no larger powers to deal with her minor child’s property than any outsider or non relative.” In another case (AIR 1926 Lah 170) the Court said that a Muhammedan mother has no power to alienate the property of her minor son and such alienation is void ab initio. These cases were followed in the later case of PLD 1950 Pesh 69. As a mother is not the natural guardian under Muslim law and the Courts have said that in deciding matters under the Guardian and Wards Act, Islamic principles and jurisprudence would be adopted by the Courts⁸ then it could be concluded that generally a mother would not be able to have herself appointed legal guardian of the property of her minor children in the lifetime of the father especially in a situation where the marriage was subsisting.

This contention is strengthened by the view of gender roles which is generally adopted by the Courts. To give one example, in the case reported in 2000 CLC 800 the Court stated “Islam keeps the institution of the family in high regard and tries to preserve it. Rights and duties of the

4 2000 CLC 1252

5 PLD 1963 WP (Rev) 20

6 1999 MLD 1687; PLD 1995 Lah 617(a) the principle was upheld even in the case of a co sharer.

7 PLD 2004 Lah 290 (a).

8 1995 CLC 800

Spouses have been prescribed in a manner to keep an ideal balance. While it is a man's job to earn livelihood and provide sustenance to the family, the wife's duty is to give birth to the children, to bring them up, and to groom them and beyond that she is supposed to do nothing. The father is also better placed to protect the life and honour of his children." This construct does not take into account educational levels or capability or recognize a woman's position in society outside the traditional role ascribed to her.

6. The Islamic Laws of Inheritance

In matters of succession and inheritance Muslim women are subject to laws which give them a differential status. Pursuant to the West Pakistan Muslim Personal Law (Shariat Application) Act 1962 the issue of inheritance is to be dealt with under the personal law of each citizen residing within the State. The Courts have decided that every Muslim is presumed to be Hanafi unless proved otherwise⁹. However the presumption is rebuttable and the person may prove himself to be a Shia. The Courts have said that "no Court can test or gauge the sincerity of religious belief". Therefore the Courts would accept the assertion of the person's sect without detailed inquiry.¹⁰ The Courts would however not accept that a Muslim person did not have a sect as the Shariat Act required the matter to be decided with reference to a person's particular sect.¹¹

The Courts have further decided that if a Muslim citizen domiciled (resident) in Pakistan dies and leaves property in a foreign jurisdiction, succession to this property will be governed by Islamic principles. The only limitation recognized by the Courts is that their judgement with regard to succession of property abroad should be capable of being enforced according to the law of that jurisdiction; therefore in cases where a judgement can be enforced abroad the Courts in Pakistan will apply the personal law of the deceased¹².

Inheritance has been defined in the Quran as the 'involuntary devolution of property by which the estate of the deceased person is transferred to the heirs as his or her successors.¹³ The Pakistani Courts have decided that inheritance occurs automatically on death.¹⁴ It cannot therefore be stopped or contracted out of. In fact the principle would take effect even if the heirs did not wish to inherit. The Court decided that a female heir who did not wish to take her share of inheritance would have to transfer her share under a registered document after inheriting that share. An oral statement would not be sufficient.¹⁵

9 PLD 2001 Lah 245

10 PLD 1952 Sind 54

11 PLD 1977 Kar 320; the deceased had disowned her affiliation to any particular sect of Islam. However the Court had to determine a sect as it did not have the power to apply general principles. This would be "tantamount to the creation of a new system of Personal law applicable to cases of Muslims not belonging to any sect.... new theories cannot be propounded independent of rival theories of great antiquity and authority propounded by two sects of Shias and Sunnis."

12 PLD1968 Kar 480

13 Surah Rehman 82:402

14 PLD 1990 SC 1. A Muslim's estate vests immediately on his death in his or her heirs. Brother, father, husband, son or vice versa cannot intervene as intermediaries.

15 PLD 1993 SC (AJ&K) 24(a)

The main principle governing the Islamic Law of Succession is that only blood relatives may inherit therefore adopted children are not able to inherit.¹⁶ Inheritance devolves according to the ‘Quranic Shares’ which are pre-defined. It includes all properties (which are free from encumbrances e.g. Mortgages) movable, immovable, ancestral or self acquired.¹⁷ According to the pre-defined Quranic Shares under Hanafi law there are 12 sharers, 4 male sharers and 8 female sharers and under Shia law 8 sharers. Under Hanafi law the sharers include the wife or wives, the mother, the true grandmother (could include either maternal or paternal grand mother as defined), daughters, son’s daughters, uterine sisters and full sisters. Shia Law does not include the true grand mother or the son’s daughter. The general principle with regard to allocation of shares is that the women sharers receive half the share of a male sharer. Therefore under Hanafi Law the father would receive 1/6th share and the mother would receive 1/3rd share. The husband would receive 1/2 share and the wife would receive 1/4 share of her husband’s estate. Daughters would receive half the shares of the Sons. The Hanafi Law further divides the heirs into sharers and residuaries. The residuaries receive the remaining estate after the claims of the sharers have been satisfied. Shaheen Sardar Ali explains that “all residuaries are related to the deceased (whether man or woman) through a male”.¹⁸

Shia Law allows female heirs to be the sole heirs. Thus a sister being the sole heir of the deceased was entitled to claim succession and ownership would automatically vest in her.¹⁹ In another case it was decided that since the deceased was Shia his brothers would not succeed in the claim that they were legal heirs as the legal heirs were the widow and daughter of the deceased.²⁰ Under Shia Law however an issueless widow irrespective of the duration of the marriage is not entitled to inherit the landed estate of her deceased husband.²¹

In upholding the principle that women must inherit according to their Quranic Shares the Courts have laid down a number of important principles:

- The Courts would be willing to change the mutation of property and revert this back to a female legal heir if she had been deprived²².
- In order to exclude a legal heir from inheritance, strong convincing evidence was required to discharge the burden.²³
- The mere fact that a daughter was married and living independently with her husband would not disentitle her from her share, nor would the fact that the brother was in exclusive possession of the property.²⁴
- A daughter claiming under Muslim Law cannot be defeated except by reason of some act of the father in his lifetime of disinheriting the daughter.²⁵

16 PLD 1988 Lah 588

17 Mulla 91

18 Explanation taken from Kamran Arif and Shaheen Sardar Ali, *The Law of Inheritance and Reported Case Law Relating to Women*, in Farida Shaheed et al, *Shaping Women’s Lives*, Shirkat Gah, Lahore 1998

19 1993 CLC 2152 (a)

20 1993 CLC 781(b)

21 2000 YLR 2580

22 2000 CLC 733(d); 2000 YLR 3053(a)

23 1997 CLC 1768

24 1997 CLC 1768; 2000 CLC 1943

25 2000 CLC 1943

- A male heir could not claim title under adverse possession to deny title to a female heir.²⁶

The Courts whilst enforcing Islamic inheritance rights at the same time accept the concept of Tanazul (relinquishment) whereby a woman would have the right to relinquish her share of inheritance. Whilst the practice of relinquishment is fairly common, very few challenges to this have been taken up in the Courts. In one case the Court held that a relinquishment of inheritance by a female living with her male relatives had no value. The Court considered that women are prone to give up rights in order to secure other forms of protection from within the family.²⁷

Given the fixed and immutable nature of the Quranic Shares historically a number of devices have been used to allow a person to deal with his property according to his own free choice. The most important of these devices are Gifts and Wills.

A Gift has to be made in the donor's lifetime. It is an effective way for property to be transferred to a female heir during the donors's lifetime. The Courts have held that a Gift made in the donor's lifetime in favour of some heirs to the exclusion of others is valid.²⁸ Realizing that Gifts to women would be a cogent way of giving them a fairer share over and above the Quranic Share, the Court in a number of instances has ruled in favour of Gifts to women:

- If a husband was giving a Gift to his wife strict proof of delivery of possession would not be required.²⁹
- An oral Gift to a wife would be permissible.³⁰
- An oral Gift by a father to a daughter would not require registration.³¹
- A Gift made by a father to his daughter would be irrevocable.³² The father could later not deal with the property as his own.³³

The Court has in a number of cases also set aside (based on the particular facts of the case) Gifts which were made with the intent of depriving a female heir of her inheritance.³⁴ Further Gifts by women of their property are also considered valid.³⁵ These may however be examined based on the principles of 'pandanashin' ladies (ladies in seclusion) or duress.

A Gift can be contested by the legal heirs on the basis of 'Marz ul Maut' (death being imminent). The principle that it can be contested after the donor's death however weakens this as a method to circumvent the Islamic Law of Inheritance. The principle of 'Marz ul Maut' requires proof

26 1998MLD 1857(g) 1993 CLC 228 (a)

27 1992 MLD 1598 (a)

28 PLD 1955 Lah 191. Also see 1999 MLD 1687: the owner of any property has the unfettered power to gift away his property according to his own wish. 2002 CLC 1327(C) A gift may be made to one of the legal heirs, be they men or women.

29 2003 CLC 1006 (a) Also see 1998 MLD 3(a) If the husband and wife were living in one house no strict proof of delivery of possession would be necessary.

30 2000 SCMR 1021 (a)

31 PLD 1997 SCMR 1439

32 1999 MLD 1687

33 1990 CLC 1187; 1987 CLC 2011

34 2002 SCMR 1938 (d); 1995 MLD 1841 (a)

35 PLD 1952 Lah 545; PLD 1979 Lah 148: A gift made by a mother to her daughter was held to be valid.

that the Gift was made when the donor was on his death bed. If a Gift was made under pressure of the sense of the imminence of death, then the Gift would be hit by the doctrine of ‘Marz ul Maut’ and could therefore be set aside so that the property would then devolve according to the Quranic Shares.

It should also be highlighted that even though the Courts in numerous cases have upheld oral Gifts, procedurally these Gifts are not valid to transfer possession without registration of a Gift deed and payment of stamp duty.

Wills are allowed by the Courts to the extent of 1/3 of the Testator’s total estate. A Will could also be an effective way of granting women a larger share of inheritance than allowed according to the Quranic Shares. However in practice Wills are rarely used as a device for devolving property and one important reason for this would be that these are open to challenge after the Testator’s death by the legal heirs. In the case of challenge the Courts have taken contradictory positions. In the case of Sadi v Ghulam Mohammad,³⁶ it was held that the widow was not competent to deprive the legal heirs on the basis of a Will as they were not parties to the Will. Similarly in the case of Zakirullah Khan V Faizullah Khan it was held that a Muslim could not make a Will in favour of any heir unless the other prospective heirs had consented to such a Will.³⁷ Contrary to this view in Sarwar Khatoon V Bakht Bhari, a Will granting rights to the daughters of the Executor was upheld. It was stated that the principle of Marz ul Maut would not apply³⁸.

7. The Muslim Family Laws Ordinance 1961

The Muslim Family Laws Ordinance 1961 which codified a number of matters dealing with Muslim Personal Law did not totally codify the laws relating to Islamic inheritance however Section 4 was introduced which was enacted to cater to the needs of grandchildren. Section 4 allows inheritance to the children of a pre-deceased son or daughter to the extent that the son or daughter could have inherited if he or she were alive at the time. Even this small amendment to the Islamic Law of Inheritance has caused unease and Section 4 has been challenged a number of times.

As the Constitution of Pakistan does not allow the Federal Shariat Court to review Muslim Personal Law under Article 203-B(c), attempts were made to have this review done at the High Court level. The argument raised was that the High Court could validly take up the issue of whether Section 4 was an Islamic provision or not in the light of Article 2A of the Constitution of Pakistan (The Objectives Resolution). However, the High Court decided that the provisions of Article 2A of the Constitution were never intended at any stage to be self-executory or to be adopted as a test of repugnancy. The High Court thus had no jurisdiction to declare any law invalid on the touchstone of Article 2A of the Constitution³⁹. However in an earlier case of

36 NLR 1980 AC 525

37 1999 SCMR 971 (c)

38 YLR 2002 3514(a)

39 1993 CLC 1989

Farishta V Federation of Pakistan, the Shariat bench of the Peshawar High Court had held that a person must be alive to be able to inherit under Islamic Law. Therefore it said that Section 4 of the MFLO was against the injunctions of Islam⁴⁰ In the Allah Rakha case Section 4 was declared to be in violation of the injunctions of Islam.⁴¹ This case is also significant in that the Federal Shariat Court took cognizance of the Muslim Family Laws Ordinance 1961 despite the bar in the Constitution which disallows any such review. The argument used by it to do this is interesting though tenuous. It said that the bar in the Constitution did not allow it to look at Muslim Personal Laws related to a particular sect but it could look at codified law.

In some cases the application of Section 4 has been upheld however this issue is by no means settled.⁴²

8. The Application of Customary Law

The Courts accept customary law and practice as being valid to decide issues of inheritance of agricultural land. Under the Muslim Personal Law (Shariat Application) Act 1937 questions related to agricultural land and ‘charities and charitable institutions and charitable and religious endowments’ were expressly exempted from the purview of Muslim Personal Law. This position was later amended by the WP Muslim Personal Law (Shariat Application) Act 1962 so that inheritance would be decided under the Personal law of the citizen. However this did not apply with retrospective effect. Thus in the case of Qadir Baksh v Bakht Bakhari⁴³ it was decided that following the principle in Abdul Ghaffar’s case land inherited under custom prior to 15th March 1948 could not be interfered with. In Eada Khan⁴⁴ existence of custom was claimed depriving females of inheritance rights. The Court said that this was a matter of proof as to whether custom was applicable at the time.⁴⁵ Explaining the historical background it has been said that women initially were only entitled to maintenance from agricultural land. This then changed so that the woman was given a limited right of ownership during her lifetime. This limited right did not allow the woman to either alienate or gift the land. On the woman’s death the Muslim Personal law would then be used rather than customary law to determine succession to her legal heirs.

Generally, given that a woman would have a limited right her name would not appear on the Revenue Record thereby disadvantaging her further in dealing with the land or demanding access to water or other rights.

9. Property Rights of Women arising out of Marriage

Further, Pakistani law does not recognize the rights of women to property which may have been acquired during the marriage. Currently the law does not have the concept of co-ownership of marital property therefore a woman would have no ownership claim to household land despite

40 PLD 1980 Pesh 47

41 PLD 2000 FSC 1

42 2003 SCMR 1664; 2000 CLC 795(a); PLD 1998 Lah 321 (b); 1997 SCMR 281(d)

43 1998 CLC 41 (d)

44 2004 SCMR 1524 (c)

45 2000 YLR 1637 (g); 2000 CLC 1943; 2002 CLC 2001 (f); 2001 MLD 212; 1997 CLC 659

working on it and despite the fact that her work (paid or unpaid, as household labour) may have contributed to the purchase of that land by the family during the marriage. Though contribution in kind is not recognized under the law if a woman is able to prove that she contributed cash then she may be able to lay a claim to property under the principle of “benaami” (anonymous) transactions however this is a difficult principle to prove and generally the law recognizes title only if a person’s name is on the title document. In case of divorce a woman cannot claim a share in her husband’s property and she is not entitled to maintenance in the long term. Her claim to dower also has to be forfeited if she has asked for the divorce (Khula). In the agricultural context a divorced woman would lose her right to work on the household land or access any common land which perhaps was being used by her husband’s family as tenant farmers or share croppers. Interestingly, according to the Moroccan Family Code property acquired in the subsistence of a marriage has joint ownership of both spouses.

10. The Compensatory Property Principle

Objectively, the inheritance rights granted to Muslim Women under Islamic Law are discriminatory and contribute greatly to the inferior status of Muslim Women. The National Commission of Inquiry has clearly recognized that women’s inheritance rights are half those of men and that even these rights are ignored.⁴⁶ The framework of inheritance however has been justified in various ways. The widespread belief (which is repeated by the Courts in a number of cases) is that women were not required to take on financial obligations and therefore were given a share in property commensurate with that. It is also pointed out that women first received their share of property rights through Islam. In Pre-Islamic Arabia women could not inherit land or wealth, and holdings were usually considered the property of the tribe. The Islamic Scholar William Montgomery Watt states “Muhammad improved things quite a lot. By instituting rights of property, ownership, inheritance, education, and divorce, he gave women certain basic safeguards. Set in such historical context the Prophet can be seen as a figure who testified on behalf of women’s rights.”⁴⁷ However, as John Esposito says “alongside ideals embodied in the Quran and the traditions of Muhammad, one must look at the actual condition of Muslim women in diverse time periods and socio-historical contexts. The status of women in Islam was profoundly affected not only by the fact that Islamic belief interacted with and was informed by diverse cultures, but also, and of equal importance, that the primary interpreters of Islamic Law and Tradition (Hadith) were men (religious scholars or Ulema) from those cultures.”⁴⁸ The challenges to Section 4 show the struggle between the conservative and liberal schools of Islamic thought and this tension is evident in the decided cases also.

Scholars have also put forward the justification that Islam provides a ‘compensatory property regime’ for women.⁴⁹ One in which the woman is theoretically supposed to obtain property through other avenues such as gifts, dower and maintenance in marriage. However as the UN

46 Report of the National Commission for Inquiry (1997)

47 Quoted in Wikipedia, Women and Islam

48 Quoted in Wikipedia, Women and Islam

49 UN Habitat Islam, Land and Property Research Series, Paper 5 (2005)

Habitat Study points out, in practice the compensatory system does not deliver equitable access to land. The UN Study lists three reasons for this,

- There is no mechanism to ensure that the woman is compensated for her inheritance rights through the other methods,
- Secondly, while inheritance generally applies to immovable property, the others e.g. dower or maintenance would relate to cash or movable property,
- Additionally customary norms and practices result in creating pressure on the woman to either relinquish her right or not exercise full control over it.

The current Study shows that women in practice do not have access to the compensatory property regime, that dower for example by application of custom is generally deferred (not paid at the time of entering into the marriage contract) and later waived by the wife. By practice dower is generally specified as a sum of money rather than transfer of immovable property even within those classes who are able to afford and hold property.

11. Conclusions - Part - A

The cases decided by the Superior Courts show that whilst the Courts always invariably uphold the principle of inheritance according to the Quranic Shares no inquiry is ever made as to whether the woman did receive property in actual fact under any other head. In fact the Court has upheld other provisions which could militate against the rights of women e.g. restricting the devolution of property through Will, upholding the principle of relinquishment, giving separated and divorced wives a limited right of maintenance, taking away the right to dower in the case of a khula (dissolution of marriage).

Though the Courts have tried to favour women by saying for example that if property is mentioned in the Nikahnama then transfer of that property to the wife will take place based on the Nikahnama,⁵⁰ however the Courts have not suggested progressive concepts like joint ownership of marital property or recognized the contribution of women (through household work) in acquiring marital property. Courts have not considered either that women who are single or divorced would not have access to the compensatory property regime through their husbands but would continue to receive a smaller share from their parents and therefore should be entitled to a larger share.

The Court also upholds the surrender of a dower claim by the wife if it is satisfied that coercion is not involved.⁵¹ In doing so whether with reference to dower or inheritance the Courts perhaps do not give sufficient weight to the fact that women may be influenced by family or kinship considerations perhaps not always to the degree which can be considered coercion but to a degree that their decision is not independent. In these matters the fact that women largely do not have economic independence cannot be ignored.

50 1999 CLC 163(b); 1993CLC 567(a)

51 PLD 1997 Lah 417(b); PLD 1956 Kar 363

It is interesting that in deciding matters of inheritance, the superior judiciary has generally tried to favour interpretations which are more beneficial to women and in this their attitude is at variance to the generally discriminatory stance taken when deciding issues of criminal law (The Hudood Ordinances) or matters relating to marriage and divorce. The reason for this could be that issues related to inheritance and related property rights for women are decided squarely within the religious context and with reference to the Quran and Hadith. Rights are granted to women in consideration for fulfilling their traditional roles within society i.e. that of mother, daughter and sister. The Quranic shares given to these women recognize their traditional role in that the religious justification for not giving women equal inheritance rights is that they are not required under Islamic injunctions to provide for the family and that the male providers who are supposed to be looking after them will do so in other ways. Therefore, when a woman abandons her traditional role for example as a wife through divorce she loses her right of access to the marital property through maintenance and the law does not recognize any contribution made by her to acquiring the marital property during the pendency of the marriage.

The cases where the law takes a supportive view in favour of women is done within a patriarchal construct as the premise is that women are “illiterate” and not well versed with material matters. The Courts have said that in the case of Gifts by ‘pardanashin’ (veiled) ladies for example the donee would have a high burden of proof to discharge.⁵² Even signature on the Gift Deed in some cases would not be considered sufficient. Evidence would be required showing that at the crucial time independent advice had been available.⁵³ The Courts would, based on the facts determine whether the lady had executed the Gift of her own free will.⁵⁴ The Court has extended the principle of ‘pardanashin’ ladies to old, illiterate women even if they were not observing ‘purdah’ (veiling/seclusion).⁵⁵ The Courts have said that the object of the rule of law which is applicable to ‘pardanshin’ ladies is to protect the weak and the helpless, and consequently such a rule should not be restricted to that class but should apply to the case of a poor woman who is equally ignorant and illiterate though not a ‘pardanashin’ in the strict sense of the term.⁵⁶

It must also be emphasised, as supported by the results of the Study that in order to enforce inheritance rights women have to be able to access the formal Court system which is complex, expensive and slow. In any event women in general have restricted access to formal law generating mediums which are all at the command of a patriarchal State apparatus. Decisions in property cases may take up to ten years or more. Even if a case is decided in favour of a woman this does not mean that the decision will be effectively implemented and that women especially in the rural context will have their names registered in the Revenue records. Very few women will eventually exercise control over their property. In a 1995 survey of over 1000 households in rural Punjab only 36 women owned land in their own name and only 9 had the power to sell the land without permission from the male members of the family.⁵⁷

52 1992 CLC 402 (b)

53 1994 MLD 1741(a); 1994 MLD 2339(a)

54 PLD1966 Pesh 121

55 PLD 1959 Lah 932

56 PLD 1961 Dacca 140

57 Report of the National Commission of Inquiry for Women, 1997

According to Rubya Mehdi's study, women's names may be registered but in practice they would not have practical ownership over their land.⁵⁸ In many cases the male members of the family will use the 'legal' devices of Gifts or Relinquishment Deeds to deprive women. Women, afraid of putting family and kinship relations at stake will generally forgo their share.

The question therefore arises as to what percentage of women even after winning their entitlements through the Courts are able to actually in real terms access these. The related question to this being whether the Court should be satisfied with the judgements it is handing down in property cases which are designed to benefit women or whether it should or even can get involved in the practical implementation of its judgements.⁵⁹

Monitoring or supporting such implementation of rights should be done by Government policy and law making so that the Courts' judgements are effective. The review of Government policy examines whether there is an acknowledgement of the importance of these rights and whether concrete measures are proposed for their enforcement.

58 Rubya Mehdi, *Gender and Property Law in Pakistan, Resources and Discourses*. (2002)

59 *Beauregard V Canada* 1986 2 S.C.R. 56 " Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach.

B. Review of Policy

1. Introduction

Research has consistently shown that secure access to land for women is critical for achieving gender equality and is a fundamental factor in ensuring food security. In a study conducted by Shirkat Gah it is said that land is a basic physical resource to provide food, shelter and, space for livestock; it is also “a source of security and power⁶⁰.” The Shirkat Gah study cites the Participatory Poverty Assessment study which identifies non ownership of land as a key determinant of poverty. It states that less than half of the rural households in Pakistan own agricultural land. The Shirkat Gah study also found that a larger proportion of men own land and that in the context of Muslim women even though certain inheritance rights are provided for, these are generally not implemented.

2. International Conventions And Declarations

Given the link between ownership and access to land and poverty it is not surprising that a number of International Conventions focus on land rights issues and women’s rights in this area. Thus Article 17 of the Universal Declaration of Human Rights states, “everyone has the right to own property alone as well as in association with others.” The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which was ratified by Pakistan in 1996⁶¹ says that States Parties shall provide “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration⁶².” Under Article 13 (b), States Parties should procure that women should have equal access to “the right to bank loans, mortgages and other forms of financial credit” and in the area of rural development States Parties are required to take steps to ensure that women have access to “agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes⁶³.” Further under Article 14 (h) “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.” Even though this Convention was ratified by Pakistan it did so with a reservation under Article 2 that it would not undertake steps which would be in violation to its Constitution or Law (which would include its Islamic Law provisions). In Pakistan devolution of land rights through inheritance is governed by the Personal Law of each citizen. Thus, even though CEDAW has been ratified the equality required by it with reference to land rights would be subject to the Country’s laws.

The Cairo Conference of 1994 on Population and Development recommended that “(g)overnments at all levels should ensure that women can buy, hold and sell property and land

60 Khawar Mumtaz and Meher M. Noshirwani “Women’s access and rights to land and property in Pakistan”.

61 As per the Report of the Commission of Inquiry for Women 1997 (page xi).

62 Article 16 (h) CEDAW.

63 Article 14 (g) CEDAW.

equally with men, obtain credit and negotiate contracts in their own name and on their own behalf and exercise their legal rights to inheritance”.

The Fourth World Conference on Women in Beijing in September, 1995 re-affirmed that women must have “equal rights, opportunities and access to resources”⁶⁴ and said that the States Parties who were signatories were “determined” to ensure women “equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets”, as a means to further the advancement and empowerment of women and girls⁶⁵. The Beijing Declaration recognizes that women and children are more particularly affected by “increasing poverty”⁶⁶. The analysis on women and poverty states that women’s poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance⁶⁷. In the Platform for Action under the diagnosis for women and poverty two important strategic objectives are mentioned namely :

- Strategic objective A.2. Revise laws and administrative practices to ensure women’s equal rights and access to economic resources.
- Strategic objective A.3. Provide women with access to savings and credit mechanisms and institutions⁶⁸.

It is interesting that whilst the link between access to land and poverty is generally recognized by International Conventions; the emphasis is on ensuring that women have full and equal access to land rather than on ownership of land and, International UN Instruments do not emphasize equal inheritance rights. The Platform for Action (1995) for example refers to only “an equal right to inheritance”,⁶⁹ which essentially means that women should be able to exercise or assert their right of inheritance on the same basis as a man however, it is not necessary that their inheritance share would be equal or in the same proportion as that given to a man. This takes into account the principle of the Islamic Law on inheritance which provides for smaller Quranic shares for women.

In the Beijing + 5 process the Review acknowledged that “two major areas – violence and poverty – continue to be major obstacles to gender equality worldwide⁷⁰.” It further said that little progress had been made in legislation in favour of women’s rights to own land and other property.

64 Beijing Declaration (1995) paragraph 15.

65 Beijing Declaration (1995) paragraph 35.

66 Beijing Declaration (1995) paragraph 6.

67 Beijing Declaration (1995) paragraph 51.

68 Platform for Action (1995).

69 Platform for Action (1995) paragraph 61(b).

70 Review and Progress Report by the United Nations Committee 2000.

3. Domestic Policy Research

The Report of the Commission of Inquiry (1997) does not cover land rights and issues related to access to land separately. It does however accept that the Country continues to have laws and customs which violate the absolute and sacred principle of equality. The Report states “that it is unfortunate that many of the derogatory laws and customs are justified in the name of Islam⁷¹.” Both law and custom play a role in land rights as rights are governed either by the Customary Laws or in matters of inheritance by the Personal Law of the individual or in certain cases by the Civil Law⁷².

In a research study commissioned by the National Commission on the Status of Women in conjunction with UNDP, it is stated that “(w)omen’s Right to Inheritance plays a vital role in the socio economic and political empowerment of women folk, but unfortunately women are often denied of their said right due to deeply rooted patriarchal system and biased interpretation of divine directives and laws of the land and above all inefficient mechanism for the implementation and enforcement of laws⁷³.” The research study found that even if women were given a share in inheritance they were still denied possession and authority over the land. It stated that women were being denied inheritance rights due to the following reasons :

- Discriminatory attitudes towards women in general.
- Lack of decision making power.
- Registration of birth – The research study found that almost 74% of female respondents did not have birth certificates or registration, which would later impact on their ability to claim inheritance rights.
- Social pressures, which made women voluntarily withdraw their right to inheritance in favour of male family members.
- Loss of inheritance rights due to customary practices. For example, the study records that widows generally lose their right of inheritance on their re-marriage outside the family of the deceased husband.

Given the limited number of households which own land an equally important aspect is the right to access and use land which is not in the ownership of the woman or her family. In a Study conducted by Rubya Mehdi⁷⁴ she concludes that women generally do have usufructuary rights which allow them to use the land but the rights fall short of ownership. She says that these rights exist in different forms from their right to till the land, to the right of residence on the father’s or husband land. If the father is dead and she is single, widowed or divorced this responsibility would devolve upon her brother. Usufructuary rights as defined by Rubya Mehdi allow women to subsist however these reinforce the subordinate and dependent status of women as control remains with the male member of the family. These rights are also not legally enforceable. The Shirkat Gah study highlights the subordinate status of women by using the example of the

71 Report of the Commission of Inquiry for Women (August 1977) (page-xi).

72 For discussion on this also see the section on Review of the Law.

73 Draft Report: NCSW “Policy Research on Women’s Right to Inheritance and its Implementation” (Executive Summary page-1).

74 Rubya Mehdi, “Gender and Property law in Pakistan, Resources and Discourses 2002”.

earthquake of October 2005. It concludes that since household title invariably rests with the male member of the family, women survivors could not access relief and reconstruction compensation, and their claims were superseded in favour of the claims of male relatives, (the deceased's brothers, nephews etc;)⁷⁵.”

4. Invisibility of Land Right Issues in Policy Documents

The research undertaken by the National Commission on the Status of Women⁷⁶ relies on the Constitution of Pakistan to argue that the State must take steps to guarantee property rights to women. However, it also agrees that the State must (according to the Constitution) bring all laws in conformity with the Holy Quran & Sunnah and strike down any custom or usage having the force of law in so far as this is inconsistent with Fundamental Rights.⁷⁷

Government Policy documents do not focus specifically on issues around women's ownership and access to land despite the critical acknowledged link between this and poverty. As stated, the Report of the National Commission on the Status of Women does not focus on this issue specifically.⁷⁸ The National Policy for Development and Empowerment of Women (2002) does not highlight this issue as a fundamental one. It states however that the aim of this Policy is “to remove inequities and imbalances in all sectors of socio-economic development and to ensure women's equal access to all development benefits and social services.”⁷⁹ In its key action areas only education and skills training are emphasized. In additional steps it is said that “steps are to be taken to ensure the access of poor rural women to land, agricultural and livestock extension services and support mechanisms and facilities; providing women easy access to micro-credit, especially through the Pakistan Poverty Alleviation Fund (PPAF), Rural Support Programmes (RSPs), First Women Bank (FWB), Agricultural Development Bank (ADB) and the Khushali Bank.”⁸⁰

It is further said, “women, particularly in general and female headed households, women bread earners, and women with disability, are also to have priority in accessing credit on soft terms from FWB and the Khushali Banks and other financial institutions for setting up their business, for buying properties, and for house building.”⁸¹

Women's access to inheritance rights or issues created by custom/customary laws are not mentioned in the section on drafting of appropriate legislation which focuses on equal remuneration and sexual harassment at the work place.

75 Khawar Mumtaz and Meher M. Noshirwani “Women's access and rights to land and property in Pakistan.”

76 Draft Report: “NCSW Policy Research on Women's Right to Inheritance & its Implementation.”

77 Article 2A, Article 203 cc and Article 8 (1) of Constitution of Pakistan 1973.

78 Draft Report: “NCSW Policy Research on Women's Right to Inheritance & its Implementation.”

79 National Policy for Development and Empowerment of Women 2002, (“Aims and Objectives”(a).

80 National Policy for Development and Empowerment of Women 2002.

81 National Policy for Development and Empowerment of Women 2002.

Earlier, in the National Plan of Action for the Advancement of Women under the Beijing Platform (1998) (NPA) certain issues related to land rights were taken up however these are not emphasized in the 2002 National Policy. The relevant sections of the 1998 NPA are as under:

- Increasing women's access to ownership, control and management of productive assets e.g. land, and formal credit.
- Creating awareness of legal and constitutional rights of women, related to land and asset ownership and legislation for equitable distribution of productive assets.
- Training women in financial and land management.

Currently Pakistan is working actively to achieve the Millennium Development Goals⁸². Goal 3 is stated to be to “promote gender equality and women's empowerment. Within this goal focus has been on the following⁸³:

- Improve female enrolment and retention at the primary and secondary school level respectively;
- Improve female adult literacy;
- Improve the share of women in wage employment in the non agricultural sector;
- Increase the vote of women in national politics and decision making.

In reviewing challenges and constraints in achieving the objectives of Goal 3, the Government of Pakistan report (2005)⁸⁴ mentions the following :

- “Women are more adversely affected by the incidence of poverty on account of their weak position and educational background, low participation in economic activity, and inequitable access to productive resources.”
- “Whether it is access to education, health facilities, employment opportunities, information or to credit facilities, all of these obstruct in the way of women's empowerment and the efforts to reduce the gender gap.”
- “One of the biggest challenges is to create enabling environment by expanding, updating and rewriting the archaic civil, criminal & family laws alongwith their effective enforcement. The laws are needed to protect rights of women to inherit family wealth, give them a fair deal in marital contracts and provide adequate protection against violence.”

Thus the framers of the Millennium Development Goals Strategy recognize the link between access and ownership/inheritance to land and female empowerment. Having recognized and articulated this link, it is interesting however that the actions taken by Government programmes and projects do not in any way address this issue. The issue of access to micro credit is addressed. However, in the context of income generation rather than asset ownership. The Ministry of Women's Development provided a credit line to the First Women's Bank of Rs.48 million to provide small loans of Rs.5,000/- to Rs.25,000/- to poor women. The quantum of the

82 Millennium Development Goals as adopted by the UN Member States in 2000.

83 As reported in the Pakistan Millennium Development Goals Report 2005 published by the Government of Pakistan (Planning Commission).

84 Pakistan Millennium Development Goals Report 2005: Published by the Government of Pakistan (Planning Commission) as an annual reporting process.

loans was such that these were not designed to lead to asset/property ownership nor were these necessarily accompanied by transfer of skills leading to sustainability.

5. Conclusions - Part - B

The gap between the identification of structural impediments to women's empowerment/poverty alleviation and concrete action plans is thus particularly stark in this area. As pointed out, Government Commissions and policy research studies do highlight the critical need for women to have access to land and more importantly to have ownership and control of land. However, Government programmes and projects do not translate this critical need into concrete actions. Similarly, whilst the issue is taken up by International Instruments when translating provisions of these Instruments into domestic law and policy again, the Government neglects this particular area.

In a country which is largely agricultural, ownership and control of land are fundamental to maintaining the current power structures and therefore laws, custom, government policy & enforcement mechanisms act in concert to ensure that the underlying structures are not impacted by measures which could lead to meaningful change. In doing so, the Country signs on and implements its international obligations in an illusory manner. The Report of the Commission of Inquiry for Women (1997) argues that Pakistan can not divorce itself from international norms in the long term. The Report says "(it) needs to address its domestic issues in ways that are in some harmony with the international perspective and universally accepted norms. If it does not do it now, it will be compelled to do it later, after much damage."⁸⁵ It is hoped that policy makers will re evaluate Government policy in this area and bring it in line with Pakistan's International obligations.

6. Recommendations

In India where Personal Law is also applicable to family and inheritance matters, Women have demanded the application of a secure Civil Code which would grant women equal rights. In Pakistan also the application of a Civil Code taking inheritance out of the purview of Muslim Personal law would allow the State to enact gender neutral laws granting women equal inheritance rights. Even keeping within the confines of Muslim Personal law lawmakers may take a more progressive interpretation by following examples of other Muslim states e.g. Morocco which automatically provides for joint ownership of all property acquired during the pendency of a valid marriage or the Shia law which allows a woman to inherit the total estate of the deceased without any residual share reverting to a male heir.

The Law making should also focus on dower and maintenance. Women should have a right to acquire immovable property as dower (if the parties can afford it) and the property mentioned as dower should be transferred at the time of the Nikah (formal marriage ceremony) . In a divorce situation not only should maintenance be provided for a certain period of time (e.g. 5 years), but there should also be an equal division of immovable property acquired during the validity of the

85 Report of the Commission of Inquiry for Women (August 1997) (page-xi).

marriage. Women should also be granted the right to retain their dower even when “khula” (dissolution of marriage) is applied for on the basis that dower is consideration for entering into the marriage contract and theoretically should have been transferred at that time.

Along side this there is an urgent need to have these matters decided by Special Courts so that the delays in the regular Court process are minimized. Courts should not restrict their judgement to merely deciding the entitlement of applicants but should pass implementing orders also directing e.g. that a women’s name should be entered in the Record of Rights within a specified period of time.

This must be coupled with awareness campaigns. The registration of the birth of a female infant is important as it may later impact on her claim of inheritance and women must understand that securing title to property requires formal registration. The Government could encourage registration by stipulating a concessional stamp duty and registration fee for women. Further, women should be given access to concessional credit by using land as security for the loan. This again would encourage ownership of property in the name of women. This principle could be cascaded down so that even the grant of micro credit could be linked either to evidence of ownership of land or access to land for farming purposes. Contracts between land owners and women should be encouraged so that women do not lose their right to work on common land in the case of divorce. These measures may indirectly encourage women to exercise a degree of control over the land also.

Given the invisibility of this issue from official Government policies and plans the real challenge is to have this recognized as a key contributing factor to women’s subordinate status so that this may be prioritized for concrete action. Though in many instances the Courts have taken a supportive view this action in the absence of policy support will not have long term impact.

Case Summaries

General Property Rights of Women

- Muhammad Yousuf v. Noor Jehan Bibi: 2000 CLC 1252 (c) –In Muslim Law the concept of joint ownership of property does not exist. Both the wife and the husband have independent property rights.
- There is no distinction drawn between real and personal property in Muslim Law. (Nawazish Ali Khan v. Ali Raza Khan: PLD 1948 PC 23.
- A mother, under the Muhammadan Laws is not a guardian of either the person or property of her children in the lifetime of the father – She is entitled only to Hizanat.
- It is well settled law, and one of the fundamental principles of the Muhammedan Law itself, that no court can test or gauge the sincerity of religious belief. Where a person professes to be a Sunni Muslim, Courts regard such a declaration to be enough to hold that person as a Sunni. It is not permissible to any Court to enquire further into the state of mind and the belief of a person who professed to belong to a particular faith and inquire whether his actual beliefs conformed to the orthodox tenets of that particular faith. Moulabux v. Charuk: PLD 1952 Sind 54.

Property Rights of Pardanashin Ladies

- 2001 YLR 893 – In cases where donors were illiterate females having their family and children, burden of proof rested on the donee to produce convincing evidence showing that a gift had been made in his/her favour.
- Aziz Begum v. Badshahan: 1994 MLD 1741(a) – A gift deed had been executed by a ‘Pardanashin’ lady. She was held to be entitled to protection even if she had signed gift deed. Evidence was held to be required showing that at crucial time independent advice had been available. (Khalida Bib v. Daryai Khunam: 1994 MLD 2339(a) also concerned pardanashin lady – similar judgment).
- Hassan Bibi v. Ghulam Siddique: 1992 CLC 402(b) – In cases concerning Pardanashin ladies there was a high burden of proof to discharge – solitary witnesses were not considered enough to discharge such burden.
- Ghulam Ali v. Ghulam Sarwar Naqvi: PLD 1990 SC 1⁸⁶ – pardanashin lady – co sharer – right of females – it was held that an heir in possession has to be considered to be in constructive possession of the property on behalf of the heirs in spite of his exclusive possession. A Muslim’s estate vests immediately on his death in his or her heirs. Brother, father, husband, son or vice versa cannot intervene as intermediaries. The scope of rights of inheritance of females is so wide and their thrust so strong that it is the duty of the

86 Landmark case.

- courts to protect and enforce them, even if the legislative action for this purpose of protection in accordance with Islamic jurisprudence is yet to take its own time.
- *Mst. Wallan v. Mst. Bashir Bibi and Others*: 1980 CLC 1709 - Gift of property by a pardanashin lady – the appellant, admittedly an illiterate woman was residing with the respondent along with her children after the death of her husband occurring six years before institution of suit – The appellant was living with respondent even at the time the gift was made and this was the state of affairs for quite some time after her second marriage – none of persons present at time of making gift by appellant stated to be interested in her welfare and the appellant had had no opportunity to seek friendly advice before making the gift of land in favour of the respondents – The appellant had not derived any benefit out of making the gift and was possibly affected by natural love and affection to transfer land in favour of respondents, her daughters – the transaction was held to not be free from circumstances throwing doubt and suspicion on the validity of the transfer - factum of gift and conveyance of land by way of gift. Entries in jamabandi consequential to gift, held no more than assertion of a deed of gift by Registrar acting under the Registration Act – attestation even if established qua a pardanashin lady the entries were not operative to confer sanctity of gift, if not shown to have been made in accordance with requirements of law governing gifts made by pardanashin ladies.
 - *Abdur Rehman v. Khalilur Rehman*: PLD 1966 Pesh. 121 – Disposition of property made by a Pardanashin lady – there was no hard and fast rule that could be laid down. The donor was an old, infirm and illiterate lady found to be under the influence of the donee, who was one of her sons, at the time of making the gift deed – Held, in the circumstances of the case, she could not be considered to have executed the gift deed of her own free will thereby depriving her other heirs.
 - PLD 1959 Lah. 932 – The donor was an old, illiterate woman – She was held to be entitled to protection as a ‘pardanashin’ though she was not observing the purdah – the donee in the case, was in position of influence.
 - *Parial v. Nasib Khatun*: PLD 1958 Kar. 399 – This case concerned women folk in area of former Sind – They were accustomed to leaving management of their property to men-folk. The onus of establishing full and intelligent consent to the terms of the compromise by Pardanashin ladies is a difficult one to discharge in such cases, if the emphasis is laid on what the ladies actually understood. It is necessary that the terms of a document should be explained to such ladies and those they should accept them after understanding them. But the burden of explaining a subject does not include the responsibility of creating a will and the capacity to understand it. Sometimes the will to exert self is absent and sometimes the problems of an estate are utterly strange to pardanashin ladies because their mind has not been initiated into them. As has been judicially recognized women folk in the area of former Sind are accustomed to leaving the management of their properties to their menfolk and to trust them completely. Such a custom indicates a disinclination on the part of the women folk to scrutinise problems relating to their properties and a tendency in them to accept the actions of their men folk as substitutes for their own acts. If, in such circumstances, there is an allegation of an adverse interest of the men-folk against the interest of the women folk, then the importance of the absence of

knowledge of facts to women folk is much greater than in the circumstances in which absence of information is pleaded as a ground for repudiating a transaction.

- *Ayana Dasi v. Arena Bala Dasi*: PLD 1961 Dacca 140 – (The concept behind the rule applied to property rights of Pardanashin ladies is stated in this case). The object of the rule of law which is applicable to pardanashin ladies is to protect the weak and the helpless, and consequently such a rule should not be restricted to that class only, but should apply to the case of a poor woman who is equally ignorant and illiterate though not a pardanashin in the strict sense of the term.

Gift of Property

- *Chaman bibi v. Muhammad Shafi*: PLD 1977 SC 28- If a gift was made under what the Privy Council described as ‘pressure of the sense of the imminence of death, then the gift would be hit by the doctrine of marz-ul-maut.
- *Fateh Muhammad v. Adalat Khan*: 1979 CLC 587 – A Gift is defined in the Hedaya as a transfer of property made immediately and without an exchange. Areet, on the other hand is defined ‘as investiture with the use of a thing without return ...Korokhee and Shafe’s define Areet to signify simply a licence to use the property of another...’
- PLD 1963 WP (Rev.) 20 - Gift by a widow is voidable and not void – widow or female shown as owner in revenue record – There exists no presumption that a widow is the limited owner of property.
- *Malak Maharam Khan v. Baz Khan*: PLD 1955 Lah. 516 – Gift of vested remainder – not valid among Sunnis. Gift unaccompanied by possession – the donor may revoke such a transfer at any time.
- *Safi Ullah v. Ghulam Jabbar*: PLD 1955 Lah.191 –It was held that a gift in favour of some heirs to the exclusion of others is valid – The owner of the property has unfettered powers of alienation. The only restraint upon a Muslim in the matter of alienating his property imposed by the Muslim Law relates to wills and gifts on death bed. Gift in favour of some heirs to the exclusion of others is valid. It may be impious for a Muslim to deprive some or all of his children of property by alienating it in his lifetime – and it would be obviously so in all good sense if down without just cause – but there is nothing anywhere in the Holy Quran to forbid such gifts when made by a person not suffering from Marz-ul-maut.
- Joint gift in favour of two or more persons is permissible. *Aurangzeb v. Daud Khan*: PLD 1957 Pesh. 85.

1. Gift of land to women (general):

- 1999 MLD 1687: It was held that the owner of any property has unfettered power to gift away his property according to his own wish.
- *Muhammad Malik v. Rasool Bibi*: 2002 CLC 1327(c) – Muslim under Islamic Law can dispose of his property in favour of an heir completely excluding other heirs and no restriction of fetters exist under Muslim Personal Law to prevent a person from gifting the whole or any part of his property to one of his legal heirs, be they women or men.

- Sheedan v. Abdul Ghafoor: 2001 CLC 807(b): A gift was made in favour of wife and minor children. In general, the delivery of possession is considered a requirement in order to constitute a valid gift. However, it was held that in cases where the gift is to one's wife or minor children, physical departure of donor from gifted land and delivery of actual possession to donees was not necessary. The gift was held, therefore, to be valid.
- Fazal Muhammad Bhatti v. Saeeda Akhtar: 1993 SCMR 2018(c) – The case concerned the gift of a house made by a grandmother to granddaughter. Subject matter of the gift (the house) was unoccupied by anyone and remained so. The gift was made and accepted and keeping in view relationship between donee and donor it was held requisite handing over of possession would sufficiently stand established in circumstances. The gift was therefore valid.

2. Rights of women to make a gift of land:

- Niaz Ali v. Muhammad Sadiq: PLD 1995 Lah. 617(a) – The Plaintiff's wife was a cosharer and in exclusive possession of khasta numbers. She had gifted the land in question in favour of plaintiff. There was no evidence to rebut such a transfer – therefore valid.
- Nemat Bibi v. Nemat: 1990 ALD 278(2) - Widow of last male owner (ltd owner) was held not to be authorised to make a donation of land received by her from her deceased husband in that capacity. Therefore, a gift of such property made by her to daughter was adjudged null and void.
- Hayat Ali v. Saudagar etc: PLD 1979 Lah. 148 – A widow on acquiring propriety rights under S.114 of Punjab Tenancy Act (XVI of 1887) acquires only a life estate – the widow, hence, was entitled to gift away only her own share and not the entire land.

3. Gift of land made by a man to his wife:

- 1998 AC 1: Disposition of land by husband in favor of issueless wife would amount to "UMRA"- species of gift of property under Muslim law gift of corpus of land would be complete and absolute and consideration of () sought to be attached to gift would be invalid and ineffective. There was a condition attached to the gift. The Trial Court, Appellate Court and the High Court all held that the transfer was a gift and that the condition attached to it was void. The decision was upheld by the Supreme Court.
- The case concerned a bridal gift by the husband. It was held that a bridal gift given by the husband is the absolute property of the wife and it cannot be snatched away from her. Shahnaz Begum v. Muhammad Shafi: PLD 2004 Lah. 290 (a).
- Property gifted by husband in to wife was a share in khata – delivery of possession – question was raised as to what proof was required – I it was held that strict proof of delivery of possession in favour of the wife was not required. Sikander Hayat v. Ahmed Sher: 2003 CLC 1006(a).
- The transfer of property in lieu of dower made at time of Nikah takes effect as a gift. Altaf Hussain Shah v. Azra Bibi: PLD 2000 Lah. 236 (b).

- Hajran Bibi v. Maryam Bibi: 2000 SCMR 1021(a) – Donor gifted property to his wife orally – it was held that an *oral gift is permissible under Muhammadan Law*.
 - Waheed Gul v. Saida Jan: 1998 MLD 3(a) – Where donor and donee lived jointly in one house as wife and husband, no strict proof of delivery of possession would be necessary for donee would be considered in possession of property in question. Strict proof of delivery of possession would not be imperative when on account of attestation of mutation it can be presumed that change of possession had occurred.
 - Muhammad Sadiq Ali Khan v. Fakr Jahan Begum: NLR 1990 SD 541 – The case involved a gift made by a husband to his wife – a declaration of delivery of possession in deed and delivery of deed was held sufficient to establish transfer of possession.
 - Chan Pir v. Fakar Shah: 1990 ILJ 118 Comp’ 39 – a gift of land made by a husband in favour of his wife on account of dower is valid provided it is not made for the purpose of defrauding the rightful heirs⁸⁷.
 - Kazim v. Muhammed Iqbal: PLD 1987 Pesh. 152 – A gift was made by husband to wife (via dower deed) – any condition in such deed that donee would enjoy usufruct of property during her lifetime was held by Court be void and of no effect.
 - Dana Meah Chaudhry v. Gagan Chandra De: PLD 1955 Dacca 39 – Hiba-bil-Iwaz – a gift was made in lieu of dower to wife – transfer of possession was held not to be necessary.
4. Validity of a Gift of land made under Customary Law, or challenged under Customary Law – Courts approach:
- Muzaffar v. Mussahib Bano: 1998 SCMR 707: There was a gift of land under customary law by the deceased in favour of his wife. Brother/sister of deceased challenged the gift under custom. 1st Appellate Court granted suit to extent of ancestral land – High Court declare redundant 1st Appellate Court’s judgement. Validity of gift having acquired finality.
 - QadirBakhsh v. Bakhat Bhari: 1998 CLC 41(d) – The last male owner of a property died in 1929 – his widow gifted the property in favour of their daughter in 1945 – the validity of the gift was challenged in 1966 – It was held that a gift, transaction or sale made prior to 15/3/1948 was to stand protected on basis of law declared by Supreme Court in *Abdul Ghaffars case PLD 1985 SC 407*. Land inherited under custom would be deemed to be under Muslim Shariat law and absolute owner. The Transaction could not be interfered with in view of S. 2-A West Pakistan Muslim Personal Law (Shariat) Application Act 1962. Also, the institution of suit was barred by time. Custom of district concerned showed that widow was entitled to inherit the entire property of her husband. No contrary evidence produced by plaintiff.
 - Saleem Akhtar v. Mumtaz Begum: 1997 SCMR 879 - S.5 West Pakistan Muslim Personal Law (Shariat) Application Act, 1961 – The plaintiffs were claiming inheritance – there was a gift made to wife – but the plaintiffs claimed she was limited owner – The Trial Court and Appellate Court decreed suit, but High Court set aside their judgement.

87 How is ‘purpose’ to be ascertained?

The female was considered as not a limited owner but a full owner. Leave to Appeal granted.

5. Gift of land made to a daughter:

- NLR 1998 Civil SC 744- A Muslim is left free by law to dispose of his property in his lifetime, the way he deems fit. A gift by the deceased in favor of his daughter cannot be doubted.
- Muhammad Sharif v. Sharifan Bibi: 2002 YLR 3412 – Plaintiff-brother, Defendant-sister – the defendant had got land mutated and given to her as gift by deceased mother. By providing independent witness the defendant proved the transaction. Therefore the gift was held to be proved and the plaintiff’s suit was dismissed.
- Hamida Bibi v. Wali Muhammad: 1999 MLD 1687 – A gift made by a father to a daughter was held to be irrevocable. It was held that father could not be allowed to contend that the gift was invalid due to non-delivery of possession. The validity of gift cannot be objected by donor when the essentials of a gift were faithfully fulfilled.
- Alif Khan v. Mumtaz Begum: 1998 SCMR 2124(e) – An allegation was made, of the gift being fake and fraudulent. The donor had only one brother and two daughters – he gifted property to daughters – it was held that a Muslim is free by law to dispose of his property in his lifetime the way he deemed fit and it was open to none of the heirs to question his motive/conduct.
- Bakhsha v. Salahan Bibi: 1997 SCMR 1439 – a gift made by a deceased landowner to his daughter during his lifetime was challenged by nephews on grounds of illness (TB). Evidence was not produced, therefore the suit was dismissed.
- Khurshid Akhtar v. Station House officer: PLD 1997 Lah. 389(b) – It was held that an oral gift of one acre of land made by father in law to daughter did not require registration.
- Abdul Karim v. Muhammad Akram: 1995 CLC 130(i) – the case involved a gift made in favour of daughter. The donor’s son challenged the gift after 12 years of its execution. There was no evidence of coercion. Gift was held not revocable. When a gift was made in favour of a person related in a prohibited degree to donor, it could not be revoked except in exceptional circumstances but not by heirs of donor at all after his death.
- Naurozi v. Najaf Ali Shah: 1990 ILJ Comp’ 39 – A gift was made by father to daughter – declaration of possession was sufficient to transfer possession of house in which lived the donor and donee.
- Kanizan v. Latifan: 1990 ILJ 163 Comp’ 39 – possession – a gift was made to daughter. The father and daughter were living together on premises that were proposed to be delivered – a declaration of possession given to daughter was held to be sufficient to give her possession.
- Allah Bakhsh v. Bakht Bhari: 1990 CLC 2027 – Revocation of gift – revocation to be made after delivery of possession when donee was related to donor within a prohibited degree – donor and donee were father and daughter. It was held that the donor had no authority to alienate property after it had become absolute property of donee.
- Muhammed Khan v. Hayat Bibi: 1987 CLC 1187 – Proved that though the petitioner was the son of the donor, he was insolent and involved in criminal cases – the donor was not

happy with the son and was pleased with the donee as she was an obedient daughter – the gift was therefore held valid with foundation.

- *Mahtab Elahi v. Ghulam Rasool*: 1987 CLC 2011 – A gift deed was executed by father for minor daughter – such a gift could not be revoked by the father and the father was held to be the trustee of the gift property.
- *Hakim Ali v. Barkat Bibi*: 1988 SCMR 293 – S.2-A West Pakistan Muslim Personal Law (Shariat) Application Act, 1961 – A suit was brought by the respondent, daughter of last male owner, for possession of land equal to less than 1/20th part of entire property left by her father on the basis of a will executed on 30-10-1940 in her favour. It was dismissed by the Trial Court holding that her father was not competent to make a gift of any part of his property in her favour. The District Judge on Appeal decreed the suit, holding that under custom there were no restraints on last male holder. The High Court affirmed the decision of the District judge.
- *Inayat Begum v. Maryam*: PLD 1953 Pesh. 1 – If a person granted the lease of certain property in favour of his four daughters, and that lease was to subsist till the lifetime of these four girls, it could not be said that the lease was against any law much less the Hanafi Law, even though the consideration was natural love and affection, which is permissible under S.25 of the Contract Act.
- The case involved a gift made by a mother in favour of her daughter permanently resident with her by registered-deed – the mother had not departed the premises – the gift was held to be valid. In suitable cases, constructive possession may suffice to meet the legal requirements. *Natho v. Hadayat Begum*: PLD 1952 Lah. 545.

6. UMRA gift:

- *Khurshid Akhtar v. Station House officer*: PLD 1997 Lah. 389(b) – An oral gift of one acre of land made by a father in law to his daughter did not require registration.

7. Cases where a gift of property was made in order to deprive a female from her inheritance:

- *Muhammad Iqbal v. Muhammad Rafique*: 2007 YLR 682– where a transfer is made with the intent to deprive the heirs of their right to inheritance such a gift would be void. The gift in this case was therefore held to be void.
- *Barkat Ali v. Muhammad Ismail*: 2002 SCMR 1938(d): the Gift was held malafide by the Court. (The case involved leaving the entire property to a grandson in order to keep granddaughters from their inheritance share - negative reason).
- *Siraj Din v. Jamilan*: PLD 1997 Lah. 633 – The case concerned a preferential gift in favour of one heir to the exclusion of the other. It was held that such an act was not prohibited. Evidence to prove transaction had to be brought by donee.
- *Fatima Bibi v. Rashida Bibi*: 1995 MLD 1841(a) – The case involved the exclusion of a daughter from her inheritance according to a gift deed. Anomalies existed – lack of evidence – therefore the Court held her entitled to her share.

Dower

- The practice of transferring land in favour of wife in lieu of dower is not uncommon. (Wajida Begum v. Shamim Akhtar: 2004 CLC 231(d)).
 - Muhammad Riaz v. Noor-ul-Islam: 1998 CLC 1036(b) – Amount of dower could be enhanced by parties at any time before marriage.
 - Ghulam Mohiyuddin v. Firdous Jan: 1996 CLC 272 – Dower Prompt – payable on demand.
Deferred dower is payable on the dissolution of marriage.
If fixed in Nikahnama – deferred.
1. Non-payment of dower:
- PLD 1998 Lah. 52: The payment of dower is obligatory on a husband.
 - Muhammad Aslam v. Suraya: PLD 2000 Lah. 355(c) – the transaction of dower is to be considered complete on the day of marriage.
 - Sabira Sultana v. Maqsood Sulari: 2000 CLC 1384(a) – It is mandatory for a husband to pay the entire amount of dower.
 - Farhad v. Additional District Judge – II, Mardan: 2000 MLD 1638. Ss. 9 and 10 of the Muslim Family Laws Ordinance, 1961 – The wife was entitled to payment of dower in the shape of a house.
 - Zeenat Begum v. Muhammad Hussain: 1999 MLD 230(a): S.5 of the Muslim Family Laws Ordinance 1961 applied - A house was put up as security for the payment of dower – the plaintiff was held entitled to dower and to retain possession over property in question until her dower claim was satisfied.
 - Wali Dad v. Tasneem Kausar: 1999 CLC 163(b): An entry on the Nikahnama was held to be sufficient to effect transfer.
 - Burden of Proof held to rest on the husband for the payment of dower. Qasim Jan v. Muhammad Adil Ajaz: 1999 YLR 2303.
 - Fatima v. Ghulam: 1993 CLC 567(a) – S.5 of the Muslim Family Laws Ordinance 1961 applied – An entry in column of Nikahnama stated that husband had given two acres of land to wife in lieu of dower. It was held that a husband was not barred to have specified the land given at the time of Nikah by Khasra numbers subsequent to date of nikah. The husband was not barred to have specified the land given at the time of nikah by Khasra numbers in the (*part*). The wife (plaintiff) was entitled to a decree in respect of land in question.
 - Khan Asadullah Khan and others v. Sheikh Islamuddin: PLD 1978 Lah. 711 – The right to sue for dower was held not extinguished by death of wife- the right was held to survive the death of the wife and the wife’s heirs could continue proceedings, with their claim continuing to be one for dower.
 - Muhammad Zaman v. Naima Sultan: PLD 1952 Pesh. 47 – The case concerned non payment of dower – the marriage had not been consummated – death of husband – the full dower was held to be payable. In case of divorce by the husband before consummation of marriage the amount of dower is reduced to half, there is however no

authority that in any other case much less in the case of the death of the husband, which is not a voluntary act on his part or in which the wife has got no hand, the dower should be reduced in any manner.

2. Relinquishment of dower by a wife:

- *Jamila Bibi v. Mian Khan*: PLD 1997 Lah. 417(b) – Where dower was settled and incorporated into a registered Nikahnama, it would become property of wife and be enforceable as debt. It was the legal duty of court to determine whether the woman had exercised her free consent in relinquishing the dower property.
- *Javed Iqbal v. Nasreen Akhtar*: PLD 1994 Azad J & K 84(b) - Rules of divorce by Khula imply the return of gifts received by a wife from husband during their marriage. Such gifts include return of dower. Where the return was not proved, it was permissible to allow khula even without consideration.
- *Qamar Sultan v. Lofrin Begum*: 1990 SCMR 1646 – ¼ shares in house was transferred by owner to her daughter-in-law in lieu of dower. The marriage proved to be a failure – the respondent’s suit to secure her interest was decreed, and the mother in law brought an appeal that the house had been transferred to her in lieu of dower 50 years ago. There was nothing to show that appellant had acquiesced to her son and husband and therefore was held not be bound by the transfer.
- *Muhammed Ibrahim*: 1990 ILJ 89 Comp’ 38 – A divorce was brought about by apostasy of wife – the wife was held to be entitled to the whole dower if marriage had been consummated. The wife was therefore held entitled to recover dower, however large.
- PLD 1956 Kar. 363 – Ill will existed between a husband and his wife. The wife relinquished her dower in order to retain affection – the court considered it iniquitous to hold a woman remitting dower under such circumstances to be bound by it

3. Disposition of the dower property by a husband:

- *Sharaf Elahi v. Deputy Land Commissioner, Bahawalpur*: 2002 MLD 31 – S. 10 Muslim Family Laws Ordinance - Land Reform Act (II of 1977), S.7 – Article 199 (Constitution of 1973). A transfer of land had taken place by way of dower – the husband of the petitioner at the time of marriage transferred land in name of petitioner by way of dower. The husband submitted a declaration under s.7 LRA excluding land transferred to the petitioner but an Authority included said land in its holding after calculating product index units and ordered him to surrender excess in favour of government. Nothing was on record to prove that the Nikahnama was a fabricated document. The Authority considered it as one. The Nikahnama was admissible to prove factum of alienation of property in lieu of dower. The Authority was held to have committed material irregularity and its order was set aside.
- *Ashiq Ali v. Zamir Fatima*: A husband, after having gifted property to wife in lieu of dower was held to have no title to dispose of the same.

4. Requirement of registration of dower:

- PLD 1997 Lah. 389- There was an oral gift of one acre of land made by a father-in-law of the lady in favour by way of additional dower – its validity was accepted by Court - gift was complete and under Muslim Law did not require registration.
- Hussana v. Ghufrana: 2003 YLR 250 (a) – Properties mentioned in Nikahnama would stand transferred.
- Charagh Bibi v. Mehraj Bibi: 1998 CLC 796(a): the case concerned a gift of land in lieu of dower by a husband to his wife. Plaintiff's (wife's) suit was decreed by courts. Courts maintained that the document was genuine and was executed by the deceased husband in favour of plaintiff and land had been transferred in lieu of dower. It was held not to require registration. Document evidence and executed to acknowledge transfer of property.
- Amjad Hussain v. Shagufta: PLD 1996 Pesh. 64(b) – A transfer of immovable property had taken place through Nikahnama. The Dower deed was held by Courts not to be compulsorily registrable under the Registration Act 1908.

Inheritance

- Amir Afzal v. Ghulam Haider: PLD 1993 Pesh 117(d) – Hanafi law – The deceased in this case left behind his mother, uterine brother and two uterine sisters. Held: His mother would inherit 1/6 share in the estate left by him. Uterine brother and two sisters would take 1/3 collectively – residue ½ would go to paternal uncle, paternal aunts would be excluded from inheritance.
- Lady heirs of a Muslim owner cannot be deprived of their inheritance by adopting tactics on basis whereof, ex parte decree could be obtained against them.
- Purpose of statutes [M.L.R 115] is to reduce large holdings of land. Purposes underlying proviso (ii) to para. 7 of Land Reforms Regulation, 1972 [M.L.R] 115 – is to provide and equitable share of lawful inheritance for female heirs. Mst. Bibi Amirunnissa and 2 others v. The Chief Land Commissioner, Sind, at Hyderabad and another: PLD 1979 Kar. 200.

Cases where a female is deprived/sought to be excluded from her inheritance:

- 1997 CLC 1768 – The case concerned the exclusion of a legal heir (daughter) from inheritance. The Court considered the quality of evidence required – it held that in order to exclude a legal heir from inheritance, strong and convincing evidence was required to discharge the burden.
- Eada Khan v. Ghanwar: 2004 SCMR 1524(c) – Existence of custom was claimed, depriving females from inheritance at time of opening of succession – question of proof was considered by the Court – once such custom was not proved, then property would devolve in accordance with the normal principles of Islamic inheritance⁸⁸.

88 So if it were proved, would custom be applied? (The 1962 West Pakistan Muslim Personal Law Shariat Application Act still being in force).

- S. 2A- Ghulam Janat v. Ghulam Janat: 2003 SCMR 362 (b): Last full male owner died in 1930- there was a mutation in inheritance in favour of two sons excluding daughters under customary law. A suit was brought by daughter.(incomplete)
- Sajjad Munir v. Murad Khaton: 2002 CLC 733 (d): The plaintiffs in this case were daughters who had been excluded from the mutation of inheritance in the property left by their deceased father. The Courts decreed suit in favour of the plaintiffs.
- Fateh Muhammad v. Jautan: 2000 YLR 3053 (a) – Daughters were excluded from the mutation of land owned by their deceased father and the whole land was mutated in the name of the son of the deceased. The Courts decreed suit in favour of the daughters.
- *Exclusion of a female from her inheritance under custom* - Muhammad Anwar v. Qadir Bakhsh: 2002 YLR 1637 (g): S. 2-A West Pakistan Muslim Personal Law (Shariat) Application Act - Punjab Laws Act (IV of 1872), s.5: The case concerned Succession – question was whether custom or Muslim Personal Law was to be applied. (Village Goth Lal from years 1904 – 1925 – Principle of Pagwand (i.e. inheritance by male heirs per capita to exclusion of female heirs of deceased) was the rule according to custom). The trial court decreed the suit, but the appellate court set aside the decree. According to S. 5(b) of the Punjab Laws Act, 1872, Muslim Law was to be applied as a governing rule subject to any modifications made by any custom, which was alleged and proved to have modified Muslim Law – The defendant was bound to prove that usage had been acted upon in practice for such a long time that it acquired the status of a governing rule. Bar of limitation would not apply against plaintiff, who was entitled to succeed the deceased to the extent of $\frac{1}{2}$ shares in his estate upon his death. The High Court restored the judgement of the Trial Court.
- In this case, daughters were excluded from the inheritance of their father. Brother raised plea of custom whereby daughters not allowed inheriting under Islamic Law. The Trial Court found that the parties bound by custom and suit of plaintiffs were dismissed. Maintained by Appellate Court. According to the Supreme Court – the plaintiff was entitled to $\frac{1}{3}^{\text{rd}}$ share therefore Muhammedan Law was applied. Sharam v. Taj Muhammad: 2002 CLC 2001(f).
- Said Bibi v. Hayat Bibi: 2000 CLC 1943 – S. 2-A West Pakistan Muslim Personal Law (Shariat) Application Act 1962/ Specific Relief Act (I of 1877) Ss. 42 and 54. The Son of the deceased got whole land depriving his sister. He claimed that being male, he had acquired all the land as absolute owner under custom. The Trial Court dismissed the suit but later on allowed it – the daughter was granted $\frac{1}{3}^{\text{rd}}$ share in the suit property.
- Muhammad Ashraf Khan v. Rehmat Jan: 2001 MLD 212 – S.3 West Pakistan Muslim Personal Law (Shariat) Application Act, (V of 1962) applied; the owner of the property died in 1948 – his daughter was deprived of inheritance under custom. Witnesses did not point out any detail as to whether the parties were governed by custom before promulgation of Muslim Personal Law. The plaintiff was held to have failed to prove the existence of custom.
- Mohib Shah v. Jannat Bibi: 1997 CLC 659(a) – Daughters of last male owner (Plaintiff) – Defendants claimed that deceased having died before partition, his inheritance was governed by custom. Plaintiff's suit dismissed by Trial Court but allowed by Appellate Court – evidence – deceased to be governed by Muslim Personal Law. The deceased was

- a Syed. The defendants could not produce proof of existence of custom or that the deceased was governed by it.
- *Khair Din v. Salaman*: PLD 2002 SC 677(a): Limitation – a brother had deprived his sisters from inheritance. The sisters were held to be in constructive possession and their rights could not be denied on limitation either under Article. 142 or 144, Limitation Act 1908.
 - *Ameer v. Yara*: 2002 YLR 608 – 4 sons 2 daughters. The daughter’s names were not included in the attestation of occupancy tenancy – It was held by the High Court that sons in constructive possession on behalf of sisters as well – restored Trial Court Judgement.
 - *Sarwar Khatoon v. Bakht Bhari*: 2002 YLR 3514(a) – The doctrine of ‘Marz-ul-Maut’ was pleaded in order to exclude the daughters of the deceased from their share in the inheritance. A will was made for daughters – they were denied their claim. Held: Fact that executor was on death bed would not derogate from validity of will, especially when it wasn’t pleaded that he wasn’t in sound state of mind.
 - *Fazal Noor Begum v. Muhammad Akhtar*: 1997 CLC 1768(a) – The case concerned the exclusion of a legal heir (daughter) from inheritance – quality of evidence required – held – to exclude a legal heir from inheritance, strong and convincing evidence was required to discharge the burden.
 - *Abdur Rahim v. Rooh Afza*: 1996 SCMR 1213 – The share of daughters was sold by brothers without their consent – the land devolved on two daughters of deceased and was alienated by brothers. The Courts decreed suit.

A widow inheriting land under custom as limited owner:

- If land is acquired under custom before the 1948 Pakistan Muslim Personal Law (Shariat) Application Act, it will be deemed to be under absolute ownership. (*Khuda Bakhsh v. Niaz Bibi*: PLD 1994 SC 298(b).
- *Sher v. Fatima*: 2004 PLR 1184 – A widow inherited her husband’s land as a limited owner – after she remarried, the land was divided amongst her two daughters. It was held that the widow and daughters were entitled to Shariee shared in the said piece of land belonging to the said owner and that the remaining land was, however to go to the collaterals in their respective shares.
- *Mohsin Khan v. Ahmed Ali*: PLD 2004 Lah.1 (a): A mutation of inheritance was effected, giving the whole estate of the deceased to his widow. Court held that the widow could have taken whole estate of deceased either as a widow under custom as limited owner or in the extent of 1/8 share under Islamic Law. Such mutation would mean that she had got the property not under Islamic Law, but as per custom. It was held that the widow was not the limited owner.
- *Bhagay v. Fatima Bibi*: PLD 2004: Lah. 12(b) - The widow of ‘A’ inherited his property under custom as a limited owner. On the remarriage of the widow of A her limited ownership was extinguished and the property went to the daughter. Upon the daughter’s marriage, ½ of the property went to A’s brother and ½ went to the widow of the third brother. Held: the property was to revert back to A (as Last Full Owner) and then distributed according to Islamic Law. The daughter got 1/16th share in the suit property.

- *Zargoon v. Shadana* 2002 CLC 1539: A widow contracted a second marriage and the property ultimately vested in the paternal uncle of the deceased. Held: That 1/8th of the property was to devolve on the widow as she was entitled to her share under the Muhammedan Law.
- *Abdul Rehman v. Amrat*: PLD 2003 Lah. 186(d) – A widow, as a limited owner had no authority under law to transfer the total holding of the deceased owner.
- *Hashim Khan v. Mir Baz Khan*: 2000 CLC 1863 – Alienation of property by the limited owner beyond her share was declared invalid. She was only entitled to her legal share, under Islamic Law.
- *Muhammad Iqbal Khan v. Khan Muhammad*: 2001 CLC 272(b): widow out of income received from limited estate purchased the disputed property. Such payment was made under the provisions of the Rehabilitation Settlement Scheme. The plea was that as the property was purchased from the income of a limited estate, the widow was not the exclusive owner of the same. It was held by Court, that where land in question was allotted/purchased by the widow against mortgagee rights of her deceased husband and the amount for such allotment/ purchase was made out of income received from the limited estate, the widow would not become trustee for the reversioners and she would acquire the land as her own exclusive property, not framing part of the estate.
- *Manzoor Ahmed Khan v. Nasrullah Khan*: 1999 YLR 27(b): A gift in favour of females holding a limited estate was held to be valid which would consequently vest them with absolute ownership, and the heirs of such females would be entitled to inherit their property after their death. It was also held that alienation by a widow to the extent of her share will remain valid.
- *Haider Shah v. Roshanee*: 1996 SCMR 901(b) – S.5 West Pakistan Muslim Personal Law (Shariat) Application Act 1961 applied – The share to which the female owner of a limited estate was entitled under Muslim Personal Law would devolve upon her. Plaintiffs being reversioners, their right to challenge alienation by limited owner would be hit by S.2-A, whereby decrees of Court based on customary right would stand nullified.
- *Saba v. Fatima Bibi*: 1996 SCMR 158(b) – A gift by a limited owner is valid to the extent of her share.
- *Murad v. Karam*: 1987 SCMR 2008 – The heirs of a widow whose life estate terminated, were entitled to the share which she would have obtained as Muslim Law heir from the inheritance of her deceased issueless husband.
- *Sith Pehlaj Rai v. member, Board of Revenue – (III), Baluchistan and others*: PLD 1978 Quetta 146 (Mitakshara School) – A widow took a limited estate in property inherited by her as widow's estate. It was held that a widow cannot alienate her life interest in such property except under legal necessity – alienation by widow can be impeached only by the reversioner and by state, claiming by escheat in a civil court – property cannot automatically be escheated to state.
- *Mahboob Beg v. Sharif Beg and another*: PLD 1978 Lah. 1318: Ss. 3 and 5 West Pakistan Muslim Personal Law (Shariat) Application Act, (V of 1962) applied. The case involved succession to a life estate. Section 3 allowed inheritance to take place on the termination of limited interest as it would have taken place if Muslim Law were

applicable when propositus died – Last male holder’s predeceased son’s widow succeeds to last male holder’s interest on fiction of law created by principle of representation as applied in the Sialkot district – such widow being not entitled succession, if last male holder were governed by Shariat, due to predeceased son being excluded by surviving sons of last male holder, held further, entitled to inherit property on death of such widow thus leaving plaintiff without any right of pre-emption.

- Ahmed Din v. Imam Din: PLD 1980 Lah. 672 – Ss. 3 & 5 West Pakistan Muslim Personal Law (Shariat) Application Act 1961 applied – Succession – Impart of promulgation of WPMPL(S)AAAct – Widow holding a life estate. Held: life estate held by a Muslim female under customary law devolved upon persons entitled to succeed under the Act – Share from estate to which such widow would have been entitled under Muslim Personal Law (Shariat) upon death of last full owner, would devolve upon her.
- Sadi v. Ghulam Muhammad: NLR 1980 AC 525 – S.3-A Muslim Personal Law (Shariat) Application Act (IX of 1948) – A widow was not competent to deprive the heirs of the last male owner either on basis of a ‘will’ (executed in 1895) or a compromise decree (given in 1904) – this rule will apply with much force in a case where heirs were neither a party to a compromise decree nor did they ever consent to the alleged ‘will’ – succession to such property was governed by Shariat Law to the exclusion of Customary Law.

A widow inheriting under Muslim Law:

- Roshan Akhtar v. Muhammad Boota: 2000 SCMR 1845 law, the widow of a deceased Muslim could succeed to only her Islamic share in the estate of the deceased.
- Bhambhar v. Nooria: 1999 YLR 2078(d): Lower Appellate Court disentitled the widow from her right on the basis of divorce. HELD: Where divorce to the widow by the deceased was not proved, such a finding of the lower Appellate Court was unfounded and contrary to law and the same was set aside accordingly.
- Janat Bibi v. Bhagran: 1995 MLD 110 – A Talaq certificate was produced by the plaintiff in order to deprive the deceased’s wife from inheritance. The Talaq was not proved and it was held that the widow was entitled to inherit.
- Abbas Khan v. Sat Bherai: 1993 CLC 2181(a) – Talaq was to be effective after 90 days from receipt of notice by Chairman of Union Council and wife. Since 90 days had not elapsed in this case, the widow was entitled to inherit.

Inheritance of a daughter:

- Saima Khatoon v. Manzar Hussain: 1993 MLD 1542(c): Qanun-e-Shahadat (Art. 218) – The brother of the plaintiff was in exclusive possession of the suit property and claimed the deceased, their father, had gifted it in his favour. The plaintiff claimed her share in the inheritance of her father. Held: The onus to prove factum of gift lies heavily on person claiming to be donee. Mere oral word coupled with possession would not be sufficient. Plaintiff being daughter of deceased would be entitled to her share of inheritance in the assets left by the deceased. Mere fact that plaintiff had been married and was living

separately with her husband would not disentitle her from her share nor would the fact that the defendant (brother) was in exclusive possession.

A specific portion of the house been constructed by the son (defendant). It was held that the plaintiff would not have any share in that portion. The remaining was to be divided under Islamic law.

- *Izhar Fatima Bibi v. Ahsan Fatima Bibi*: 1990 ILJ 99 Comp' 38 – A daughter with a claim to inheritance under Muhammedan Law cannot be defeated except by reason of some act of the father disinheriting the daughters or some act of the daughters disentitling them.
- *Wali v. Sardara*: PLD 1978 Lah. 1392 – The propositus in this case was governed by customary law, and died long before the enactment of the West Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948). The widow of the propositus remarried before enactment of Act IX of 1948 – The Riway-i-Am of the district concerned provided for the exclusion of collaterals by daughters in respect of self-acquired property – The respondent (daughter of propositus) was therefore held to become full owner of non-ancestral property and subsequent enactment of Act IX of 1948 did not change this position.

Whether the widow and daughters of predeceased son/daughter are entitled to inherit:

- The question was whether the widow and children of a predeceased son were entitled to inherit in this case – The Dispute was with regard to the entitlement of inheritance of the plaintiffs who were widow and daughters of the predeceased son. The Courts found that the plaintiffs were entitled. (*Children of the predeceased, under S.4 of the Muslim Family Laws Ordinance 1961 were entitled to claim inheritance and widow of the predeceased son was not so entitled*). *Ghulam Haider v. Nizam Khatoon*: 2002 YLR 3245.
- *Ghulam Ahmad v. Muhammad Yousuf*: PLJ 2002 Lah. 2053(i) –The case regarded the question of the inheritance rights of the children of predeceased children. Held: S.4 of MFLO declared to be in violation of the injunctions of Islam.
- *Allah Rakha's case*: PLD 2000 FSC 1 – Held: S.4 of the Muslim Family Laws Ordinance (MFLO) 1961 was declared to be in violation of the injunctions of Islam by the Federal Shariat Court and children/widow of predeceased son were not entitled to inherit the property share of the deceased.
- *Mukhtar Ahmed v. Rasheeda Bibi*: 2003 SCMR 1664 – the plaintiff (daughter of predeceased son) claimed a share in inheritance that was granted under S.4 of the MFLO 1961.
- *Sarbuland v. Ashiq Ali*: 2000 CLC 795(a). S.4 of MFLO 1961 – The case concerned the entitlement of the children of a predeceased son/daughter to inheritance. Held: the children of predeceased children are entitled to inherit – S .4 of the Muslim Family Laws Ordinance 1961 was said to not be against the injunctions of Islam and hold good as valid law.
- *Ghulam Ali v. Ghulam Muhammad*: 1999 YLR 2182 (d). The son of the predeceased daughter of the propositus brought forward suit – he was held entitled to inherit in place of his deceased mother under S.4 MFLO.

- Sardar Muhammad v. Jantey: 1999 YLR 1928 – Out of 2 sons, one died during the lifetime of propositus leaving behind his widow and a daughter. Held: Widow of predeceased son entitled to get share of inheritance of her deceased husband's estate.
- Nizam Din v. Faiz Muhammad: PLD 1998 Lah.321 (b) – heirs of predeceased son/daughter. S.115 CPC (V of 1908). Held: S.4 MFLO holds good as valid law and heirs were entitled to inherit.
- Nazir Ahmed v. Abdullah: 1997 SCMR 281(d) – Held: Children of a predeceased daughter are entitled to inherit share in property.
- Muhammad Khan v. Fateh Khan: 1993 CLC 133(b) – Court held that the widow of a predeceased son would not inherit his due share.
- Asghar Ali v. Shahzullah Khan alias Shazullah Khan: 1993 CLC 545(a) – Granddaughter (child of predeceased daughter) was held entitled to her grandfather's share.
- Zamir Muhammad Khan v. Fateh Khan: 1993 CLC 133(a) – (West Pakistan Muslim Personal Law (Shariat) Application Act applied) Last male owner (no living son) – was governed by custom – question arose regarding the status of female heirs – the widow of predeceased son and daughter of his other predeceased son were to inherit in equal shares under custom. On the death of the widow and marriage of daughter to predeceased son, the entire land was mutated in favour of the widow of other predeceased son. Held: The succession of such an estate would be deemed to have opened out on the termination of life estate held by the widow of the predeceased son on 31st December 1962 in terms of S.3 of Act V of 1962. Distribution of land left by the last male owner was to be in accordance with provisions of Islamic law of inheritance. The widow of the predeceased son or the husband of predeceased daughter was not to be heirs because the MFLO did not intend to disturb Islamic law.
- Zamir Muhammad Khan v. Fateh Khan: 1993 CLC 133(a) – Last male owner – sonless – custom applied – his widow, the widow of the predeceased son, and the daughter of the predeceased son were to get the property in equal shares under custom. 31st December 1963 – succession deemed to have opened out. It was held that the distribution of land was to be under Islamic Law; therefore the widow and daughter of predeceased son were not to inherit.
- Sardar v. Nehmat: 1992 SCMR 82 – Held: predeceased son's children entitled to inherit (S.4).
- Manzoor Elahi v. Tahir Masood: 1987 CLC 297 – The case concerned the right of grandchildren (children of predeceased son/daughter to inherit). The children of a predeceased son/daughter per stripes receive a share equivalent to the share which such a son or daughter would have received, if alive.
- Mahboob Beg v. Sharif Beg and another: PLD 1978 Lah. 1318 - Life estate – section 3 of West Pakistan Muslim Personal Law (Shariat) Application Act (V of 1962) allowed inheritance to take place upon the termination of a limited interest as it would have taken place if Muslim Law had been applicable when the propositus died – in this case, the last male holder's predeceased son's widow succeeded to the last male holder's interest on a fiction of law created by the principal of representation as applied in Sialkot district – since such a widow was not entitled to succession if the last male holder were governed by Shariat (due to predeceased son being excluded by surviving sons), nor was such

succession being permitted under Family Laws Ordinance(VIII of 1961). The widow of the predeceased son, having succeeded only under custom, was held by Court to have been left no share in the suit property after the termination of her limited interest. Even if the limited interest of the widow had not been terminated, the sons of the last male holder were held by Court to be entitled to inherit the entire property on the death of such a widow. The plaintiff (widow) was left without any right of pre-emption.

The principle of representation under custom is applied with full force in Sialkot district – the widow of a predeceased son is entitled to succeed to the property to which her husband, if alive, would have succeeded despite his brothers surviving their father – widow in such case holds only a limited interest in property for life or till remarriage.

- Mst. Farishta v. The Federation of Pakistan: PLD 1980 Pesh. 47 - S.4 MFLO 1961 – inheritance of offspring of predeceased son/daughter was considered repugnant to the injunctions of Islam – a person, in order to be entitled to inherit his parents or near ones must be alive – S.4 of MFLO providing for inheritance of predeceased’s offspring living at time of opening of succession was held to be against the injunctions of Islam and liable to be repealed.

Cases where adverse possession is used in order to deprive a female from her inheritance:

- Zainul Hassan Mian v. Khuwand Naka: 1998 MLD 1857(g) – It was held by Court that a male co-heir could not challenge adverse possession against a female co-heir. The daughters of a predeceased son were held to be entitled under S.4 MFLO to the entire legacy, as no other sharer existed.
- Allah Ditta v. Hussain Bibi: 1993 CLC 228(a): Co sharer – adverse possession – rights of a female – The plaintiff was the daughter of a deceased landowner whose inheritance was in question. On death of her father, she would inherit automatically along with other heirs and would become a co sharer. Other co sharers could not claim title by adverse possession. Even otherwise, there was no claim of adverse possession by defendant co sharers as being open, continuous and hostile to the knowledge of the plaintiff. The defendant co sharers, therefore, could not deny title of the plaintiff as co sharers and she was held entitled to her share in the inheritance.

Entitlement of females to the property of ancestor:

- Dilmeer v. Rajab Ali: 2002 CLJ 782(a) = 2003 MLD 484 – Held: A daughter would be entitled only to her Quranic share in the inheritance.

Relinquishment of inheritance by a female:

- Bostan v. Sattar Bibi: PLD 1993 SC (AJ&K) 24(a) – The property of deceased Muslim devolved on his daughter. A mutation was not attested in her favour because she had relinquished her share in favour of the male heirs of deceased. The plaintiff (female heir) seeking relief pertaining to entries in ‘Jamabandi’. Held: estate left by Muslim owner would devolve on his heirs on his death; fact that such heirs did not wish to inherit was of

no consequence. Where the plaintiff wanted to transfer her share she had to do so under law i.e. through a registered document. A mere oral statement would not extinguish her title. The, plaintiff being a co sharer with male heirs (defendants) though not so recorded in Revenue Record, would be deemed to be in continuous possession of her share and any adverse entry in the Revenue Record would not oblige her to challenge the same within a period of six years of the entry, for cause of action in such cases would accrue only when a real threat was posed to her title i.e. when defendants denied her title in unequivocal terms. Relief was not time barred.

- *Azhar Hussain Alvi v. Khursheed Akhtar*: 1992 MLD 1598(a) - Co sharer – rights of females – Islamic Law affords special protection to Muslim females. Held: a relinquishment deed from inheritance by female while living with her male relatives had no value. The relinquishment deed had been executed in circumstances that it tended to violate protection afforded by Islam to females.

Cases where the question of inheritance of land by a sister arises:

- *Ahmed Khan v. Ghulam Ali* – the deceased left behind a daughter and 2 grandchildren from his predeceased son. It was held that the sister of the deceased was not entitled to any share from him.
- *Muhammad. Hanif v. Muhammad Aziz Khan*: 2003 YLR 389 (b) – In the absence of residuaries, the entire property left by the owner would revert to the real sister of the owner on account of the principle of return.
- *Rashid Ahmad v. Sardar Bibi*: 1994 MLD 467(b) – The record gave a clear impression that a last minute attempt was made by the donee to deprive sisters of their share in the brother's land (by alleging that a gift had been made by the donor in his favor). Factum of gift was not proved. Plaintiffs entitled to take their share in land in question in accordance with Muhammedan Law of inheritance.

Where children of a daughter claim a share in inheritance:

- *Ghulam Farid v. Muhammad Nawaz*: 2000 CLC 1236. The children of a deceased daughter claimed share in inheritance – In the presence of brothers of a deceased Muslim male owner of land, petitioners who were children of the daughters of a deceased Muslim male owner of land could not inherit anything in suit land which constituted the estate of the brothers of the deceased who had acquired the property through inheritance from a Muslim before 15/3/1948.

Co-widow's share in property:

- *Mehrun Nisa v. Muhammad Shah*: PLD (Rev.) 1953 Pb.15 – Section 3 West Punjab Muslim Personal Law (Shariat) Application Act 1948 applied – Co-widows – There were three co-widows enjoying a life estate in the property of their deceased husband. One of the widows then died. Under Section 3 of the Act, her share in the property was to be

divided among the remaining co-widows and any other heir according to Shariat. In this case the share of the deceased widow was divided as under:

- Sister of deceased male owner – $\frac{1}{2}$
- 2 Co-widows (in equal shares) – $\frac{1}{4}$
- 2 Collaterals (sons of deceased male owner's father's real brother): $\frac{1}{4}$
- Mst. Bakhat Bibi v. Mst. Fateh Bibi: PLD (Rev.) 1955 Pb. 26 - S.3 West Punjab Muslim Personal Law (Shariat) Application Act 1948 applied – co-widows were enjoying life interest in the property of their deceased husband. Held: death of one will not render her share available for the other widow by survivorship but would go to the Shariat heirs of the last full owner.

Will made in order to favour a particular heir:

- Zakirullah Khan v. Faizullah Khan: 1999 SCMR 971(e): Held: A Muslim could not make a will in favour of any heir unless the other prospective heirs had consented to such a will.

Rights of a step-daughter to inheritance:

- Saeed Ahmed Malik v. Shamim Akhtar: 1999 SCMR 1558(b): S.4 MFLO. The Courts finding was that the stepdaughter of deceased Muslim female was entitled to get a share in property. The Supreme Court did not interfere with this ruling.

Property rights of state subject women who marry non-state subjects:

- If immovable property devolves on a state subject woman who has left the state after marrying a non-state subject, it will be her lawful property. PLD 1997 SC (AJ & K)1(f)

Inheritance to the property of a female:

- Shamsher Ali Khan v. Sher Ali Khan: PLD 1988 Lah. 588 – S.2 West Pakistan Muslim Personal Law (Shariat) Application Act 1961 applied– Inheritance to property left by a Muslim female who died in 1963, when Muslim Personal Law was in force. Held: inheritance to the estate of such a Muslim female would be regulated not by Customary Law but by Muslim Personal Law, which was in force at the time of her death. **Muslim law does not treat adoptee as an heir.**
- Hussain v. Mansur Ali: PLD 1977 Kar. 320 = PLJ 1977 Kar. 334 – The deceased had disowned her affiliation to any particular sect of Islam. Interpretation by courts - she had to be governed by Islamic law interpreted by courts on basis of the Holy Quran (Sura Nisa referred), free from the jurisprudential theories of the sects. Held: legal relevance of question whether deceased belonged to Sunni or Shia sect arose by virtue of operation of provisions of West Pakistan Muslim Personal Law (Shariat) Application Act 1962 which required each sect to be governed according to law applicable to such sect as already prevalent and applied. The Shariat Act did not allow interpretation by courts by a process

of reasoning in their own light, the contention was fallacious – acceptance of such a contention would tantamount to the creation of a new system of personal law applicable to cases of Muslims not belonging to any sect – new theories cannot be propounded independent of rival theories of great antiquity and authority propounded by two sects of Shias and Sunnis.

Succession to tenancy:

- Muhammad Yar and 8 others v. Ghulam and 58 others: 1980 CLC 1319 - S.2 West Pakistan Muslim Personal Law (Shariat) Application Act 1962 applied - The case involved succession to the tenancy of State land – female heir of original tenant did not succeed to tenancy either under customary law nor under Muslim Law to the exclusion of collaterals. She was found to have been occupying the property on the basis of a fresh allotment made in her favour before being clothed in with ownership rights, and her possession was never held to be that of a squatter or trespasser by authorities concerned. It was held that such a case, did not fall within mischief of S.30-A(1) of the Colonization of Government Lands (Punjab) Act (V of 1912) but was covered by S.30-A(2). The law of succession applicable to inheritance of such a female grantee of State land was to be found in S.2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962.

Inheritance under Shia Laws:

- Under Shia law, an adult woman can validly agree not to receive any dower. (As long as she is not of weak disposition).
- An issueless widow under the Shia law does not inherit landed estate of her deceased husband.
- Daulan v. Muhammad Hayat: 2002 YLR 3247(g) – Mutation of inheritance was sanctioned by Revenue Authorities in favour of the widow of the deceased. The deceased was claimed to be Shia and his widow was excluded from inheritance. The High Court established that he was Sunni by birth and that there was no evidence of his being Shia except the manner in which his funeral was conducted. Revision was allowed.
- Sharif Bibi v. Munir Hussain Shah: 2000 YLR 2580 – under Shia Law, an issueless widow was excluded from the estate of the deceased. The Court declined interference.
- Ahmed Hussain Shah v. Taj Bibi: 1993 CLC 2152(a) – Shia Law – sister (plaintiff) was the sole heir and ownership was to automatically vest in her.
- S.2 West Pakistan Muslim Personal Law (Shariat) Application Act – The last male owner was Shia - his widowed daughters were his only heirs and the brothers had no claim in inheritance. The 1962 Act came into force before the widow died in 1965 (limited owner). Therefore the life estate was terminated. Being Shia, only the widow and daughters were entitled to inheritance, and brothers were excluded. (*case citation missing*)
- Ghulam Sakina v. Mohsin Ali Shah: 1993 CLC 781(b) – Since the deceased was Shia, plaintiffs (brothers) could not succeed in suit for transfer of land in their favour because of the presence of the widow and daughter of the deceased.

- Muhammad Tufail v. Atta Shabir: PLD 1977 SC 220: Shia school – interpretation – distribution of bequeathable one third depends upon testator’s intention as spelt out from the language of instrument. The testator in this case, as disclosed by will desired to deprive his daughter of her share and wanted the entire property to be equally shared by his son and two grandsons from a predeceased son in fifty and fifty, the latter otherwise being disentitled to inherit. Since no specification of shares had been made by testator, the only equitable interpretation of the will was held to be that the son and grandsons shall inherit bequest in fifty fifty shares.
- Nawazish Ali Khan v. Ali Raza Khan: PLD 1948 PC 23 – Limited interests have long been recognised under Shia law.

Right to Alienation of Land by Females

- A suit to challenge alienation of land by female was allegedly effected without consideration, without legal necessity and against the customary law prevalent at relevant time. Alienations were not challengeable under custom after 1983. Customary restrictions regarding land in possession of female owners was vanished. Even if devolution taken place before independence it would not be deemed to be under custom. The plaintiffs, therefore, had no cause of action to challenge the alienation and the female was held to be holding the land as a full owner. (*case citation missing*)

Ahmadis

- Section. 4 of the MFLO does not apply to Ahmadis.

CUSTOM (as before the West Pakistan Muslim Personal Law (Shariat) Application Act 1961):

- Barkhurdar Shah v. Rab Nawaz Shah: PLD 1952 Lah. 555 – Custom (Punjab) – A declaratory decree was obtained before the coming into force of the Punjab Muslim Personal Law (Shariat) Application Act (IX of 1948) that certain alienation by a female with limited interest is invalid and not binding on reversioners – this was not affected by the Act.
- Gul Muhammad v. Shama: PLD 1951 Pesh. 40 – NWFP MPL(S)AA 1935 as amended by the NWFP MPL(S)AA (XI of 1950), S.4 – a female was holding property as a limited owner under custom – she was to continue as such till her life interest ended by marriage or death. S.4 kept the life estate of those females alive who were already in possession of the property as such, and the devolution of the property according to Muhammadan Law was been postponed until the life estate ended.
- Rab Niwaz v. Ghulam Haider: PLD 1950 Lah. 79 – Custom (Punjab) – Succession – Jats of Mianwali district – rule of pagwand – the estate was not partitioned – full blood and half blood were held to succeed in equal share.

1. Rights of a daughter to property under custom:

- *Niamat Bibi v. Nur Muhammad*: PLD1954 Lah. 671 – Custom (Punjab) – female heirs could not challenge an alienation. The right of a reversioner to impeach alienation was based on the agnatic theory according to which the male descendants of an ancestor have a kind of residuary interest in property. They inherit not from the last male owner but from the common ancestor through the last owner and their right of inheritance from the common ancestor remains unaffected by an alienation which custom does not accept as valid against the reversionary right. Under agricultural custom, the female heirs were entitled originally to maintenance alone. In course of time the right of maintenance developed in some cases to a life estate. But they succeed only from the last male holder and not from the common ancestor. They are bound by the alienation of the last male holder. They can neither challenge such an alienation nor can they take advantage of a decree obtained by the reversioners. A daughter has no right to impeach alienation by her father. In fact, no female had a right to impeach alienation by a male under custom.
- *Rana v. Muhammad Afzal Khan*: PLD 1949 Lah. 435 – Custom (Punjab) – There was alienation by a widow of her husband's self acquired property with the consent of her daughter. The daughter survived the widow – it was held that her son could challenge the alienation. Paragraph 64 of the Rattigan's Digest raises a very strong presumption against a female's power of alienation. It was a very rare case where under custom a daughter would approximate to a 'male' in her powers to deal with the property she had succeeded to. The answer to the question referred to the Bench was that the consent of her daughter to the alienation by the widow of the self-acquired property of her husband would, in case the daughter survived the widow, operate to invest the alienee with rights which shall be presumed to be limited to her lifetime and would not debar her son from challenging the alienation.
- *Barkat Ullah v. Zulfiqar Ali Shah*: PLD 1949 Lah. 193 – Custom (Punjab) – issue: proof of existence of custom – Sayyeds of Nawankot – Held: Instances of daughter not taking a share in inheritance does not necessarily prove an existence of custom restricting power of alienation by male proprietors of the ancestral land.
- PLD 1966 Lah. 47 – It was held that a daughter had no locus standi to contest alienation made by her father. This position not changed after promulgation of the West Pakistan Muslim Personal Law (S) Application Act 1948.
- PLD 1952 Lah. 88 – Custom (Punjab) – Held: daughters exclude collaterals with respect to non ancestral property.
- *Muhammad Shafi v. Ibrahim*: PLD 1955 FC 102 - Custom (P) – issue: Successions of self acquired property – Jats of Gujranwala district – daughters were held to be heirs of their father in preference to collaterals. According to entry in the riwaj-e-am, the daughters were excluded from the ancestral as well as non ancestral property. This initial presumption would, therefore, arise against the daughters and in favour of the agnates of their father. The general custom of the province was in favour of the daughters against the collaterals to the self acquired property of their father. The presumption arising in favour of the collaterals under the riwajeam of the gujranwala district was fully rebutted –

daughters were held to be the heirs of their father to self acquired property in the presence of near collaterals.

- *Muhammad Shafi v. Ibrahim*: Custom (Punjab) – succession of a sonless proprietor. The property of a man, who died without an issue, reverted to the ancestor and descended to the male lineal descendants of that ancestor. Thus, a brother would succeed a sonless brother not as a brother, but because the estate reverted to the father and descended to his sons. Similarly, a mother would not as a mother but as the widow of the father to whom the estate has ascended. This also explains what is called the ‘principle of representation’. The same principle applied in the case of a female holding a life estate. On her death, the property would revert back to the last male owner from whom she got it and then his heirs would have to be discovered.
- *Muni v. Khan Bibi*: PLD 1952, Lah. 230 – Custom (p) – succession of self acquired property – daughters were to succeed as absolute owners in the absence of collaterals up to sixth degree. Among pathans of Kamar Mushani in the Tehsil of Isa Khel, Mianwali district, according to the rule of custom as laid down in answer to question 16 (customary law of mianwali district) the daughters were to inherit the estate of their father absolutely in the absence of collaterals up to the sixth degree. In the case of self acquired property the general custom of the province favoured the succession of daughters in preference to collaterals. Answer to q.16 of customary law of mianwali district stated that there was no distinction between ancestral and self acquired property so far as succession of the daughter was concerned, but the value of this rule of custom which is to be found in the *riwaj-e-am* of almost all the districts of this province, has been completely destroyed by a number of judicial decisions in which notwithstanding the rule of custom stated above, daughters were held to be preferential heirs in respect of self acquired property of their father.
- *Buta v. Farzand Begum*: PLD 1952 Lah. 451 – Custom (Punjab) – Succession amongst Jats of Jhelum Tehsil of Jhelum District – daughters were to exclude collaterals in respect of non-ancestral property. Not only was the general custom in favour of the daughters but the custom of the Tehsil, as stated by the author of the *riwaj-e-am*, also favoured them. As the entry into the *riwaj-e-am* on which reliance was placed by the collaterals was contrary to general custom, the initial burden of proving that collaterals of the fourth degree excluded married daughters was on the collaterals. That onus did not in the present case shift by reason of any entry to the contrary in the latest *riwaj-e-am* because though the tribes consulted stated that whether the property be ancestral or non-ancestral, married daughters were excluded by collaterals within the fifth degree, the compiler of the *riwaj-e-am* expressly stated in the subjoined note that the statement of custom, so far as the Jhelum and Pind Dada Khan Tehsils were concerned, was not correct and that the prevailing custom in these Tehsils was that daughters, married or unmarried, excluded all collaterals from succeeding to non-ancestral property.
- *Barkat Ullah v. Zulfiqar Ali Shah*: PLD 1949 Lah. 193 – Custom (Punjab) – Sayyeds of Nawankot – Instances of daughter not taking a share in inheritance did not necessarily prove the existence of custom restricting power of alienation by male proprietors of ancestral land.

- Muhammad v. Karim Khan: PLD 1954 Lah. 167 - Custom (Punjab) – succession of ancestral land – the daughters of a predeceased son were admitted as heirs to the share of their deceased father by the other sons. It was held that the daughters did not acquire an absolute estate in the land mutated in their favour. It was well-established that female heirs under customary law did not, in the absence of a special custom inherit an absolute estate. The daughters of a predeceased son therefore did not inherit a full estate.
Azizan v. Umra: PLD 1949 Lah. 427 – Custom (Punjab) – succession – arains of Chak No. 2 Abbottabad, Tahsil Chunian, and District Lahore – daughters were held to have a preferential right to succeed to ancestral land as against collaterals.
- Hassan Din v. Rahim Baksh: PLD 1956 Lah. 145 – Custom (Punjab) – A daughter was held to succeed only to life and not to an absolute estate – Ordinarily when a daughter succeeded her father (applied to all females) under agricultural custom it was only a life estate in the property which they inherited. Paragraph 67, riwaj-e-am of Lahore District (1935) apparently lay down that the daughter could alienate property without restriction. (This and other paragraphs in the riwaj-e-am have been the subject of debate and it has never been held that the daughter had a free power of alienation).

2. Rights of a widow to inheriting property under custom:

- Khuda Bakhsh v. Muhammad Hussain: PLD 1949 Lah. 236 – Custom (Punjab) – regarded question of alienation under legal necessity – a sale by the widow of a property (limited owner) for defending her honour was not justified by law.
- Karim Dad v. Sharifan: PLD 1955 FC 155 – Custom (Punjab) – alienation of the self acquired property of husband – the issue was whether a widow’s powers to alienate were unrestricted (Muhammadan Gill Jats of Amritsar District). It was held that widow had no unrestricted power of alienation in respect of self-acquired property of her husband over which she enjoyed a life estate.
- Raja Manochehr Khan v. Mir Dad: PLD 1949 Pesh.10 – Custom (Punjab) the case concerned the alienation of occupancy rights by widow – a reversioner had, under the Customary Law, power to challenge the alienations of a widow holding occupancy rights under the Punjab Tenancy Act.
- Muhammad Shafi v. Ibrahim PLD 1955 FC 102: A widow was in possession after her husband’s death – on the death of the widow a mutation was sanctioned in favour of her daughter with the consent of the reversioners – daughters become full owners – reversioners could not subsequently challenge status of daughters.
- Muhammad Shah v. Fateh Muhammad Shah: PLD 1955 FC1 - Custom (P) – a widow made a will of her life-estate to which the nearest reversioner consented – the heir of such a reversioner was not debarred from contesting the will. Such consent amounted to no more than the relinquishment or transfer of a spes successionis. The transfer of such expectancy was void under s. 6(a) of the Transfer of Property Act in the provinces where that Act was in force.
A will by the widow was not void, but voidable at the instance of the reversioner. A will by a widow governed by customary law was voidable at the instance of her reversioner and relating to self acquired property it became operative. The next reversioner who

would assent to such a will was therefore incompetent to challenge it by his own conduct when he survived the widow. After the death of the widow the remote reversioner who derived his title through the next reversioner would stand debarred from challenging the validity of the alienation.

- *Fatima Bibi v. Nur Muhammad Shah*: PLD 1951 Lah. 147 – Custom (Punjab) Case involved a mother succeeding her son. She was held to have done so as the widow of her own husband. Upon her death the inheritance was to be traced to her husband and not to the last male holder. The general principle applied in these cases was that the property of a person, who died issueless, first reverted to the ancestor who left issueless and then descended to his lineal descendants. The line that left no descendants was deemed not to have existed at all.
- (*Fatima Bibi v. Nur Muhammad Shah*) – The case concerned married daughters allowing widow of their grandfather’s brother to succeed collaterally to their father – the daughters were held to have no preferential claim as against collaterals on the death of widow – Sayads of Gujrat District.
- (*Fatima Bibi v. Nur Muhammad Shah*) - right to representation. Females could not invoke the principle of representation as of right in every case. ‘Sex is no bar to representation’ only meant that where such a custom was proved to exist, sex would be no bar. The principle that a general right of representation in favour of females was in existence would cut at the root of the agnatic theory which is the foundation of all customary rules in the Punjab.
- *Khushi Muhammad v. Fatima Bibi*: PLD 1951 Lah. 88 - Custom (Punjab) – succession – the case concerned the ‘surrender’ or ‘relinquishment’ of a widow’s estate – a widow’s succession to house property was not as a limited heir. Two important conditions had to be fulfilled before the surrender by a widow could operate. Those were (a) the relinquishment of the entire estate of which she was in possession as a widow and (b) surrender to the next heir. The surrender or relinquishment of an estate had to be confined to that property which is in the possession of a widow as a limited estate and which on her death must go to the reversioners of her husband. The Shariat Application Act XXVI of 1937 prescribed that the inheritance to property other than agricultural land, was to be regulated according to Muslim Personal Law where the parties were Muslims. In consequence, on the death of her husband, the widow did not succeed to the house as a widow under the customary law with a life estate only. She had a definite share and would rank as a tenant in common with the other co-sharers. The doctrine of surrender is unknown to Muhammedan Law. It applies only to succession of a widow under Hindu Law or by analogy to a widow succeeding to the usual life estate under custom. It was not therefore, necessary that the house should have been surrendered to all the heirs of her husband under Personal Law, to make her surrender the estate of her husband, to which she had succeeded as a widow for life only, complete and effective.

3. Gifts of land among females under custom:

- *Majid v. Gul Muhammad*: PLD 1949 Lah. 152 – Custom (Punjab) – concerned gifts of land in the female line among Awans of Tallagang Tehsil of Campbellpur District – such

activity was opposed to the general feeling of the tribes. The general feeling of the tribes of Awans undoubtedly opposed to alienations by gift of part of inheritance by a male proprietor during his lifetime without the consent of his sons, and gifts of land in the female line were not popular and did not have the sanction of custom.

- Zainab Bibi v. Nur Begum: PLD 1956 SC (Pak) 438 – Custom (Punjab) – Case involved a ‘Khana Damadi’ gift - where, therefore, a daughter enjoying a Khana – damadi gift died issueless, the property reverted to the daughter’s daughter of the original donor in preference to the descendants of the donor’s brothers.

4. Position of a sister with regards to property rights under custom:

- Nur Muhammad v. Muhammad Yar: PLD 1951 Lah. 132 - Custom (Punjab) – Inheritance. Under custom the position of a sister could not be assimilated to that of a daughter.
Custom (Punjab) – sister versus collaterals in respect of self acquired property – burden was on the sister to prove her preferential right – Gujranwala District. The burden rested on the sister to prove her preferential right in comparison with collaterals even in the case of non-ancestral property.
- Nur Muhammad v. Muhammad Yar: Riwayat-e-Am of the Gujranwala District, question 55 related to the rights of a sister or the sister’s sons. The recorded answer was that sisters and their sons were in no case entitled to inherit. It was noted further that among the tribes of tehsil Wazirabad and Arains of Tehsil Sharakpur, that in default of the collaterals of the fourth degree, the inheritance devolved upon daughters and in their default upon sisters and their sons. It was further added that among the Cheema Jats, a childless proprietor was not competent to make a gift in favour of a sister’s son in the presence or collaterals related to the donor in the sixth degree.
- Mair Minhas Rajputs of Chakwal Tehsil of Jhelum District – The sister of the deceased in this case was preferred to collaterals of 3rd degree. (A similar case is Mehr Bhari v. Bahadur: PLD 1951 Lah. 268).
- Ali v. Shahu: PLD 1956 FC 92 – Custom (Punjab) in the succession of non ancestral property, a sister’s son was preferred to collaterals (Gondal Jats of Gujrat District). The burden of proving a custom was on the party alleging such a custom – right of representation was allowed in case of female found being the next heir. It was held that in cases of non-ancestral property, among Gondal Jats of Gujrat District, a sister’s son was preferred to collaterals. Also, that the right of representation, which was one of the cardinal principles of customary law, was allowed to females wherever they were found to be the next heir.
- Wahid Bakhsh case: PLD (Rev.) 1953 Pb. 18 – Custom (Punjab) – succession – with respect to an issueless proprietor the sisters excluded brothers and collaterals. (Jats of Muzzaffargarh District).

Annexure B

Pakistan Law

- The Constitution of Islamic Republic of Pakistan 1973.
- The Guardian and Wards Act 1908.
- Contract Act, 1872.
- The Transfer of Property Act, 1882.
- The Registration Act, 1908.
- Muslim Personal Law (Shariat Application) Act 1937 amended in 1962.
- The Muslim Family Laws Ordinance 1961

Reports/Government Policy

- Report of the National Commission of Inquiry for Women 1997.
- Review and Progress Report by United Nations Committee 2000 (Beijing + 5 Process).
- National Plan of Action for the Advancement of Women under the Beijing Platform 1998.
- National Policy for the Development and Empowerment of Women (2002) (Aims and Objectives).
- Millennium Development Goals as adopted by the UN Member States in 2000.
- Pakistan Millennium Development Goals Report 2005: Published by the Government of Pakistan (Planning Commission) as an annual reporting process.

International Instruments

- Universal Declaration of Human Rights (1948).
- The Convention on the Elimination of all Forms of Discrimination Against Women ratified by Pakistan 1996.
- Declaration of the UN Cairo Conference of 1994 on Population and Development
- Declaration of the 4th UN World Conference on Women in Beijing, 1995 (Beijing Declaration).
- Platform for Action (1995) at the Fourth UN World Conference on Women.