

# Comparison of Family Laws of Pakistan and Code of Hammurabi: A Legal Analysis with Reference to Existing Statutes and Case Laws

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## Abstract

The institution of family is considered a basic and essential building block in any society. It bears huge significance as it is the foundation of civilization and social relationships. Laws govern such relationships and provide security and protection to this institution. In the same vein, Hammurabi, the King of Babylon circa 1792-1750 BCE, codified many laws concerning marriage, divorce, slavery, commerce, and punishment for various crimes under the code of Hammurabi. It retains the primitive features of ancient Mesopotamia. This article is limited to the discussion of family laws. The article attempts to deliberate on both legislations with a special focus on comparative analyses of both legal regimes. When discussing family laws, the article refers to both judicial rulings and the compendium of family laws of Pakistan. An analysis of the code of Hammurabi, family laws in Pakistan, and precedents of superior courts is carried out. The comparative study of both legal regimes reveals that their family laws share many similarities in respect of the contract of marriage, dower, and dissolution of marriage. Similarly, the laws of maintenance are also discussed in detail. The analytical study reveals that both schemes have certain differences in other respects too.

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## **1. Introduction**

In the history of mankind, human beings strive to protect their interest and promote their goals. This urge has motivated them to suggest certain laws and regulations. These laws are designed in such ways as to resolve their conflicts, regulate interactions, and guide a just order in society. In his celebrated work *Spirit of Law*, Montesquieu mentioned that the laws must conform to the needs of the society in which they prevail. To meet the requirement of justice, the Babylonian king of ancient *Mesopotamia*, Hammurabi enacted the corpus juris of Babylonian laws. It consists of a myriad of laws pertaining to economic provisions, family laws, criminal laws, and others, outlining standards of justice for the subjects. The family laws in the code of Hammurabi cover the relationships between husband and wife and their shared rights and obligations. In addition, these laws provide a mechanism for the annulment of marital bond, alimony, gift, maintenance, and custody of the child. The code of Hammurabi (COH) and family laws in Pakistan share the same concern about the entire family system. The ancient code of Hammurabi and the family laws in Pakistan have similar features to some extent in respect of marriage, maintenance, dissolution of marriage, dower, and custody of the child. However, the procedure for agitating the family matter differs between the two legal doctrines.

## **2. Institution of Marriage**

Marriage is a tie that shields individuals from actions that may put them closer to breaking the law. It is a union of men and women who share the same desire to know and love one another. Marriage is a highly noble

institution that establishes rules for family life and children. It teaches couples and their families to love one another, cooperate in doing good, and ward against evil. In order to live a content life, man and woman enter into this sacred contract.<sup>1</sup> Marriage is a union based on consensual and contractual relationships. It is considered a contract that includes betrothal, *nikah*, and formal wedding party (*rukhsati*).<sup>2</sup> The Hammurabi code also suggests the same concept of marriage. Article 156 of the code speaks about the first formality of the marriage contract, that is, betrothal.<sup>3</sup>

In addition, this contractual relationship, as per Pakistan's legal system, is a tool to legalize sexual intercourse between spouses to procreate their offspring.<sup>4</sup> The ancient Babylonian code also confirms the belief that the aim of this matrimonial union is the upbringing of the children as stated in Article 138 that where a man wishes to claim separation from his wife then he must restore her dowry and pay silver equal to her ransom before he can leave her and it is subject to the condition that has not given birth to any of his own children.<sup>5</sup>

Both legal regimes assign the same sanctity to the contract of marriage and firmly believe in the concept of marriage. First and foremost, there are certain prerequisites that determine the status of marriage in both doctrines of law. Due to the existence of such elements the contract of marriage acquires a legal position and legal proceedings can be initiated in a court of law. In the family jurisprudence of Pakistan for the solemnization of *Nikah*, the elements of this contract must be in existence such as proposal,

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<sup>1</sup> Yusma Natasya Perdana, Abidin Abidin, and Kamaruddin Kamaruddin. "The Impact of Underage Marriages on Family Welfare." *International Journal of Contemporary Islamic Law and Society* 3, no. 2 (2021): 32-43.

<sup>2</sup> 'Dowry and Bridal Gifts (Restriction) Act', Pub. L. No. XLIII (1976), sec. 2 (c).

<sup>3</sup> 'Code of Hammurabi' (1700 B.C. E), art. 156.

<sup>4</sup> *Mst. Mumtaz Bibi versus Qasim and others*, PLD 228 (Islamabad High Court, 2022).

<sup>5</sup> Карпенко, Константин Викторович. "О некоторых особенностях семейных отношений по законам Хаммурапи." *Вестник МГИМО Университета* 5 (2012): 172-181.

acceptance, and presence of two male or one male and two female witnesses.<sup>6</sup> On the contrary, Article 128 of the said code contemplates sexual intercourse as one of its essential ingredients, in addition to the others. It clearly states that where a man concludes a marriage contract with any woman but does not consume it means that he has no legal bond with her at all. The absence of which renders the marriage contract a nullity.<sup>7</sup> While in the context of family laws of Pakistan, any willful sexual intercourse between the couple amounts to fornication.<sup>8</sup>

It is a well-settled exposition of the law, deducible from a plethora of dictums laid down by the superior court that the marriage must be solemnized in the presence of witnesses as required by the law, either the two male witnesses or one male and two females. The regulations, established by the code of Hammurabi, have also drawn attention to this stipulation of the marriage contract which determined the legality of the contract.<sup>9</sup>

Under both laws, the guardian has the right to marry his/her child of his own free will, but the son has the right to defile the marriage contract upon reaching puberty.<sup>10</sup> The code agrees with the marriage law of Pakistan. A guardian can enter into a contract on behalf of the minor.<sup>11</sup> Such marriages must still be dissolved or confirmed by a court in Pakistan. This marriage can be dissolved under Hammurabi's law by simply paying the wife's dower.<sup>12</sup> However, under Pakistani law, the wedding must be

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<sup>6</sup>Mst. Saman Naseer versus Additional District Judge, Lahore, and others, CLC 549 (Lahore High Court, 2020).

<sup>7</sup> 'Code of Hammurabi' (1700 B. C. E), art. 128.

<sup>8</sup>'Pakistan Penal Code', Pub. L. No. XLV (1860), sec. 496 B.

<sup>9</sup> Ion Tutuianu, "Civil and Criminal Rules of The Babylonian Law." *Studies and Scientific Researches. Economics Edition* 18 (2013): 110.

<sup>10</sup> Ibid.

<sup>11</sup> Muhammad Ifzal Mehmood and Noraini Binti Md Hashim, "Marriage Without Wali's Consent: A Paradigm Shift in the Family Structure of Pakistan" 29, no. (S1) (2021): 135-151.

<sup>12</sup> Code of Hammurabi, art. 156.

dissolved by the court, and after separation, both laws grant her the right to a second marriage with the man of choice.<sup>13</sup>

### 3. The Concept of Dower

The Sumerian Family Laws recognized the women's right to dower and preserved their ownership in the bride price as explicitly mentioned in Article 160 of the code. In addition to paying the dower amount for his wife, the husband has a duty to bring certain items into his father-in-law's home. However, the father of the girl has the right to refuse his proposal. In such a case the husband has the right to recover his belongings<sup>14</sup> but apparently this right exists where the father gives his consent to the marriage. Where the husband no longer wishes to live with his wife and wants to claim separation, he can certainly make it but the law of the code obliges him to pay the purchase price and to return the articles that the wife brought with her.<sup>15</sup>

Dowry articles are considered the property of women, and a man's excess is only limited to its use. When a woman dies, such articles devolve upon her children, and her father's family if she is childless. If the marriage ends in divorce, the woman forfeits the dowry articles; however, unless the marriage ends due to her fault, the woman forfeits it as a penalty.<sup>16</sup> Besides, the code embodies other provisions that deal with the Mehr and dowry articles. Article 137 of the Hammurabi code led to the conclusion that the husband can alienate his wife as of right, but it is mandatory for the husband to leave her with an amount of dowry irrelevant to the fact that the couple is childless or have children.<sup>17</sup> In this regard, the Hammurabi code and the Dowry and Bridal Gifts (Restriction) Act, of 1976 find a striking parallel.

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<sup>13</sup> 'The Dissolution of Muslim Marriages Act', Pub. L. No. VIII (1939), sec. 2 (vii).

<sup>14</sup> Code of Hammurabi, art. 160.

<sup>15</sup> Ibid. 138.

<sup>16</sup> Tutuianu, "Civil and Criminal Rules of The Babylonian Law", 110.

<sup>17</sup> Code of Hammurabi, art. 137.

As both laws respect the absolute ownership of the bride in the gifts and property transferred to her. She can retain it with no strings attached.<sup>18</sup>

The dower is an obligation imposed on the Muslim husband under the Dowry and Bridal Gifts (Restriction) Act of 1976, and it is an intrinsic and integral part of this marital contract. It can take any form in the nature of the property having some monetary value.<sup>19</sup> The amount depends upon the consensus of the parties. The parties of the marriage contract mutually decide and determine the nature and the amount of it.<sup>20</sup> There are certain modes of dower. It can either be prompt or deferred. In addition, it can also be specified and unspecified. The amount of dower must be paid as per the mode already decided. A perusal of section 10 of the Muslim Family Law Ordinance 1961 reveals that where no manner of dower is mentioned it must be paid as a whole and on demand.<sup>21</sup> The code of Hammurabi makes no mention of such specification rather the concept of dower is explained only.

#### **4. Dissolution of Marriage**

The contract of marriage assigns certain rights and responsibilities to the spouses in the jurisprudence of both family laws. More than 4000 years ago, the regulation offers certain provisions for separation between married couples.<sup>22</sup> The right to repudiate the marriage contract is vested in both husband and wife. Both legal regimes generated rich jurisprudence when it comes to the rights of the spouses. Like COH, in the Pakistani legal system, the husband has the unilateral right of Talaq Man, and the wife can also seek

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<sup>18</sup> Dowry and Bridal Gifts (Restriction) Act, sec. 5.

<sup>19</sup> Dowry and Bridal Gifts (Restriction) Act, 1876, sec. 2 (b).

<sup>20</sup> Muhammad Qayyum Anjum Versus Additional District Judge, Muzaffargarh and 2 others M L D, 416 (Lahore High Court, 2022).

<sup>21</sup> 'The Muslim Family Laws Ordinance', Pub. L. No. VIII (1961), sec. 10.

<sup>22</sup> Code of Hammurabi, art. 137,138,139, 141,143,156 & 159.

dissolution through talaq-e-tafweez,<sup>23</sup> Khula, and any other ground mentioned in the *Dissolution of Muslim Marriages Act, of 1939*.<sup>24</sup>

The ancient COH, like Muslim family law, also recognized both judicial and extra-judicial forms of divorce.<sup>25</sup> The Babylonian code exhaustively enacted different modes of separation. It is not only divorce through which the spouses decide to live apart rather the option of judicial separation is also available to the wife. If the wife is aggrieved with the malevolent behavior meted out to her by the husband. She can take her matter to the court and seek dissolution on this ground alone. However, the onus of proof will always lie on her in such a case. In case of failure to prove her stance will subject her to punishment.<sup>26</sup> Likewise, the interpretation of section 5 of the *Dissolution of Muslim Marriages Act, of 1939* is certain that in case of dissolution of marriage, the woman need not forfeit her amount of dower rather she can retain it.<sup>27</sup>

To alleviate the suffering between the spouses, Muslim Personal Law also takes different forms of separation including judicial and extra-judicial. In order to safeguard the interests of all stakeholders: man, woman, children, and society at large certain rules are also integral part of such modes. To revoke the contract of marriage through such modes the initiating party must be well-versant in the rules and procedures.<sup>28</sup> Those modes that empower the husband to repudiate the contract of marriage are *Talaq, Zihar, and Illa*. On the other hand, the wife can exercise her right of

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<sup>23</sup> The Muslim Family Laws Ordinance, sec. 8.

<sup>24</sup> The Dissolution of Muslim Marriages Act, sec. 2.

<sup>25</sup> Lucy Carroll, "A note on the Muslim wife's right to divorce in Pakistan and Bangladesh." *New Community* 13, no. 1 (1986): 94-98.

<sup>26</sup> Charles F. Horne, "The Eleventh Edition of the Encyclopedia Britannica, 1910- by the Rev. Claude Hermann Walter Johns, MA Litt. D. The Code of Hammurabi Introduction Charles F. Horne, Ph. D."

<sup>27</sup> The Dissolution of Muslim Marriages Act, sec. 5.

<sup>28</sup> Lawal Mohammad Bani, and Hamza A. Pate. "Dissolution of Marriage (Divorce) under Islamic Law." *JL Pol'y & Globalization* 42 (2015): 138.

separation through *Talaq-e-Tafweez*, *Khula*, and *Li'an*. Any couple can dissolve their marriage by mutual consent through the mode of *Mubarrat*.<sup>29</sup>

Man is not required to keep his wife if he prefers to live apart from her, but he must pay back some of the dowry and property if he does so. Where the woman is at fault in case of separation, she is in no position to raise a claim for dowry.<sup>30</sup> The husband has large discretion as to divorcing his wife. It is striking to note that the husband can annul the marriage contract with the barren wife, but the COH regulated the restitution of the dower in this regard. However, the husband cannot leave her at the mercy of others if she is under some other chronic illness.<sup>31</sup>

In the same vein, analysis of various precedents, that have been already laid down by the superior courts in Pakistan, reveals that where any woman is subjected to mal-treatment and an abusive partner is perpetrating violence -physical and mental- against his spouse. The right to dissolve marriage or separation accrues under such compelling circumstances.<sup>32</sup> It is pertinent to note that such a female is not obliged by the law to surrender the dower amount to her husband as compensation for such separation if it is claimed through *khula* coupled with cruelty. The condition precedent of restoration<sup>33</sup> of dower is no longer mandatory in the current jurisprudential debate of family laws in Pakistan.<sup>34</sup> In the contrast, under section 10 of the *Family Court Act of 1964* it is the discretion of the family court to pass a decree of the like nature.

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<sup>29</sup> Shagufta Omar, "Dissolution of Marriage: Practices, Laws, and Islamic Teachings." *Policy Perspectives* 4, no. 1 (2007): 91-117.

<sup>30</sup> Tutuianu, "Civil and Criminal Rules of The Babylonian Law." 110; Code of Hammurabi, art. 156.

<sup>31</sup> Code of Hammurabi, art. 148.

<sup>32</sup> Farhan Farooq versus Salma Mehmood, Y L R 638 (Supreme Court (AJ&K), 2022)

<sup>33</sup> The Family Court Act, sec. 10.

<sup>34</sup> Safer Ahmad versus Mst. Gulshan Bibi and others, C L C 634 ([Lahore (Rawalpindi Bench), 2022].



The power of the husband in the matter of divorce is not unconditional or unfettered and the wife could not be divorced at the caprice of the husband. The husband must take into account the circumstances which warrant the use of such power. Certain conditions are mentioned in Article 141 of the Code of Hammurabi which allowed the husband to release his wife such as upon her intention of leaving the husband's house, accruing debt, trying to ruin his house, ignoring her husband, and being found guilty by a court of law. These circumstances disentitle the wife for her claim of any gift, but She must remain in her husband's household as a servant if he refuses to release her and marries another woman.”<sup>35</sup>

From the point of view of Babylonian legislation, the law established other grounds pertaining to the dissolution of marriage mentioned in the COH, Article 136 states that if a man flees his home and later on his wife moves in with another man. Subsequently, when he comes back and wants to take his wife back, the runaway man's wife is not permitted to return to her husband because he fled his home and ran away.<sup>36</sup> It contemplated that when the whereabouts of the husband are not known to the wife, she can claim separation from him and is not bound to return to his wedlock with him upon his arrival. This ground is an important addition to the dissolution of a marriage by a wife. It is noteworthy to mention that the DMMA stands in resemblance with the COH as it regulates the dissolution of marriage on the ground of husband, *inter alia*. However, the act stipulated a time period of four years for a missing husband.<sup>37</sup>

The COH draws attention to other grounds where the marital union is subject to conflicts and disagreements. Such conflicts can be on different issues ranging from financial to parenting issues. In a case when there are persistent and heated arguments between the couple, the wife can take back

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<sup>35</sup> Code of Hammurabi, art. 141.

<sup>36</sup> *Ibid.*, art. 136.

<sup>37</sup> The Dissolution of Muslim Marriages Act, sec. 2.

her dowry and make a return to her father's house as enumerated in Article 142 of COH as when a woman and her spouse argue, she must have good reasons, such as their incompatibility. On the contrary, if her husband abandons her and she is innocent, she must return to her parent's home after taking dowry from her husband.<sup>38</sup>

The rationale behind Section 2 of the *Dissolution of Muslim Marriages Act, 1939* is the same as COH. The contract of marriage is considered a sanctimonious relationship founded on love and harmony between them. When the spouses no longer honor their rights and obligations and this union turns into a hateful relationship, both of them are free to claim separation. The antagonistic attitude is sufficient to exercise the right of separation. The above-mentioned provision stated different grounds which entitle the wife to end her marital life with her husband.<sup>39</sup>

## **5. The Practice of Polygamy as a Social Institution**

Hammurabi's law permits second marriage on certain conditions, such as if the husband has children from his first wife, he is not entitled to marry for a second time, and if his wife is suffering, he can get a second wife without the first wife's consent. The practice of marriage with multiple wives is common in Pakistan's marital culture. Nonetheless, the case of a polygamous union in the family law of Pakistan is different from the COH. In Islamic marital jurisprudence, a male Muslim can take up to four wives, but that permission must qualify certain exceptional circumstances and stringent conditions. there is no blanket permission for polygamy, as clearly stated in Quran that if one is allowed to marry as many women as one like two, three, or four but if one cannot treat them fairly, then only one will be more appropriate to avoid unfair conduct.<sup>40</sup>

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<sup>38</sup> Code of Hammurabi, art. 142.

<sup>39</sup> Mst. Seema and another versus Wajid Ali Shah and others, P Cr. L J 849 (Sindh, 2022)

<sup>40</sup> Al-Qur'an, 4:3.

Contracting second marriage is legally permissible in Pakistan but it is not an unqualified right and is subject to certain restrictions. The dictates of polygamy, as imposed by MFLO, must be followed in order to avoid legal penalties. In addition to equitable treatment, a husband will be penalized if he decides to marry a second wife without first securing authorization from the arbitration council and the wife. Non-compliance with the relevant provision of law regarding polygamy invites punishments under Pakistani law.<sup>41</sup> Section 6 of the Muslim Family Law Ordinance 1961 (MFLO) explicitly incorporated the limitation imposed upon polygamous marriage:

No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.... (4) If a person contravenes the provision of:

5) If a man marries a second time without the Arbitration Council's consent, he must (a) pay the full amount of dower due to the first wife or wives immediately either whether promptly or later. Where the husband does not comply with it then it may be recovered as arrears of land revenue, and (b) face a fine of 500,000 rupees and up to a year's simple imprisonment if found guilty after a complaint.<sup>42</sup>

Besides the punishments, a wife can invoke the jurisdiction of the family court for dissolution of marriage under section 2 of DMMA, 1939 if she finds that her husband enters into a second marriage contract without

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<sup>41</sup> Hira Shahjehan, and Sami Ur Rahman. "Laws Relating to Polygamy in Pakistan: Rights of the Polygamous Wives." *Islamabad Law Review* 5, no. 1/2 (2021): 47-64.

<sup>42</sup> The Muslim Family Laws Ordinance, 1961 sec. 6.

obtaining her consent as elaborated in the said section. It entitled women to seek dissolution on various grounds which includes taking additional wife against the dictates of MFLO.<sup>43</sup>

In the family law of Pakistan, there is a standard protocol for second marriage and punishment for those who flouted the law, but in Hammurabi's code, there is none except for the separation of first wife. As per article 144 of the Babylonian code, where there is no issue with the first wife and the couple has children then the husband is not permitted to contract a second marriage.<sup>44</sup>

Article 145 of the Code of Hammurabi stated that if a man marries a woman who does not bear him children and he plans to wed another woman, he must ensure that the second wife is not given the same rights as his first wife before bringing her into the home.<sup>45</sup>

Article 148 of the Code of Hammurabi stated, "If a man takes a wife, and she is seized by disease, if he then desires to take a second wife, he shall not put away his wife, who has been attacked by disease, but he shall keep her in the house which he has built and support her so long as she lives."<sup>46</sup>

Both legal regimes do not recognize plural marriages as a matter of absolute rights for a man. They speak for taking a second wife and allowing it but under a different set of circumstances and conditions. The conditions and circumstances which necessitate polygamy are the points of divergence between both doctrines. There is no mention of the element of consent in COH in this context. Contrarily, consent is the cardinal condition for a man's right to polygamy under the MFLO. The presence of consent from the first wife and permission of the chairman

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<sup>43</sup> The Dissolution of Muslim Marriages Act, sec. 2 (ii (A)). 9

<sup>44</sup> Code of Hammurabi, art. 144.

<sup>45</sup> *Ibid.*, art. 145.

<sup>46</sup> *Ibid.*, art. 148.

union council concerned are the prerequisites of a valid subsequent marriage and correct legal procedure. The absence of which renders such a contract a nullity in the eyes of law.<sup>47</sup>

Moreover, equal treatment in terms of time and resources is the clear commandment of Allah as mentioned in *surah al-Nisa*. The husband is duty-bound to deal with his wives fairly. If the husband cannot fulfill such a condition, he is not permitted to contract subsequent marriages. The scheme of Islamic jurisprudence does not forbid the man to marry another woman rather he is allowed but he is required to adhere to the condition of *Adl* (justice) as prescribed by Allah.

Unsurprisingly, the COH justified second marriage but that too in situations where the first wife is childless or ill and discouraged in any other case. In case of non-observance of the letter of the law for second marriage in Pakistan, the husband is liable for the punishments mentioned in MFLO. However, there is no such scheme of punishment and penal provision available under COH.

## 6. Laws of Maintenance (*Nafaqah*) for Wife

The Arabic word *Nafaqah* is derived from the word *infaq* which means to provide for good purpose. The provision of necessities of life comes under maintenance. All four schools of thought hold various opinions regarding the scope of maintenance. To achieve the goals of social justice for the marginalized section such as destitute wives, this duty is imposed upon the husband. In matrimonial matters, it is incumbent upon the husband to support his wife and provide her with sufficient means of sustenance.<sup>48</sup> The same role of men has been prescribed in Holy *Quran*, *ahadith*, and *ijma*. As stated in *Surah Nisa* Verse 34; "Men are in charge of women by [right of]

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<sup>47</sup> *Ishtiaq Ahmad versus the State and others*, P L D, 187 (Supreme Court 2017)

<sup>48</sup> *Azizah Mohd, and Badruddin Hj Ibrahim*. "Muslim Wife's Rights to Maintenance: Husband's Duty to Maintain a Working Wife in Islamic Law and The Law in Malaysia." *IUMLJ* 18 (2010): 103.

what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard."<sup>49</sup>

The responsibility to fulfill the economic needs of the wife thus lies on the shoulder of the husband. He is duty-bound to make ends meet for her wife and family by virtue of the marriage. The wife can claim it as a matter of right and ask her husband for it. The husband cannot deny it one or the other pretext rather legally and morally obliged to support her.

As to the Sunnah of the Prophet (pbuh), JÉbir (r.a.) said that the Prophet (pbuh) said:

Fear Allah concerning women! Verily you have taken them on the security of Allah and intercourse with them has been made lawful to you by words of Allah. You too have right over them, and they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner...<sup>50</sup>

Concerning *Ijma* all the jurists hold a unanimous opinion on the subject of maintenance. It is noteworthy to mention that even his financial status does not absolve him of his duty. There is no disagreement on the payment of maintenance to the wife. He has to bear the expenses of her daily life. However, this obligation of the husband is also subject to the obedience of the wife. Only an obedient and devoted wife can seek the reward of maintenance.<sup>51</sup> A wife who does not offer herself to her husband and

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<sup>49</sup> Al-Qur'an, 4:34.

<sup>50</sup> Mohd, et al. "Muslim Wife's Rights to Maintenance,"103.

<sup>51</sup> Ibid.

refrains from performing matrimonial duties cannot claim any kind of provision from her husband.<sup>52</sup>

Under Muslim law, the wife is entitled to maintenance as long as the wedlock subsisted and this right lasts till the life of such marriage. All the schools of thought agreed with this. However, where marriage is dissolved through revocable marriage the wife is also entitled during such an *iddah* period. In the event of the death of her husband, she cannot claim the sustenance allowance from his property. Her right to maintenance dies with the death of her husband.<sup>53</sup>

A hand-to-mouth existence for the wife, while the husband lives a lavish life, is not envisaged by Islamic laws. The obligation of men to provide maintenance stands on a higher pedestal than the wife. There is no single opinion on the quantum of maintenance as per different schools of thought. Different verses of the Quran reveal that there are no upper and lower limits on the payment of maintenance.<sup>54</sup>

The determination of the amount of maintenance is subject to the financial status of the husband. The courts during fixation of maintenance must gauge the strength of the husband while taking into consideration the assets and property. However, it must be reasonable and fair enough to let the spouse live a dignified life with comfort.<sup>55</sup>

The state of Pakistan is constitutionally obliged to protect the wife in case of any injustice.<sup>56</sup> For this reason, under section 9 of the Muslim Family Law Ordinance 1961, an efficacious avenue of relief is available to

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<sup>52</sup> Rukhsana Ambreen versus District and Session Judge, Khushab and 2 others, C L C 1512 (Lahore, 2021).

<sup>53</sup> Tarannum Siddiqui, "Maintenance Rights in Muslim Personal Law." *International Journal of Humanities & Social Science Studies* II, no. III (2015): 161-169.

<sup>54</sup> Fayyaz-ur-Rehman, "Islamic Law of Maintenance for Wives in Pakistan and Afghanistan since 1960." Ph.D. diss., University of Peshawar, 2004.

<sup>55</sup> Arslan Aijaz versus Mst. Sanobar and 2 others, Y L R, 450[Sindh (Hyderabad Bench), 2022].

<sup>56</sup> 'The Constitution of the Islamic Republic of Pakistan, 1973', art. 35.

the desecrated wife. She is empowered under the said section to compel the defaulting husband through Arbitration Council to pay the required amount.<sup>57</sup> In addition, the husband's failure to provide maintenance to his wife furnishes her with grounds for divorce. The aggrieved wife can resort to the dissolution of her marriage where the husband is unable to cater her provision of life for a period of two years.<sup>58</sup>

The Muslim family laws have discussed in detail the rulings pertaining to maintenance. On the contrary, the legal code of Babylonian code has not explicitly incorporated any specific provision of maintenance for the wife. However, certain articles explained the provision of maintenance. Article 148 of the code illustrated that it is the duty of the husband to look after the ailing wife. He is instructed not to abandon her in the event of any disease but rather obliged to take care of her in such a condition.<sup>59</sup>

The COH also contemplated that during the subsisting of marital life, the provisions of necessities are the obligation of the men. Maintenance is an integral part of the marriage. He has to provide all those things which are essential to support life. The same is envisaged in Article 133 of the said code. Where she violates the sanctity of the marriage contract, her husband is empowered to punish her in a grave manner. Another consequence of this breach is that she is not entitled to maintenance by her husband.<sup>60</sup> It clearly explains that the event of her disobedience or her status as rebellious makes her disentitled for the maintenance.

Under the circumstances which led to the severance of their conjugal life, the husband is no longer liable to provide maintenance. She is entrusted with the duty to guard her chastity and take care of her husband's house and

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<sup>57</sup> The Muslim Family Laws Ordinance, sec. 9.

<sup>58</sup> The Dissolution of Muslim Marriages Act, sec. 2.

<sup>59</sup> Code of Hammurabi, art. 148.

<sup>60</sup> Ibid. art 133.



property. Where she is unable to perform her duties cheerfully and breaches the covenant of marriage, she is disqualified for the claim of maintenance. Her husband is absolved from his financial obligation.<sup>61</sup>

The COH did not extend the maintenance beyond the period of marriage. The claim of maintenance arises out of the marriage contract only. It is the continuation of this contract that gives rise to maintaining a wife. The wife cannot claim it after the dissolution of their marriage. In addition, there is no quantum of maintenance determined under the ancient code of Babylonian, but various articles of the code signify that the rank, financial status, and condition of the husband is the determinative factor in deciding the amount of maintenance. Furthermore, there is no mention of the procedure for the protection of the wife, in a case where the husband is unable to provide the maintenance as compared to the statutory laws of Pakistan.

## 5. Conclusion

To sum up, the ultimate aim of both legal regimes is the protection of the family unit in different ways. They are confirmed to the dictates of their respective circumstances. It can be safely said that in most of the cases, Muslim family laws and Babylonian laws are in harmony with each other. Islamic law drew on pre-existing customs and practices. Under Islamic law, the adoption of earlier customs is generally accepted as long as they do not contradict the teachings of Islam. Likewise, Islamic family laws were also shaped by pre-existing customs and traditions. They have adopted a number of the family laws of this surviving set of laws, the Code of Hammurabi, while neglecting all other provisions which stand in direct clash with the shariah rulings. Muslim family law has incorporated the contract of

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<sup>61</sup> Ibid art 141 & 143.

marriage along with its essentials but rejected its concept of sexual intercourse as one of the requirements.

Marriage is regarded as a sanctimonious contract having the same goal under both doctrines. Like COH, the statutory family laws in Pakistan prescribe marriage as a contract having certain prerequisites. However, sexual intercourse before the solemnization of marriage is an essential condition under Babylonian law. Furthermore, both legal doctrines do not prescribe the binding of men and women together in a state of extreme discord. The right to separation is recognized for both men and women when they cannot keep the bond of marriage. Both laws enjoin the guardian to contract the marriage of its minor, but the son has the right to annul the marriage contract once he or she reaches puberty. The code is in accordance with Pakistani marriage law. The Sumerian Family Laws agree with the Muslim Family laws in Pakistan in the provision of dower. When the marriage vows are recited, the husband is obliged to pay the dower. The true owner of Mahr, regardless of the type of property, is the wife. The dower and dowry articles under both laws belong to the wife. Unlike Hammurabi's code, under Islamic law, various modes of dower are discussed at length. The marriage bond is supposed to be a source of mutual love and affection. When both spouses remain unable to maintain it and there is the likelihood of hatred union then they are under no obligation to live with each other. Different efficacious remedies are available to them under both legal regimes. They both can seek judicial and extra-judicial divorce. Contracting another marriage during the existence of the first marriage is allowed by the family law of both regimes. It is noteworthy to mention that the circumstances and conditions required for it are distinct from each other. There are various provisions in the family laws of Pakistan that protect the right of maintenance of wife and sufficiently guarded it through statutory provisions and precedents. Similarly, the code of Hammurabi also discussed

the role of husband in fulfilling the duty of maintenance. However, the significant family laws that is enforced at present has considerably touched this issue and provided legal remedy if the husband neglects his duty. To meet the requirements and the needs of their respective societies, the code of Hammurabi and family laws in Pakistan were enacted. The intent of the lawgiver is to protect their interest and advance their goals. These laws outline standards of justice for the subjects and ensure to secure the goals through such family laws.

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