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Khan, Iqra Saleem

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# UNWILLING CO-WIVES AND THE LAW OF POLYGAMY IN PAKISTAN

Iqra Saleem Khan

## ABOUT THE AUTHOR

The author is an S.J.D. candidate at Harvard Law School. Her doctoral research focuses on the role of religion/secularism in the divergent judicial interpretation of Muslim Family Laws in Pakistan and Bangladesh, with a special focus on the status of *Ahmadiyya* Muslim women. She previously taught Islamic Law at the Institute of Legal Studies.

## ABSTRACT

This paper is a legal realist endeavor that seeks to uncover a thorough and exhaustive description of Polygamy Law in Pakistan before moving on to a prescriptive analysis. Having an understanding of the stakes involved, background rules at play and the inadequacies within the law can be immensely useful in identifying the harm and redressing it. Thus, in first separating the “Is” from the “Ought”, Part I describes Pakistani polygamy Law and the limited legal remedies available to unwilling cowives. In Part II, the “background rules” driving the bargain amongst the parties’ to enter (or leave) polygamous marriages is discussed. Thereafter in Part III, a distributive analysis is conducted using “ideal-types” to uncover polygamy’s dual nature as a security or a threat for all the parties impacted by the law. Here I rely on the idea that marital partners “bargain in the shadow of the law” with bargaining endowments created in part by the legal rules. By comparing four typical but contrasting marriages and examining the rules about the formation and breakup of polygamous marriages, the role of the pre-existing and new wife’s consent (or not) and the economic consequences of poly-formation in ongoing and divorcing marriages, I demonstrate that the surpluses generated and distributions currently in place can both benefit and harm the cowives. Finally, Part IV will prescribe a restorative justice approach to the situation of unwilling cowives, arguing that the solution ought to be focused on redressing the social, emotional and economic harm caused to unwilling cowives than simply punishing the perpetrator. Monetary restoration, victim-focused circles, and involvement of the wider community are proposed as alternatives to punishment. My goal with this project is to provide a nuanced and theoretically informed understanding of a topic over which much ink has already been spilled. By using analytical techniques from the legal realist toolkit, I seek to recast the case of polygamy in Pakistan as more than just a “ban it” or “allow it” issue.

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INTRODUCTION

In February, 2017, the Supreme Court of Pakistan affirmed the judgement of a lower court sentencing a man to a month in prison and a 5000 rupee fine for contracting a second marriage without the permission of the Arbitration Council.<sup>1</sup> In doing so, the Court asked:

Husbands are required to “deal justly” with their wives and to, “live with them [wives] on a footing of kindness and equity” (verses 3 and 19 respectively of surah 4 an-nisa). If a husband, without his wife’s permission or in secret, takes another wife can his dealing with the first wife be categorized *just* or is he maintaining the *footing of kindness and equity*?<sup>2</sup>

The recent wave of enforcing penal sanctions upon polygamous husbands has been lauded by women’s rights activists in Pakistan, who have consistently called on the state to restrict polygamy.<sup>3</sup> It merits a debate about whether penal sanctions really *do enough* to remedy the situation of unwilling cowives. Is it punishing the behaviour without really fixing the “problem”? Important questions about retributive versus restorative justice arise which have not been previously addressed in this context.

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- 1. Ishtiaq Ahmed v. The State, S.C. Criminal Petition No. 1252 of 2016.
- 2. *Id* at 5–6.
- 3. See RUBYA MEHDI, THE ISLAMIZATION OF THE LAW IN PAKISTAN 162 (1994).

This paper is a legal realist endeavour that seeks to uncover a thorough and exhaustive *description* of Polygamy Law in Pakistan before moving on to a *prescriptive* analysis. Having an understanding of the stakes involved, the background rules at play and the inadequacies within the law can be immensely useful in identifying the harm and redressing it. Thus, in first separating the “Is” from the “Ought”, Part I will describe Pakistani Polygamy Law and the limited legal remedies available to the cowives. In Part II, the “background rules” driving the bargain amongst the parties’ to enter (or leave) polygamous marriages will be discussed. Thereafter in Part III, a distributive analysis will be conducted to uncover polygamy’s dual nature as a security or a threat for all the parties impacted by the law. Finally, Part IV will prescribe a restorative justice approach to the dismal situation of unwilling cowives, arguing that the solution ought to be more nuanced than outright banning polygamy or permitting it with penalties for husbands who break the rules. My goal with this project is to provide a refined and theoretically informed understanding of a topic over which much ink has already been spilled. By using analytical techniques from the realist and critical legal studies toolkit, I seek to recast the case of polygamy in Pakistan as more than just a “ban it” or “allow it” issue.

## I. POLYGAMY LAW IN PAKISTAN

s.6(1) of the Muslim Family Law Ordinance, 1961 states:

6. Polygamy— (1) 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.<sup>4</sup>

In order to obtain this permission, the man must submit an application to the Chairman of the Union Council stating “. . . reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.”<sup>5</sup> Upon receipt of this application, the Union Council Chairman is required to constitute an Arbitration Council consisting of representatives of the applicant and his existing wife or wives.<sup>6</sup> If this Council is satisfied that the proposed marriage is “necessary and just”, permission to contract the proposed marriage may be granted, subject to conditions, if any.<sup>7</sup> Relevant factors that the Arbitration Council may consider in deciding whether the marriage is “necessary and just” include “sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on

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4. Muslim Family Law Ordinance, No. 8 of 1961 (hereinafter MFLO No. 8) § 6(1), THE GAZETTE OF PAKISTAN EXTRAORDINARY (hereinafter GAZETTE), 1961.

5. MFLO, No. 8 of 1961 § 6(2), GAZETTE, 1961.

6. MFLO, No. 8 of 1961 § 6(3) GAZETTE, 1961.

7. *Id.*

the part of an existing wife.”<sup>8</sup> The husband’s failure to obtain this permission before contracting a subsequent marriage is punishable by “simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.”<sup>9</sup> Curiously, the subsequent wife does not incur any penal sanctions, even if a knowing participant. Taking the rules together, they impose procedural impediments which, if the Husband ignores, can result in penalties—but both marriages are valid.

Before 1974, only the Union Council could initiate criminal proceedings by filing a written complaint in the court against a husband who has acted in contravention of section 6.<sup>10</sup> This law was narrowly interpreted. In *Muhammad Islam v The State* and *Fateh Muhammad v. Chairman*, for example, the court rejected the argument that the Union Council *Chairman* or the first wife had any *locus standi* to file a complaint under section 6.<sup>11</sup> The husbands in these cases, therefore, escaped any prosecution. To rectify this omission, the provinces of Punjab and Khyber Pakhtunkhwa introduced amendments in 1974 and 1992 respectively that replaced “Union Council “ with “aggrieved party.”<sup>12</sup> The rationale behind this was to provide a wider set of persons adversely affected by the polygamous marriage with the *locus standi* to file a complaint under section 6.<sup>13</sup> Evidently, this included the “unwilling” existing wife, but the court held in *Ejaz Mahmood v Humaira* that the “unknowing” subsequent wife could also be an aggrieved party.<sup>14</sup> Justice Sardar Muhammad opined that since the second wife was unaware of her husband’s previous marriage and would have never married him otherwise, she was therefore an aggrieved party for the purposes of Rule 21.<sup>15</sup> The Supreme Court of Pakistan in *Faheemuddin v. Sabeeha Begum* extended the ruling in *Ejaz Mahmood* to include *any* subsequent wife—whether

8. The Muslim Family Laws Rules 1961, rule 14.

9. MFLO, No. 8 of 1961 § 6(4)(b), GAZETTE, 1961.

10. The Muslim Family Laws Rules 1961, rule 21. (“21. No Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the Union Council stating the fact constituting the offence.”)

11. *Muhammad Islam v. The State*, (1967) P.L.D. 201 Pesh; *Fateh Muhammad v. Chairman Union Committee*, Ward No. 14/15, P.L.D. 1975 Lah. 951.

12. The Punjab Amendment of November 26, 1976. (“21. No Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the aggrieved party, stating the facts constituting the offence.”); *Waqas Khan v. Dr Seema Hanif* PLD 2019 Pesh 180.

13. See Zubair Abbasi, *Polygamy and Second Marriage under Muslim Family Law in Pakistan Regulation and Impact*, 59(1) ISLAMIC STUD. 29, 38 (2020).

14. *Ejaz Mahmood v Humaira*, P.L.D. 1983 Lah. 615.

15. *Id.* at 614. (“It is obvious that the petitioner had duped respondent No. 1 by not disclosing that he was a married person. Had he acted in accordance with law and had obtained prior permission for entering into a second marriage, the respondent would have definitely come to know of it and in that case she might not have married him, as stated by her. In this view of the matter, I have no doubt in my mind that the second wife is also an aggrieved person in the set circumstances of this case.”)

or not aware of her husband's previous marital status—as an “aggrieved party.”<sup>16</sup> Whilst these amendments have certainly conferred more rights upon wives in unwilling polygamous unions, the Lahore High Court in *Ejaz Mahmood* maintained that under the new law, the Union Council or the Chairman cannot be an “aggrieved party.”<sup>17</sup> This means that the onus to initiate criminal proceedings under section 6 in Punjab and Khyber Pakhtunkhwa now rests exclusively on the co-wives. As Kanwal Muzaffar, a field worker at *Simorgh Women's Recourse and Publication Centre* (hereinafter *Simorgh*) has indicated:

Most wives do not want to get involved with the criminal justice system because of family pressure, lengthy proceedings, associated costs, lack of mobility and the taboo associated with going to court. No matter how inequitable their husbands have been towards them.<sup>18</sup>

Even when a criminal complaint *is* filed, the actual sanctions applied on husbands under MFLO are subject to criticism.<sup>19</sup> Lawyers David Pearl and Werner Menski argue that husbands contracting polygamous marriages without the requisite permission are given light sentences and that “evidence from the case law indicates that the courts are not very interested in the deterrent force of either imprisonment or financial penalties.”<sup>20</sup> One month imprisonment seems to be the maximum, as evident from the cases of *Raja Muhammad Azram v. Mst. Jamila Banaras*,<sup>21</sup> *Ishtiaq Ahmad v. The State*<sup>22</sup> and *Liaqat Ali Mir v. Additional Session Judge*.<sup>23</sup> Courts often substitute imprisonment with *mahr*, arguing in *Manzoor Bibi v. Muhammad Afzal Haq* that “under the Muslim Family Laws Ordinance, in such like situation the husband has to pay the dower in demand. This in itself is also a punishment.”<sup>24</sup> In that case, the husband spent only 4 nights in prison for violating section 6.

It is important to note that whilst contravention of section 6 is punishable by penal sanctions (however scarcely applied), Pakistani courts have held that subsequent marriage *itself* remains valid. In *Ghulam Fatima v Anwar*, the Lahore High Court dismissed the existing wife's plea to declare the subsequent marriage in contravention of MFLO void, stating that “. . . it has not been laid down anywhere in the said Ordinance that a marriage which is . . . contracted

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16. Faheemuddin v. Sabeeha Begum PLD 1991 SC 1074.

17. Ejaz Mahmood v Humaira, P.L.D. 1983 Lah. 615.

18. Interview with the Author on January 12, 2021.

19. See Doreen Hinchcliffe, *Polygamy in Traditional and Contemporary Islamic Law*, 1(3) ISLAM AND THE MODERN AGE 13, 24–25 (1970); MEHDI, *supra* note 3, at 211; Abbasi, *supra* note 13, at 39.

20. DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 261 (3<sup>rd</sup> ed., 1998).

21. YLR 2011 Lahore 1595.

22. PLD 2017 SC 187.

23. PCrLJ 2017 Islamabad 1026.

24. Manzoor Bibi v. Muhammad Afzal Haq PCrLJ 1989 Lahore, 749.

in contravention of the provisions of section 6 thereof would be invalid.<sup>25</sup> Furthermore, Section 6 only requires the husband to state *whether* the existing wife's consent has been taken in his application to the Union Council, not that her consent *must be taken* for the application to proceed. This means that the Arbitration Council can grant permission for subsequent marriage(s) without the consent of the existing wife or wives.<sup>26</sup> A study conducted by Pearl in Quetta revealed that of the 32 applications received by the Union Council between 1966–1986, husbands were granted permission for a subsequent marriage in all but one case.<sup>27</sup> Pearl concludes that “[m]any men risk the penalties inherent in section 6(5) (a) and (b) of the Ordinance, and marry a second wife without bothering to apply to the arbitration council for its approval.”<sup>28</sup>

## II. DEBATES AROUND POLYGAMY: TRADITIONALISTS VERSUS MODERNISTS

The literature around polygamy has either veered towards substantial restriction/outright ban<sup>29</sup> or absolute allowance.<sup>30</sup> The former, referred to as an Islamic “modernist” position, utilizes arguments around the social harms, negative economic impact, and radical interpretation of Quranic verses to argue that polygamy ought to be prohibited.<sup>31</sup> The primary Quranic verse pertaining to polygamy is Surah An-Nisa, Verse 3 (4:3) which states:

And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that

25. Ghulam Fatima v. Anwar, 1981 C.L.C. 1651, 1652.

26. See Immigration and Refugee Board of Canada, *Pakistan: Practice of polygamy, including legislation; rights of the first wife versus the second, including whether she has the right to refuse a second wife*, 2013, PAK104701.E. (“The WEWA Secretary-General indicated that the Chairman of the Union Council can still permit a husband to marry a second wife, even without the permission of his first wife.”)

27. David Pearl, *The Impact Of The Muslim Family Laws Ordinance (1961) In Quetta (Baluchistan) Pakistan*, 13(4) J. INDIAN L. INST. 561, 564 (1971).

28. *Id.*

29. When I refer to “substantial restriction”, what I really mean is basing the *validity* of polygamous marriages on an outside factor, such as consent of the first wife and/or arbitration council or requiring that the husband show enough funds to maintain more than one wife. Even though many laws all over the Muslim world do have restrictions on polygamy, they are not *substantive*, in that failure to comply with these requirements does not render the polygamous marriage invalid.

30. For modernist arguments against polygamy, see Doreen Hinchcliffe, *Polygamy in Traditional and Contemporary Islamic Law*, 1(3) ISLAM & MODERN AGE 13 (1970); ASGHARALI ENGINEER, *THE QURAN, WOMEN, AND MODERN SOCIETY* (2d ed., 2005). For a more traditionalist approach, see Maulana Thanvi's note in GAZETTE, 1956, at 1590–1601; Syed Abdul A'la Maudoodi, *The Questionnaires and its reply in Marriage Commission Report*, 20 (1959); ABDUR RAHMAN I. DOI, *WOMAN IN SHARI'AH* (2<sup>nd</sup> ed., 1989).

31. Doreen Hinchcliffe, *Polygamy in Traditional and Contemporary Islamic Law*, 1(3) ISLAM AND THE MODERN AGE 13, 63 (1970).



you will not be just, then [marry only] one or those your right hands possess [i.e., slaves]. That is more suitable that you may not incline [to injustice].<sup>32</sup>

Modernists interpret this verse together with An-Nisa, Surah 129 (4:129) which states “ye shall not be able to deal in fairness and justice between two women no matter how much ye wish” to mean that the Quran *itself* prohibits polygamy.<sup>33</sup> Since (4:3) requires that the husband treat all co-wives justly, and (4:129) asserts that justice is impossible between two wives, the latter “supersedes” the former. This is the approach taken by Tunisia, whereby polygamy is completely banned and invalid.<sup>34</sup> Asghar Ali Engineer, similarly, asserts that “the Quran never gave a general permission for anyone to marry up to four wives.”<sup>35</sup> Quoting modernist Islamic scholars like Muhammad Asad, Maulana Muhammad Ali and Maulana Umar Ahmad Usmani, Engineer argues that polygamy is permitted only with “widows and orphans produced by war-like situations.”<sup>36</sup>

Traditionalists like Abdur Rehman Doi, on the other hand, resist interpretations limiting polygamy to specific situations or its outright prohibition.<sup>37</sup> He argues that the modernists are mistaken in interpreting the “just” condition in (4:129) as a *legal* standard, rather, it is a matter of the husband’s conscience in deciding whether the co-wives can be treated justly by him.<sup>38</sup> Further, Doi asserts that (4:3) refers to *material* matters of justice; food, clothing, housing, etc., whereas (4:129) pertains to *emotional* matters of justice; love and affection.<sup>39</sup> He concludes that the “so-called modernist reformers have refused to accept the Quranic injunctions and have indirectly rejected the Sunnah of the Prophet by declaring it unworkable and have also disregarded the opinions of the pious ‘*ulama*’.”<sup>40</sup> Traditionalists consider any restrictions on polygamy as an “apology to the West” and cite polygamy as a better alternative to the prevalence of mistresses and girlfriends in the West.<sup>41</sup>

The provisions on polygamy within MFLO, as well as the Ordinance as whole, then are considered a “middle-ground” between the modernists’ stance of substantial restriction, or outright ban, of polygamy and traditionalists’

32. Al-Quran, (4:3), <https://www.al-quran.cc/4/3>.

33. *Supra* note 30; MEHDI, *supra* note 3, at 161.

34. George Sfeir, *The Tunisian Code of Personal Status*, 11 MIDDLE EAST J. 309, 310 (1957).

35. ASGHARALI ENGINEER, *THE QURAN, WOMEN, AND MODERN SOCIETY* 87 (2d ed., 2005).

36. *Id.* at 86. See also Syed Jaffer Hussain, *Legal Modernism in Islam: Polygamy and Repudiation*, 7(4) J. INDIAN L. INST. 384, 389 (1965). (“Due to holy wars many women became widows and children orphans. In order to protect them the Quran gave the permission to marry more than one wife in the interest of the widows and orphans.”)

37. DOI, *supra* note 30, at 55.

38. *Id.* at 55.

39. *Id.* at 56.

40. *Id.* at 59.

41. MEHDI, *supra* note 3, at 162.

contention that restrictions on polygamy be kept to a minimum.<sup>42</sup> The formal and substantive restrictions within section 6, then, are meant to *deter* polygamy, without substantially prohibiting its exercise. These restrictions and their (ineffective) enforcement leave wives in polygamous unions with limited remedies.

### III. UNWILLING CO-WIVES

The term “unwilling co-wives” encompasses both the existing wife and the subsequent wife. The former is either unaware of the subsequent marriage or has not consented to it, whilst the latter is ignorant of the husband’s existing marriage. In either case, these wives *unwillingly* find themselves in polygamous marriages. This Part will describe the options available to these women in the law and discuss the inadequacy thereof when it comes to the law “in action.” Law is not just the rules on paper, but as Karl Lewellyn argues, it is also what lawmen actually *do*, the *predictions* of what they will do, and finally “the ideology of the other folk about the law.”<sup>43</sup> That is, how subjects *think* and *navigate* themselves under the law; what *they do*.

#### A. Penal Sanctions

If the polygamous husband has not sought permission under section 6, unwilling co-wives can initiate criminal complaints directly in Punjab and Khyber Pakhtunkhwa or approach the Union Council for the same in Baluchistan and Sindh.<sup>44</sup> As touched upon earlier, for most women this is not a viable option.<sup>45</sup> Shakeela Tanveer from the *Rapid Response Network*, an NGO providing legal aid to women in need, describes how of the 30 polygamy cases currently being handled by the program, none of the unwilling co-wives wanted to pursue a criminal complaint against her husband.<sup>46</sup> She asserts that one of the biggest reasons cited by these women was the fear of divorce; “they would much rather stay in a polygamous marriage that they despise than risk losing status as a wife.”<sup>47</sup>

There is also considerable family pressure on these women. A field worker from *Shirkat Gah* recounted a case where the second wife—initially determined to put her husband in prison—backed off when her family threatened to abandon her. Natal family support is crucial because many women lack the mobility and

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42. See Naila Maqsood, *The Debate Over Polygamy in the Context of Muslim Family Law Ordinance 1961*, 28(4) SCI. INT. (LAHORE) 1–2 (2016); MEHDI, *supra* note 3, at 18–21.

43. K.N. Llewellyn, *Behind the Law of Divorce*, 32 COLUMBIA L. REV. 1281, 1297 (1932).

44. *Supra* note 9.

45. See Pearl, *supra* note 27, at 566. (“Indeed, only the bravest of women would have the strength and perspicacity to fight against the social stigma that would undoubtedly attach itself to her if she were to petition for a divorce.”)

46. Interview with the Author on January 17, 2021.

47. *Id.*

financial means to proceed with legal action. Kanwal from *Simorgh* reports that in her experience, women who end up filing a criminal complaint are either economically independent themselves or have their fathers/brothers backing them.<sup>48</sup> “There is also a general unwillingness to air one’s dirty laundry in court” Sha-keela argues “women do not want to lose face by declaring to the world that their husbands have betrayed them.”<sup>49</sup>

Even when wives *do* decide to go to court, lengthy proceedings, bribed judges and the hostile courtroom environment force wives to withdraw criminal proceedings.<sup>50</sup> Roshi from *Legal Aid Cell* narrates 3 such cases; “judges would just give dates upon dates. Eventually women get drained, both emotionally and financially.”<sup>51</sup> Whilst judicial attitude towards unwilling cowives has recently gotten more sympathetic, the light sentences discussed earlier also discourage women from seeking conviction, “is it worth all the hassle if in the end the man only spends a few days in prison or none at all?”<sup>52</sup>

The old rule in Baluchistan and Sindh—whereby only the Union Council can file the criminal complaint—brings its own set of problems. Nazia Hassan from *Simorgh* asserts that these administrative bodies are governed by men who often have links with the perpetrator: “these men sit together, eat together and come to the rescue when their friends need them.”<sup>53</sup> This translates into either granting permissions under section 6 despite the existing wife’s protests or refusing to file a criminal complaint altogether even though the husband has not sought permission.<sup>54</sup> In *Sher Muhammad v. The State*, the high court of Baluchistan refused to admit any complaint under section 6 filed by a private party, holding that only the Union Council had the *locus standi* to do so.<sup>55</sup>

## B. Divorce

Before 1981, existing wives could get a fault-based judicial divorce under Dissolution of Muslim Marriages Act 1939 (DMMA) from husbands contracting a subsequent marriage “in contravention of the provisions of the Muslim Family Laws Ordinance, 1961.”<sup>56</sup> This section was thereafter removed.<sup>57</sup> The courts,

48. *Supra* note 18.

49. *Supra* note 46.

50. See generally *Pakistani Judicial System Groans Under Corruption, Volume Of Cases*, WORLD (Feb. 03, 2012), <https://www.pri.org/stories/2012-02-03/pakistani-judicial-system-groans-under-corruption-volume-cases> (last visited May 1, 2021).

51. Interview with the Author on January 16, 2021.

52. *Id.*

53. Interview with the Author on January 10, 2021.

54. See Pearl, *supra* note 27.

55. *Sher Muhammad v. The State*, 1986 P.Cr.L.J. 1510.

56. Dissolution of Muslim Marriages Act, No. 8 of 1939 (Hereinafter DMMA, No. 8 of 1939) § 13, PAK. CODE (1939).

57. Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981, § 3 and Schedule 3 (1981).

in turn, started granting fault-based judicial divorce to unwilling co-wives under “cruelty” in section 2 (viii) (f) of the DMMA.<sup>58</sup> This ground is available if the husband does not treat the co-wives “equitably in accordance with the injunctions of the Quran.”<sup>59</sup> Dominant interpretation of Quranic verses limits this equitable treatment requirement to financial matters amongst the co-wives.<sup>60</sup> In *Allah Ditta v. Judge Family Court*, the Lahore High Court expanded section 2 (viii) (f) to include subsequent marriages without the existing wife’s permission, arguing that the very act of marrying a second woman without the consent of the first is inequitable, insulting and “breaks her [the first wife’s] heart.”<sup>61</sup> Since all the reported cases involve the existing wife, it is unclear whether the unknowing subsequent wife has a ground for judicial divorce under section 2 (viii) (f). It is not inconceivable that Pakistani courts would undertake an interpretation of “cruelty” that includes hiding one’s marital status.<sup>62</sup>

After the landmark cases of *Balqis Fatima* and *Khurshid Bibi*, co-wives can also approach the court for no-fault judicial divorce (*khul’*).<sup>63</sup> Pursuant to making a statement in court that the marriage has irrevocably broken down, the court will dissolve the marriage and order the wife to return her *mahr*—the amount depending on the conduct of the spouses.<sup>64</sup>

Irrespective of the form, the social and economic consequences associated with divorce means that many cowives in unwilling polygamous unions do not, in fact, seek to dissolve their marriages.<sup>65</sup> In the 30 cases handled by the Rapid

58. DMMA, No. 8 of 1939, § 2 (viii)(f), PAK. CODE (1939).

59. *Id.*

60. See PEARL & MENSKI, *supra* note 20, at 178–79. See also Al-Haafiz Ibn Hajar in *Fath al-Baari*, 9/391. (“If he has fulfilled his obligations towards each one of them in terms of clothing, maintenance and spending the night, then it does not matter if he inclines more towards one of them or gives a gift to one of them.”)

61. *Allah Ditta v. Judge, Family Court*, 1995 MLD 1852, 1853. Nadya argues that this case is one of the many instances where Pakistani courts have displaced strict application of codified rules to provides a remedy to unwilling cowives, see Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM (2000), <https://digitalcommons.law.yale.edu/yjlf/vol12/iss2/5> (last visited May 1, 2021).

62. *Id.*

63. *Balqis Fatima v. Najm-Ul-Ikram Qureshi* PLD 1959 W.P. Lahore 566; *Khurshid Bibi v. Muhammad Amin*, 1967 PLD SC 97.

64. See *Aurangzeb v. Gulnaz* PLD 2006 Karachi 563. (The High Court of Karachi held that in deciding how much, if any, of the dower must be returned in *khul’* cases, the conduct of the husband will be taken into account.)

65. See Australia: Refugee Review Tribunal, *Pakistan: 1. What evidence is there that women who are separated from their husbands are treated differently by the community at large in Pakistan? 2. Is there evidence that the police or government in Pakistan, and in Karachi in particular, provide support and/or protection to women who are victims of domestic violence and/or women who are separated from their husbands? If not, is there evidence of why this support and/or protection is not provided? 3. Is there evidence of tertiary educated women who have separated from their husbands living and working independently in Pakistan, and in Karachi in particular?*, (Sept. 27, 2011), <https://www.refworld.org/docid/50f7fc8e2> (last

Response Network, only one existing wife was pursuing a judicial divorce. Marriage is perceived to be a transfer of guardianship from the father to the husband, and the retraction of this guardianship in the event of divorce is socially stigmatized.<sup>66</sup> Since dominant gender roles ensure that most women do not enter the workforce, lack of natal family acceptance also hinders wives from seeking a divorce.<sup>67</sup> The Pakistan Commission noted in its report that many divorced women are rendered destitute as a result.<sup>68</sup> With no welfare system or parental support to fall back on, Shakeela asserts, co-wives remain in polygamous marriages as “at least they are married women with a roof over their head.”<sup>69</sup> Even when there is initial family support, it does not last for long; “First the father is responsible for these women and then their brothers. As remarriage is a bleak prospect, often male relatives change their tune during separation when the responsibility falls on them. They force these women to abandon divorce proceedings.”<sup>70</sup>

Divorce proceedings themselves are a lengthy and expensive process. Lucy Carroll notes that litigation under fault-based section 2 of DMMA could “easily take six years or more to come to a conclusion.”<sup>71</sup> Roshi from *Legal Aid Cell* expresses a similar sentiment “. . . judges in fault-based divorces have varying levels of sympathy and often give moral lectures to wives about the importance of ‘not breaking your home’.”<sup>72</sup> Divorcing wives thus often turn to *Khul’*, which does not require proof of a matrimonial offence and generally takes three months to finalize.<sup>73</sup> The downside is that wives often have to forgo or return their mahr, which is usually the only economic security they have.<sup>74</sup>

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visited May 1, 2021). (“Women who are harmed by their husbands are reluctant to pursue charges because of the stigma attached to divorce and their economic and psychological dependence on relatives.”); *Country Report – Pakistan, in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, ANNUAL REPORT FOR 2005 & RESOURCE MATERIAL SERIES NO. 69, 139 (July 2006) [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no69/10\\_P131-143.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no69/10_P131-143.pdf) (last visited May 1, 2021).*

66. See PEARL & MENSKI, *supra* note 20, at 223.

67. See generally Tazeen Ali et al., *Gender Roles And Their Influence On Life Prospects For Women In Urban Karachi, Pakistan: A Qualitative Study*, 4 GLOBAL HEALTH ACTION 7448 (2011).

68. Pakistan Commission, Report on Marriage and Family Law, GAZETTE, at 1199 (1956).

69. *Supra* note 45.

70. *Id.*

71. Lucy Carroll, *Qur’an 2 229 “A Charter Granted to the Wife”? Judicial Khul’ in Pakistan*, 3(1) ISLAMIC L. & SOC’Y 91, 95 (1996).

72. *Supra* note 51.

73. Carroll, *supra* note 71, at 96.

74. *Id.* at 124. (“Particularly given that there is no concept of matrimonial property and no provision for alimony for a divorced woman, the woman’s *mahr* is very important and she should not lightly be deprived of it.”)

### C. *Mahr*

Mahr is an obligatory gift (with a monetary value) made by the husband to the wife at the time of marriage. Although earlier jurists considered mahr a consideration for the marriage contract, Pearl and Menski assert that it is an *effect* of marriage that signifies the new legal, social and sexual status of the wife.<sup>75</sup> Parties can either set a specific amount (mahr-ul-musamma or specified dower) or leave it to the operation of the law (proper dower), the amount of which is fixed by the court based upon the wife's physical characteristics and status.<sup>76</sup> Even if parties decide that no dower is payable in the marriage contract, proper dower is implied into the contract. The minimum amount for both specified and proper dower varies between the schools of Islamic jurisprudence. The Hanfi school—which majority of Pakistanis subscribe to—has set the minimum to the value of 31 grams of silver, which is roughly \$28 US Dollars or 4460 Pakistani Rupees.<sup>77</sup> There are no upper limits, though the Shia schools set the maximum at 1750 grams of silver, the dower set for Prophet Muhammad's daughter Fatima. Mahr payment can be prompt and/or deferred. The former is paid at the time of marriage, whilst the latter is given at the happening of a certain event (usually death of the husband or divorce).<sup>78</sup> If the spouses do not specify the mode of payment in the marriage contract, section 10 of MFLO asserts that “the entire amount of the dower shall be presumed to be payable on demand.”<sup>79</sup>

As previously mentioned, section 6 (5) (a) of MLFO states that if the husband fails to take permission from the Arbitration Council, he has to “pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives.”<sup>80</sup> Whilst this provision seems beneficial on paper, in reality it is far from adequate for cowives in unwilling polygamous marriages.<sup>81</sup> Shakeela from the *Rapid Response Network* notes that the mahr amounts set between spouses, especially from lower income groups, are so negligible that they neither deter the husbands from contracting subsequent marriages nor offer any financial protection to unwilling cowives; “The fees paid to lawyers in lengthy court proceedings to recover mahr is often times more than the mahr itself.”<sup>82</sup> Kanwal argues that there is a cultural unwillingness to specify high mahr amounts by the wife's family

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75. PEARL & MENSKI, *supra* note 20, at 178–79. For a discussion about the legal nature of mahr, see Mona Siddique, *Mahr: Legal Obligation or Rightful Demand?* 6(1) J. ISLAMIC STUDIES 14 (1995), <http://www.jstor.org/stable/26195542> (last visited May 1, 2021).

76. *Id.* at 179.

77. *Id.* at 179.

78. *Id.* at 180.

79. MFLO, No. 8 of 1961 § 10, GAZETTE, 1961.

80. MFLO, No. 8 of 1961 § 6 (5)(a), GAZETTE, 1961.

81. PEARL & MENSKI, *supra* note 20, at 261. (“In practice, though, even such beneficial provisions will probably not help the majority of affected women because recourse to legal remedies remains limited.”)

82. *Supra* note 46.

(usually wives themselves have no say), and it's considered shameful and being "greedy" by the husband and his family. The objective is to start the marriage off on the right foot.<sup>83</sup> The most common amount is based on the sunnah of Prophet Muhammad, which roughly amounts to 20,000 Pakistani Rupees or \$126 US Dollars. To put things in perspective, the median salary in Pakistan is 18,754 Pakistani rupees per month.<sup>84</sup> Since the section only mentions "existing wife or wives", this remedy is also not available to the subsequent unaware wife.<sup>85</sup> All in all, for the unwilling co-wives in Pakistan, the right to receive mahr on demand is more symbolic than practical.

#### IV. BACKGROUND RULES AFFECTING THE LAW ON POLYGAMY

The analysis above has already hinted the implication of other rules in the way polygamy law is practiced in Pakistan. These include *both* legal and cultural rules of behavior driving the bargain amongst the parties to enter (or leave) polygamous marriages. Hale propounded this analytic in his classic article titled *Coercion and Distribution in a Supposedly Noncoercive State*.<sup>86</sup> He argued that it is not freedom of contract guiding the bargain between the employer and employee rather it is the "little" rules of property that coerce *both* the parties to enter into a contract of employment.<sup>87</sup> The foregoing Part will utilize Hale's modelling to expound upon the "background rules" guiding the exercise of polygamy in Pakistan. Identifying these rules and their detailed implementation (the "is") will allow us to imagine which of these rules *ought* to be changed in order to redress the harm caused to unwilling cowives.

##### A. Legal Rules

###### 1. Rules of Maintenance and Obedience

As marriage in Islamic law is a civil contract,<sup>88</sup> each spouse has rights and corresponding duties towards the other within the union.<sup>89</sup> The husband, having authority (*qiwama*) over the wife, has an obligation to provide for her monetary

83. *Supra* note 18.

84. Pakistan Bureau of Statistics, *Bulletin of Statistics* (2018), <https://www.ceicdata.com/en/pakistan/average-monthly-wages-by-industry/average-monthly-wages> (last visited May 1, 2021).

85. MFLO, No. 8 of 1961 § 6 (5)(a), GAZETTE, 1961.

86. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

87. *Id.* at 479.

88. See Kecia Ali, *Marriage Contracts in Islamic Jurisprudence*, FEMINIST SEXUAL ETHICS PROJECT (June 19, 2003), <https://www.brandeis.edu/projects/fse/muslim/marriage.html> (<https://perma.cc/TEL8-ZN3M>).

89. PEARL & MENSKI, *supra* note 20, at 176.

welfare i.e., maintenance (*nafaqa*).<sup>90</sup> This includes food, clothing and lodging.<sup>91</sup> The wife has a reciprocal duty to obey (*ta'a*) the husband.<sup>92</sup> Abdur Rahman I. Doi remarks that this arrangement reflects the need for a figurehead in marriage to maintain peace and harmony.<sup>93</sup> The extent of the wife's obedience towards the husband, however, is contested amongst jurists.<sup>94</sup> The majority argue that obedience extends to both social and sexual matters, in that the wife must not leave the matrimonial home without the husband's permission and must fulfil every (Islamically legitimate) demand of the husband.<sup>95</sup> The minority, such as Asghar Ali Engineer, require obedience only in sexual matters.<sup>96</sup> The suit for restitution of conjugal rights, a remedy available in India, Pakistan, and Bangladesh, allows the husband to enforce his legal right of obedience through the courts.<sup>97</sup> In *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, the court likened the remedy to specific performance, highlighting the 'proprietary interest' of the husband in the wife.<sup>98</sup> Although the court cannot physically compel the wife to return to her husband, once a decree of restitution has been issued, the husband no longer has a legal duty to maintain his *nashiza* (disobedient) wife.<sup>99</sup>

Section 9 of the Muslim Family Law Ordinance 1961 imposes a legal duty on the husband to maintain his wife and children, and in the case of co-wives to maintain them "equitably."<sup>100</sup> The jurisprudence is divided as to whether it ought to be *equal* maintenance, or enough to support the needs of each wife independently of one another.<sup>101</sup> All schools agree, however, that each co-wife

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90. GENDER AND EQUALITY IN MUSLIM FAMILY LAW: JUSTICE AND ETHICS IN THE ISLAMIC LEGAL TRADITION 10 (Ziba Mir-Hosseini et al. eds., 2013).

91. PEARL & MENSKI, *supra* note 20, at 182.

92. *Id.*

93. DOI, *supra* note 30, at 216–17.

94. See Carolyn Fluehr-Lobban & Lois Bardsley-Sirois, *Obedience (Ta'a) in Muslim Marriage: Religious Interpretation and Applied Law in Egypt*, 21 J. COMP. FAM. STUD. 39, 40 (1990).

95. PEARL & MENSKI, *supra* note 20, at 202. ("South Asian writers seem less fixed on the terminology of disobedience and emphasize the combination of sexual contact and submission to the husband's authority, with a stress on reasonableness.")

96. See ASGHARALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 6–7 (2008).

97. See Shahbaz Ahmad Cheema, *Revisiting Abdul Kadir v Salima: Locus Classicus on Civil Nature of Marriage?*, 49 AL-ADWA 63, 63 (2018).

98. See *Moonshee Buzloor Runeem v. Shumsoonissa Begum*, (1867) 11 M.I. A. 551.

99. See *Resham Bibi v. Muhammad Shadi*, P.L.D. 1967 A.J.K 32, 37. ("Under Muhammedan Law there is no obligatory duty cast upon the husband to maintain the wife when she refuses to live with him . . . without reasonable cause.")

100. MFLO, No. 8 of 1961 § 9(1), GAZETTE, 1961. ("Maintenance. (1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.")

101. Doi, *supra* note 30, at 149. Hanfi scholars propound that the quantum of maintenance



has the right to a separate residence.<sup>102</sup> Thus, if the unwilling co-wife leaves the joint marital home and files a suit for maintenance, she will not be classified as *nashiza*, and the husband will be obliged to pay her maintenance, in addition to arranging a separate home for her.<sup>103</sup> Whilst this can deter some husbands from entering a polygamous union, Pearl and Menski note how “almost all writers indicate the practical obstacles faced by Muslim women seeking to enforce their legal rights to maintenance”<sup>104</sup> and that in such cases, husbands can easily avoid their maintenance obligations by divorcing their wives.<sup>105</sup>

## 2. Rules of Divorce

If rules provide unequal distributions during and after divorce, then the disadvantaged party will be dissuaded from divorce, even if they do not want to be within a polygamous union.<sup>106</sup> The rules of divorce, thus, work in the background for spouses as they navigate themselves in an unwilling polygamous union.<sup>107</sup> Before 1939, the only way Muslim wives could divorce their husbands was if there was a physical defect or desertion.<sup>108</sup> These “fault-based” grounds were expanded in the Dissolution of Muslim Marriages Act of 1939 to include cruelty, non-payment of maintenance, imprisonment of the husband, and other fault grounds.<sup>109</sup> Thereafter in 1967, wives got the right to “no-fault” divorce, subject to returning a portion or all of mahr.<sup>110</sup> It is argued that the lack of lack of alimony or equitable property division within the rules of divorce dissuade wives from exiting a polygamous marriage. In the background, these rules strengthen the bargaining power of the husband to engage in non-consensual polygamy, being aware of the disadvantaged position of the unwilling wife or wives.

### a. Alimony

Under Pakistani law, ex-wives do not receive financial support from the husband beyond the three months of *iddat*.<sup>111</sup> This means that after divorce, ex-wives either have to seek employment or return to their natal families for support.<sup>112</sup> As the median age for marriage in Pakistan is 18.6 years old for girls,

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ought to be determined by accounting for the financial position of both spouses. See PEARL & MENSKI, *supra* note 20, at 202.

102. Hinchcliffe, *supra* note 19, at 14–15.

103. Zulaikhan v. Noor Muhammad, P.L.D. 1986 Quetta 290.

104. PEARL & MENSKI, *supra* note 20, at 205.

105. *Id.*

106. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88(5) YALE L.J., 950 (1979).

107. *Id.* at 953.

108. PEARL & MENSKI, *supra* note 20, at 280.

109. DMMA, No. 8 of 1939, § 2, Pak. Code (1939).

110. Allah Ditta v. Judge, Family Court, 1995 MLD 1852, 1853.

111. See PEARL & MENSKI, *supra* note 20, at 223.

112. *Id.*

most wives do not complete their education or enter the job market.<sup>113</sup> Pakistan also does not have a robust private welfare system to sustain divorced wives.<sup>114</sup> For the vast majority of divorced women, then, the onus of support exclusively falls on the natal families. This could explain why, as discussed earlier, most natal families do not want their female relatives to get divorced. Consequently, the cowife in an unwilling polygamous marriage has a weak bargaining power. The husband knows that his wife has limited options to sustain herself in the event of divorce, which emboldens him to risk conflict by contracting a subsequent marriage without her consent and/or knowledge. He becomes *risk tolerant*, whilst the wife becomes *risk averse*; she cannot risk conflict because of her weak bargaining position within marriage due to alimony rules.

### b. Property Division

Wealth and property accumulated during marriage are divided according to title upon divorce.<sup>115</sup> Under the Dowry and Bridal Gifts (Restriction) Act, 1976, any bridal gifts given before, at or after marriage are the absolute property of the wife and cannot be claimed by the husband after divorce.<sup>116</sup> Section 21-A of Family Courts Act 1964 also empowers the wife to file a suit for the recovery of her personal property, which the courts have interpreted broadly to include both the property acquired through her own resources or from that of her husband's.<sup>117</sup> There have been instances under the law of Benami where ex-husbands have been able to establish beneficial ownership through a resulting trust over property transferred to their ex-wives.<sup>118</sup>

Beyond this, there is no concept of “marital property” subject to an equitable division, so that the wife gets no share in the money or property amassed by the husband.<sup>119</sup> Wives can spend their entire lives taking care of the household and children, spending their own money for the same, making their husband the “ideal worker”<sup>120</sup> and in the end get effectively nothing. This has important implications because of the dismal economic status of women in Pakistan. As

113. Zeba Sathar & Tauseef Ahmed, *Proximate Determinants Of Fertility*, DEMOGRAPHIC & HEALTH SURV. 88 (1992), [https://pdf.usaid.gov/pdf\\_docs/PNABL688.pdf#page=111](https://pdf.usaid.gov/pdf_docs/PNABL688.pdf#page=111) (last visited May 1, 2021).

114. Yu Shuhong & Malik Zia Ud Din, *Social Protection Schemes In Pakistan: Assessment Of Existing Programs*, 3(2) ACAD. J. BUS., ADMIN., L. & SOC. SCI. 216 (2017).

115. FAUZIA VIQAR, RAH CTR. FOR MANAGEMENT AND DEV., THEMATIC REPORT ON THE ISSUE OF FINANCIAL PROTECTION UPON DIVORCE: MUSLIM WOMEN'S RIGHTS UNDER FAMILY LAWS IN PAKISTAN 2 (2020), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT\\_CEDAW\\_CSS\\_PAK\\_40942\\_E.docx](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT_CEDAW_CSS_PAK_40942_E.docx) (last visited May 1, 2020).

116. The Dowry and Bridal Gifts (Restriction) Act, 1976 (Pak.).

117. Muhammad Arif v Saima Noreen 2015 SCMR 804.

118. Mst. Nasira Ansari v. Mst. Tahira Begum, 2007 CLC-KHC 92.

119. VIQAR, *supra* note 115.

120. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

the Pakistan CEDAW reports, only 6 percent women had accounts in formal banking institutions, only 13 percent had access to credit and only 3 percent own any land.<sup>121</sup> Traditional gender roles ensure that the vast majority of wives take on domestic care work as their primary obligation. Whilst this domestic work is “remunerated” through maintenance *during* marriage, it is completely unrecognized *after* divorce. Like alimony rules, the lack of a matrimonial property division regime reduces the bargaining power wives have within marriage and makes them risk averse.

### 3. Rules of Zina

The Zina Ordinance prohibits all sexual intercourse outside of marriage. Punishment ranges from imprisonment to stoning to death, depending on the marital status of the culprits and the standard of evidence available.<sup>122</sup> The ordinance has been historically used disproportionately against wives by husbands in the reported cases, which has an overall impact on the bargaining power amongst the spouses.<sup>123</sup> Even if the allegation prove to be false, the humiliation caused by the accusation, together with lengthy court proceedings means that wives “spent many years in jail, were ostracized by their families, and had become social outcasts.”<sup>124</sup> Beyond this, the criminalization of extramarital intercourse serves as an important *justification* for polygamy. A family lawyer from Legal Aid Cell asserts that husbands often put forward the moral and legal implications of zina to make a case for polygamy in their application seeking permission from the Union Council. Rules of Zina thus function as an important background rule in the exercise of polygamy. They provide husbands the moral *and* legal legitimacy to exercise polygamy as an alternative to illicit sexual intercourse. The corollary is that the harm caused to unwilling cowives loses moral and legal force, because the “evil” of nonconsensual polygamy is still regarded as better than the “evil” of illicit sexual intercourse.

### 4. Rules of Legitimacy

In *Sher Afzal v. Shamim Firdaus*, the Pakistani Supreme Court dismissed a plea of adoption, arguing that “it is well-known that there is no institution of adoption in Islamic Law.”<sup>125</sup> Rules of legitimacy in Pakistan warrant that the child follows the marriage bed, that is, that the child be born “in lawful

121. See NAIMA TABASSUM, *WOMEN IN PAKISTAN* (2016).

122. The Offence of Zina (Enforcement Of Hudoob) Ordinance, No. 7 of 1979, §§ 4–5 GAZETTE, Feb. 9, 1979 (hereinafter Zina Ordinance).

123. Asifa Quaraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT’L L. 287 (1997).

124. *Id.* at 291.

125. *Sher Afzal v Shamim Firdaus*, P.L.D 1980 S.C. 228. See also Muhammad Allahdad Khan v. Muhammad Ismail Khan, I.L.R. (1888) 10 ai. 289, at 340.

wedlock.<sup>126</sup> Only then can legal rights of legitimate offspring flow to the child, such as paternity and inheritance, and the only way for husbands to try for sons when their wives are bearing daughters. (The rules of inheritance, as we will see below, give families, fathers, and mothers an incentive to prefer sons to daughters and to seek to produce at least one son.) As adopted children cannot inherit the family name or property, husbands and in-laws' bargaining power against the existing wife is strengthened by the availability of polygamy.

### 5. Rules of Inheritance

Based on traditional Islamic law, the inheritance rules in Pakistan endow sons twice the inheritance owed to daughters.<sup>127</sup> The justification offered is the traditional role of men as the breadwinners of the family and women as homemakers. The former gets a larger share of inheritance owing to their financial responsibility towards the family. Daughters, on the other hand, are not expected to economically support their families, and their share of inheritance is solely their own. This creates an unequal bargaining position for spouses in cases where families of the spouses are similarly financially situated. If the wife inherits less wealth overall from her natal family, she is consequently *more* economically dependent on her husband. Like the rules on alimony and divorce, these inheritance rules function in the background to make the wife a risk averse actor within marriage. Less wealth overall means less economic security in the event of divorce, thereby making divorce or the *risk* of divorce an unattractive option.

Additionally, a husband inherits half of the wife's estate if there is no issue and a quarter if there are children, whilst the wife inherits a quarter if there are no children and one-eighth otherwise.<sup>128</sup> If there are co-wives, the one-eighth share is divided equally amongst the co-wives. So, if there are 2 cowives, each will get a one-sixteenth share. These rules make polygamy for the husband relatively costless, for his inheritance does not reduce in the event of polygamy, whilst simultaneously weakening the wives' financial position within marriage.

## B. Cultural Rules

### 1. Taboo of Divorce

In a patriarchal society like Pakistan, gender roles place the responsibility to keep the marriage and the family from breaking apart squarely on women's shoulders.<sup>129</sup> As the caretakers of the home, women in Pakistani society are

126. Hamida Begun v. Murad Begum, P.L.D 1975 S.C. 624, at 651–652.

127. NASIR AFGHAN & TAYYABA WIQAR, SUCCESSION IN FAMILY BUSINESSES OF PAKISTAN: KINSHIP CULTURE AND ISLAMIC INHERITANCE LAW 9 (CMER, Working Paper No. 07–54, April 2007). (“The male (son) gets twice the share of the female (daughter).”)

128. *Id.* at 9–10.

129. See Tazeen Ali et al., *Gender Roles And Their Influence On Life Prospects For Women In Urban Karachi, Pakistan: A Qualitative Study*, 4 GLOBAL HEALTH ACTION 7448 (2011).

taught to believe that “marriage is the ultimate destination for a successful woman”<sup>130</sup> and expected to compromise in order to maintain harmony within the family.<sup>131</sup> Women who seek divorce face social stigma because they break the gender roles and expectations assigned to them, thereby risking “harm from their own family members for bringing dishonour to the family.”<sup>132</sup> This means that even financially independent women who do not need alimony or property division to sustain themselves tend not to seek divorce, as being a divorcee in Pakistan is “tantamount to being a social pariah.”<sup>133</sup> Women also tend to stay in abusive marriages to protect their children from becoming social outcasts.<sup>134</sup> Under this background, Husbands have immense power to harm their wives, physically or emotionally.<sup>135</sup>

## 2. Chadar aur Chaar Diwari

Women and girls in Pakistan are relegated to the domain of *chadar aur chaar diwari* (veil and four walls).<sup>136</sup> “Good women” are expected to stay in the home, not intermingle with the opposite sex and rear children.<sup>137</sup> These constructions of gender hinder women from getting education, gaining employment and becoming financially independent.<sup>138</sup> Many women in Pakistan, therefore, are stuck in a cycle of dependency, first in their natal family and then in their husband’s family.<sup>139</sup> This also means that many women lack the confidence to

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130. Qudsia Tariq, *Reasons for Pakistani Women to Stay/Leave an Abusive Relation*, 4(6) MEDITERRANEAN J. SOC. SCI. 715, 724 (2013).

131. Saima Hamid, Eva Johansson & Birgitta Rubenson, *Who am I? Where am I? ” Experiences of married young women in a slum in Islamabad, Pakistan*, 9 BMC PUB. HEALTH 265 (2009).

132. See Australia: Refugee Review Tribunal, *Pakistan: 1. What evidence is there that women who are separated from their husbands are treated differently by the community at large in Pakistan? 2. Is there evidence that the police or government in Pakistan, and in Karachi in particular, provide support and/or protection to women who are victims of domestic violence and/or women who are separated from their husbands? If not, is there evidence of why this support and/or protection is not provided? 3. Is there evidence of tertiary educated women who have separated from their husbands living and working independently in Pakistan, and in Karachi in particular?*, (Sept. 27, 2011), <https://www.refworld.org/docid/50f7fc8e2>.

133. *Id.*

134. See Tariq, *supra* note 130, at 726. (“According to most of the abused women their major concern was the life security of their children.”)

135. *Id.*

136. Mohammad Jalal-ud-Din & Munir Khan, *Socio-Economic And Cultural Constraints Of Women In Pakistan With Special Reference To Mardan District, NWFP Province*, 24(3) SARHAD J. AGRIC. 485, 486 (2008). (“v. In Pakistan the Muslim custom of Purdah also inhibits the employment of women. v. Women are still largely responsible for domestic work and child rearing. They are not as free as men to enter the labour market. vi. Majority of women prefer to stay at home and look after their children.”)

137. Rafia Faiz, *‘Ideal Worker’ Versus ‘Good Woman’: Voices from Pakistan*, 7TH EQUALITY DIVERSITY AND INCLUSION CONFERENCE, Munich, Germany 3–5 (2014).

138. Jalal-ud-Din & Khan, *supra* note 136, at 488.

139. See Tariq, *supra* note 130, at 727. (“Most of the women were financially dependent

stand up for themselves and make independent decisions, as since childhood “she has been completely dependent on her family, not only for the fulfillment of her basic needs but even for decisions like whether she should get education or not, which career should she select, who is the right person for her to marry etc.”<sup>140</sup> It makes addressing the harm caused by non-consensual polygamy and seeking justice difficult especially if, as discussed earlier, natal family support is lacking—which it usually is.<sup>141</sup>

### 3. Marital Fidelity and Izzat

In an Islamic marriage, “conjugal fidelity is a moral duty of both spouses.”<sup>142</sup> Culturally, however, this duty falls disproportionately on the women. Verma argues that:

A wife is bound to observe strict conjugal fidelity from the time of marriage contract even though the dower has not been paid. She must refrain from improper familiarity with strangers and from any unnecessary appearances in the public.<sup>143</sup>

Men do not face a similar cultural pressure of marital fidelity because notions of family *izzat* (honor) do not apply to them.<sup>144</sup> Indeed, wives are by far more willing to forgive their husband for infidelity than vice versa.<sup>145</sup> This cultural norm not only empowers men with the opportunity to seek potential partners for subsequent marriages, but also works in the background to make nonconsensual polygamy more socially acceptable in Pakistani society.

## V. A DISTRIBUTIONAL ANALYSIS

It is easy to conclude from the foregoing Parts that the condition of co-wives under Pakistani polygamy law is abhorrent. Indeed, much of the existing literature, as previously discussed, casts the subject of polygamy as black and white.<sup>146</sup> But reaching such normative conclusions without fully identifying the players, the stakes involved and the distributions currently in place leaves out a

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on their spouses. Since male chauvinist society prevails in Pakistan. It was difficult for most of the women to get a job and live a self-sufficient life.”)

140. *Id.* at 725.

141. *Supra* note 18.

142. BABU RAM VERMA & YUDHISHTHIRA, *MUSLIM MARRIAGE, DISSOLUTION, AND MAINTENANCE* 88 (2nd ed., 1988).

143. *Id.*

144. See Masood Shaikh et al., *Attitudes about honour killing among men and women - Perspective from Islamabad*, 22(3) J. AYUB MEDICAL C. 38, (2010).

145. Anum Urooj et al., *Perception of Emotional and Sexual Infidelity among Married Men and Women*, 30(2) PAKISTAN J. PSYCHOL. RES. 421, 431 (2015). (“Women have a higher intention to resolve the issue of their partner’s infidelity because of the feelings of helplessness associated with partners’ infidelity. Women are mostly dependent on men, both emotionally and economically, due to which they find it difficult to get out of the relationship. Moreover, women perceive separation or divorce as stigma.”)

146. See MEHDI, *supra* note 3, at 161.

whole lot of gray. This Part will produce a legal realist “distributional analysis” of the polygamy law in Pakistan and discuss polygamy’s nature as *both* a security and a threat for the co-wives, the children, the husband *and* the families of the spouses. Each of these “players” is in a struggle for the surpluses generated by polygamy law—there are real stakes involved. The objective is to identify “the price each of them pays to be part of the struggle, and the gains they hope to capture by staying in it.”<sup>147</sup> In doing so, I will be creating certain “ideal-types” of these players,<sup>148</sup> each with their own motivations and goals for engaging or disengaging with polygamy, taken from my own experiences at *Simorgh* and the many enlightening conversations I have had with different family lawyers, field-workers and researchers at *Shirkat Gah*, *Rapid Response Network* and *Legal Aid Cell*. These ideal types are meant to be *illustrative*, not exhaustive.<sup>149</sup> It is possible to conceive that motivations and stakes of real-life players *cut-across* several of these ideal-types.<sup>150</sup> My language of polygamy as a “security” or “threat” is meant to signify the corresponding *effect* of polygamy on the parties, which in turn, motivates them to act or not act in a particular ways.

#### A. *The Co-Wives*

Is polygamy always a cost to wives in Pakistan? The table below provides a summary of the various benefits and costs associated with entering a polygamous union under Pakistani Law. Each of these securities and threats will be brought to “life” through the stories of *Rashida*, *Samia*, *Rubina* and others.<sup>151</sup> The objective is to conceive cowives in Pakistani marriages, not as helpless subjects who are simply acted upon, but as *players* seeking to maximize their interests within the legal framework.

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147. Janet Halley, *CONCLUSION. Distribution and Decision Assessing Governance Feminism*, in *GOVERNANCE FEMINISM: AN INTRODUCTION* (Janey Halley, Prabha Kotiswaran et al eds., 2018).

148. MAX WEBER, EDWARD SHILS, AND HENRY A. FINCH, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (1<sup>st</sup> ed., 1949).

149. See Britannica, The Editors of Encyclopedia. “Ideal type”. Encyclopedia Britannica, 10 Oct. 2018, <https://www.britannica.com/topic/ideal-type> (last visited May 1, 2021). (“Ideal type, a common mental construct in the social sciences derived from observable reality although not conforming to it in detail because of deliberate simplification and exaggeration. It is not ideal in the sense that it is excellent, nor is it an average; it is, rather, a constructed ideal used to approximate reality by selecting and accentuating certain elements.”)

150. *Id.* (“Problems in using the ideal type include its tendency to focus attention on extreme, or polar, phenomena while overlooking the connections between them, and the difficulty of showing how the types and their elements fit into a conception of a total social system.”)

151. This approach is inspired by Pascale Fournier’s *Leilas* and *Samirs* in her distributive analysis of *mahr* as a bonus or penalty in Western Courts. Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24(1) INT’L J.L., POL’Y & FAM. 67 (2010).

	<i>Existing Wife</i>	<i>Subsequent Wife</i>
<i>Security</i>	Retain married status if infertile and/or disabled; reduction in marital obligations (e.g., sex or housework).	Maintenance; male guardianship; legal sex and companionship, especially if past the so-called "marriageable age".
<i>Threat</i>	Competition for resources; reduced share of inheritance for oneself and progeny; jealousy and emotional harm.	

1. Polygamy as Security

a. *The Infertile Existing Wife; Rashida*<sup>152</sup>

Rashida has polycystic ovary syndrome (PCOS) that prevents her from having children of her own. Her husband is a generally kind and responsible, he pays the bills, gets her the medication she needs and even occasionally makes her tea when she’s tired. She would not call it true love, but what is love *anyway*? As long as there’s mutual respect and they are there for each other in times of need, that’s all that matters. There is one burning contention, however, that comes up during conversations from time to time. Rashida’s husband really wants to have children; “What’s the point of working so hard when you have no one to pass it on to, you know? Who will take care of us when we are old, not like we have care homes here?” Whenever news comes of a newborn from friends or family, Rashida can see the resentment on her husband’s face. None of the fertility treatments have worked and she feels guilty for getting in the way of her husband’s happiness. She knows that adoption is not an option; the child would not carry the family name because that is forbidden in Islam. Divorce is also inconceivable; where will she go? She has not worked a day in her life and her father and brothers have their own families to take care of. Plus, her husband has been good to her, and she does not want to leave him. Rashida decides that the best option is to allow her husband to marry another woman. It’s religiously allowed, she will maintain her married status and her husband will get the children he so desires. There is an apprehension of jealousy and splitting of maintenance/inheritance, but Rashida believes the benefits outweigh the costs. She accompanies her husband to the Union Council to file a request for permission of a subsequent marriage. Everything goes smoothly thereafter in the Arbitration Council and the permission is granted.

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152. Based partly on a case relayed to me by fieldworkers at Simorgh. See also H. V. Muhsam, *Fertility of Polygamous Marriages*, 10(1) POPULATION STUD. 3, 12 (1956). (“The failure of a wife to produce offspring, after a reasonable lapse of time, might be considered another incentive to take additional wives.”)



b. *The Opportunist Existing Wife; Samia*<sup>153</sup>

Samia got married at the age of sixteen to a man twenty years her senior. She never completed high school and had her first child a few days after her eighteenth birthday. Her husband is a traditional conservative man with very particular views about how women should “behave.” He does not allow Samia to go out, get further education or speak to anyone outside the home, wherein she resides with her in-laws. Samia despises her mother-in-law. When she was pregnant, her mother-in-law still made her do all the housework, washing the dishes, cooking for the whole family, cleaning the home and doing everyone’s laundry. Seven years and four pregnancies later, nothing has changed. There are no feelings for her husband, only bitterness. She is lonely and utterly exhausted. When her husband asked her if he could marry another woman from the neighborhood, she was filled with anger; *all the work I did for him and this is how he repaid me?* but then she thought that she could use the second marriage to her advantage. They entered an agreement wherein her husband would have to pay half his salary towards her and her children’s maintenance, half his pension and his entire agricultural property in the event that relations between Samia and the subsequent wife became strained. In return, Samia gave consent to the second marriage.

Initially after the marriage, the housework was divided, and the co-wives bonded over their resentment for the mother-in-law. Samia was shocked to realize that she found somewhat of a *friend*, someone who knew and empathized with what she had been going through.<sup>154</sup> Samia’s husband also stopped consistently demanding sex from her—sex that she found absolutely dreadful. After a few years however, the cowives’ relationship started to get strained. Samia felt competitive and got worried about her husband’s children with the second wife; their presence decreased her status in the family and meant less inheritance for her own children. She asked her husband to fulfill their prior agreement and transfer the agricultural property in her name, along with half of his monthly salary. When her husband refused, she approached the court, who then enforced the agreement and ordered the husband to fulfill his contractual obligations.

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153. Based on the facts of the case *Awal Zaman v. Nasreen Bibi* YLR 2015 Peshawar 1770.

154. See generally Dominique Meekers & Nadra Franklin, *Women’s Perceptions of Polygyny among the Kaguru of Tanzania*, 34(4) ETHNOLOGY 315, 315 (1995). (“In a study of women’s attitudes toward polygyny among the Yoruba, Ware (1979) found that a majority of the women surveyed (60 per cent) indicated they would be pleased to be in a polygynous relationship because they could then share the burdens of work and also have another woman with whom they could gossip and play.”)

c. *The Divorced Subsequent Wife: Amna*<sup>155</sup>

Amna is in her late twenties with two children from her previous marriage. After her divorce, Amna returned to her parents' home with her children, which is also the home of her three brothers and their families. She began working as a high school teacher in the local government school to be able to take care of her children, but her salary does not even fully pay for her own expenses. She gets taunts from her relatives about being a divorcee, and she understands that her parents and brothers are getting more and more irritated the longer she stays. Her ex-husband has cut all communication and does not pay any child support.

Amna tells her colleague at work that she is looking to remarry as she does not want to be a burden on her family anymore, but she knows remarriage is a lost cause due to the stigma associated with divorced women with kids. A few weeks later, to her surprise, her colleague informs her about a potential suitor; mid-forties, good job, lives in a good neighborhood and is willing to accept children from a previous marriage. The catch: He already has a wife. He says his existing wife "knows and does not care as long as the subsequent wife lives in a separate residence" but Amna wonders *does she really know?* Is it even her business to find out?

This marriage will be good for Amna. It is perhaps her only chance to have a home, a companion, a protector and maintainer, for herself and her children. There's the risk that she may lose custody of her children to her ex-husband after remarriage, but she is fairly certain her ex-husband does not care to pursue any court proceedings. She agrees to the marriage. Her future husband says he does not want to get into the hassle of getting a permission from the Union Council, and Amna does not protest.

d. *The In-Love Subsequent Wife: Khalida*<sup>156</sup>

Twenty-six years old and a chartered accountant in a multinational company, Khalida is having an affair with her married boss, Taha. What started out as a fun time is slowly turning more and more serious for both. Khalida feels that there is a real connection here, beyond the weekend dinners and occasional "work" trips. She wants to take things forward with Taha, but he has made it clear to her that he cannot divorce his wife, even if he wants to. Taha's wife is the daughter of the company's majority shareholder; to divorce her would be shooting himself in the foot. He will not only lose his job, but her wife's influential father will make sure that Taha never finds a similar job in any Pakistani firm.<sup>157</sup> "I understand,

155. Based on the facts of Ghulam Fatima v. Anwar, 1981 C.L.C. 1651.

156. Based partly on the facts of Muhammad Islam v. The State, (1967) P.L.D. 201 Pesh.

157. See generally Charles Lindholm, *Polygyny In Islamic Law And Pukhtun Practice*, 47(2) ETHNOLOGY 181 (2008), [www.jstor.org/stable/25651559](http://www.jstor.org/stable/25651559) (last visited May 1, 2021). Lindholm's anthropological study of polygamy in Swat (Northern Pakistan) reveals how first wives from prestigious tribes use both natal and in-law's family support to oust the polygamous husband. ("The first wife refused to allow the new girl into her home and

but I don't want our relationship to be *haram*", Khalida contends. It is sinful to have sexual relations outside of marriage, and Khalida wants to make their relationship morally and legally legitimate. She researches online and finds posts in Muslim dating forums describing similar situations as hers; women secretly becoming subsequent wives of already-married men they were in love with. She sends the website link to Taha and asks if this is something he would be willing to do. Upon consulting a lawyer on the matter, they are both surprised to learn that a secret second marriage is valid under Pakistani law. They decide to not ask for any permission from the Union Council and get married in an informal intimate ceremony with two of their closest male friends as witnesses.

## 2. Polygamy as a Threat

### a. *The Betrayed Existing Wife: Rubina*<sup>158</sup>

Married for nearly 27 years, she is a dutiful homemaker with four children. Her husband runs a car showroom business and pays for the expenses of the entire family. Rubina never completed her secondary education, as her parents emphasized that girls should guard their modesty, avoid unnecessary travel and learn domestic chores for their married life. Since her marriage, she has taken care of her husband and children's needs. Cooking food, washing clothes, mopping the floor, changing nappies—Rubina's cracked hands bespeak decades of household labor. Sure, it is exhausting, but this work is done with the expectation that her husband and children will be there when she needs them, whether financially or emotionally. There isn't much romance, but Rubina is fiercely loyal to her husband. There were times when she would get upset by her husband's explicit messages to other women, but by now she has become used to them; *so what if he goes out and sees other women? I'm the wife, he will always come home to me!*

It comes as a shock to Rubina when she reads old messages talking about a "marriage date" from her husband to another woman. *Marriage date? Whose marriage?* Rubina decides to confront her husband, who ultimately confesses that he fell in love and married that woman a month ago. Rubina feels utterly devastated and betrayed, not because he fell in love with another woman, but because he *married* her. Now the new wife has the *same status* as Rubina and the same moral and legal right over her husband.<sup>159</sup> Rubina spent 27 years taking

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was supported by her husband's family, who were ashamed of the lowly background of the *ban* (second wife) and angered by the husband's irresponsible behavior, which threatened a strategic marriage alliance. The embittered first wife kept her house and raised her children in the village of her in-laws, while the husband moved away, living first with his new wife in reduced circumstances, and later migrating to find work outside the valley.")

158. Based on a case relayed to me by family lawyers at *Legal Aid Cell*.

159. See *supra* note 157, at 184. ("At the same time, girls are quite realistically fearful that marriage will lead to a lifetime of subservience to a cruel husband and his demanding mother in an alien compound. But the greatest fear of a *khana* (existing wife) is that her

care of this man, only to have him give another woman the same amount of maintenance, inheritance and status. Not to mention that any progeny from the second wife would reduce Rubina's children's overall share in maintenance and inheritance. She also dreads the embarrassment of her relatives finding out that she has been replaced with a younger, prettier wife. She tries to convince her husband to divorce the new wife, but she knows that she legally cannot compel him to do so.

*b. The Betrayed Subsequent Wife: Ayesha*<sup>160</sup>

26-year-old Ayesha got married to Zahab through a matrimonial match-maker introduced to her by her relatives. Zahab was four years older than she was and worked as a marketing consultant in a Pakistani clothing company. His job required him to travel regularly, which was often upsetting to Ayesha. To keep herself busy, Ayesha started working at the local bakery and honed her baking skills. She dreamed of opening a cake shop of her own. When Zahab came back from his trips, she would make him new recipes and ask for his honest criticism. Their marriage was generally respectful, and the couple planned to have children within a year. Ayesha did not like how busy Zahab was with his work though, as she wanted her children's future father to be more present and available, but Zahab gave her assurances that the workload will decrease in the future.

One day, Ayesha got a call from a woman calling herself "Zahab's mother." Ayesha thought it was prank call—Zahab's parents died in a car crash when he was 9 years old. The woman kept insisting that she was his mother and that she secretly copied Ayesha's number from Zahab's phone during his last visit. She then proceeded to tell her that Zahab already had a wife and four children who live with his family in the village. She then cursed Ayesha for "ruining another woman's home" and shouted, "if you have any shred of dignity, you will leave my son." It took Ayesha a few minutes to truly grasp the situation, after which, she was filled with horror and a sense of betrayal. This woman was telling the truth! Upon confronting Zahab, he casually denied having an existing wife and left for an important work trip. He has not returned since.

*c. The Competitive Cowives: Sakina and Anumtah*<sup>161</sup>

Sakina and Anumtah live together in one matrimonial home with their seven children. Sakina and Anumtah have their separate bedrooms, but they share the common areas, including the major battleground; the kitchen. Sakina was the first wife, which gives her a sense of authority over Anumtah, the second

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husband will humiliate her by marrying a second wife (*ban*)."

160. Based on the facts of *Ejaz Mahmood v Humaira*, P.L.D. 1983 Lah. 615.

161. Based on the facts of *Zulaikhan v. Noor Muhammad*, P.L.D. 1986 Quetta 290 and the many stories of conflict and contest between cowives narrated to me by fieldworkers at Simorgh. See also *supra* note 157, at 188. ("If the co-wives stay within his compound, the whole family will suffer from their constant bickering.")

wife, who is younger and more naïve. If one gets a gift from the husband, the other feels an intense bout of jealousy. Most of their days are spent trying to one-up each other. Who makes better food? Whose kids do better at school? Who is prettier? Who does the husband give more time and affection to? Who will get to accompany him for his next work trip? Sakina misses the expensive gifts she got from her husband before the burden of Anumtah's expenses fell on him. Anumtah misses her natal family's unconditional affection and finds the matrimonial home environment very hostile. They both demand separate residence from the husband, but he keeps putting it off due to constrained financial circumstances.

## B. *The Husband*

Prevalent narratives cast the current distributions from Pakistani polygamy law as *always* favorable for the husband. This section will deconstruct these narratives and provide a nuanced understanding of the cost and surpluses at stake for the husband engaging in polygamy.

### 1. Polygamy as Security

For the “in-love” husband, polygamy offers the benefit of validly marrying another woman, secretly or otherwise, without divorcing the existing wife.<sup>162</sup> This includes avoiding the payment of deferred mahr, costly custody litigation and family conflict. As a family lawyer working in AGHS contended; the husband may also “feel bad” about leaving his first wife to marry someone he has fallen in love with, given the amount of time and support he has received from his existing wife. Polygamy, then, offers the perfect middle-ground for such men. They can solemnize their affair whilst retaining the benefits from, and avoiding the detriments of dissolving, the existing marriage.

The “lustful” husband benefits from polygamy by gaining multiple legal sex partners. This is, in fact, the most common justification from polygamy within Islamic scholarship; there is a male biological desire (and capability to match) to have sex with more than one woman.<sup>163</sup> As sexual intercourse outside of marriage is immoral and legally prohibited, polygamy offers the only “solution” to fulfill this sexual urge. It allows the husband to engage in legitimate sex with up to four partners as a *right* ordained by the law. There is no guilty conscience, and the law provides validity and accommodation to male sexuality.

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162. See RASHIDA PATEL, *WOMEN AND LAW IN PAKISTAN* 85 (1979). (“At times men become physically or emotionally involved with another women, and if she is single, marriage between them may ensure.”)

163. See V.P. BHARATIYA, *SYED KHALID RASHID'S MUSLIM LAW* 75 (3rd ed., 1996); DOI, *supra* note 30, at 146–149. (“if the man feels he cannot do without a second wife in order to satisfy his natural desire which is very strong and when he has enough means to support her, he should take another wife.”)

If one husband wants to officiate his love and the other wants to have sex with multiple women, the “property” husband is more concerned with making as much wealth as possible and distributing that wealth to his own progeny. Polygamy offers an avenue to have more children than would otherwise be possible in a monogamous marriage. In situations similar to those of the infertile existing wife *Rashida*, polygamy allows husbands to have legitimate issue without divorcing existing wives. Kanwal from *Simorgh* reports instances where the need for male offspring also motivates husbands to pursue polygamy.<sup>164</sup> Sons are important because they go on to become breadwinners and inherit the family name and business. They also get twice the inheritance compared to daughters, thereby ensuring that wealth remains within the family.<sup>165</sup> For the “property” husband, then, the ability to procreate and have legitimate heirs is a surplus provided by the polygamy law.

## 2. Polygamy as Threat

Pakistani polygamy law requires that husbands financially maintain both wives equally.<sup>166</sup> This includes separate identical lodging and monthly maintenance payments for both wives and children.<sup>167</sup> For the “budget” husband, this is an enormous cost of contracting a polygamous marriage. His financial burden is doubled, and at least in theory, it leaves polygamous husbands susceptible to suits for separate residence and maintenance by the co-wives. In *Zulaikhan v. Noor Muhammad*, for example, the Quetta High Court held in response to the husband’s suit for the restitution of conjugal rights that the unwilling existing wife cannot be compelled to live with the subsequent wife.<sup>168</sup> The husband was ordered to give her a separate residence and equal maintenance as “[t]he right of the husband is not free from conditions or limitations. The Islamic injunctions lay down conditions, which if not fulfilled, would absolve the woman from obligation to accompany the husband or to live with him.”<sup>169</sup>

Courts also enforce stipulations incorporated into the marriage contract, either at the time of the marriage or through a subsequent agreement, guaranteeing equal financial maintenance and separate residence to the wife in case of a polygamous marriage.<sup>170</sup> The Lahore High Court upheld such an agreement between the spouses, holding that the wife can live with her natal family

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164. *Supra* note 18.

165. AFGHAN & WIQAR, *supra* note 127.

166. *See supra* note 19, at 14–15.

167. *Id.* at 15. There is disagreement amongst the jurists about equal amount of maintenance or only enough to support the cowives. *See also* DOI, *supra* note 30, at 149.

168. *Zulaikhan v. Noor Muhammad*, P.L.D. 1986 Quetta 290.

169. *Id.* at 296.

170. *Awal Zaman v. Nasreen Bibi* YLR 2015 Peshawar 1770.

and is entitled to maintenance until a separate residence is arranged for her by the husband.<sup>171</sup>

Another potential cost of polygamy is the emotional harm and stress caused as result of conflict between the cowives.<sup>172</sup> Speaking to men involved in polygamous marriages in rural Punjab, a fieldworker from Simorgh recounts how one of them said to her “This was the worst mistake of my life, *biwi aik hee achi* (only one wife is good enough).”<sup>173</sup> Upon asking why? The man responded that the constant fights and “drama” between his cowives has turned his life upside down and uprooted his “peace.” He said he married again because his family did not like his first wife from a love marriage. He is now stuck with two wives, both of whom he cannot divorce. The first wife because of the children, and the second wife because of family pressure: “I wish I could go back in time.” This instance brings in another, albeit rare, phenomenon into the forefront; men *too* can be in unwilling polygamous unions.

Finally, polygamy may threaten the husband’s right to custody of his children. There has been a trend in custody cases to award custody of the children from an existing marriage to the mother.<sup>174</sup> Though the mere fact of a subsequent marriage does not *itself* grant custody to the unwilling existing wife, the guiding standard of welfare of the minor establishes a favorable position for the existing wife in polygamy cases.<sup>175</sup> For example, in *Haseeb Ahmad v. Mst. Wajiha Wakeel*, the Peshawar High Court noted that “it is centuries-old human experience that behaviour of father changes when he contracts second marriage, as his conduct and behaviour towards the minors do not remain affectionate and filled with love . . . .”<sup>176</sup> Due to this, the custody of the children was granted to the mother. There is also a judicial cynicism about stepmothers taking care of children. The Supreme court of Azad Kashmir noted in *Tassadiq Hussain Shah v. Surraya Begum* that “the stepmother [of the minor] cannot be expected to be very much interested in his welfare.”<sup>177</sup> All of this culminates into the very real cost for the polygamous husband of losing custody of his children from an existing marriage in the event of divorce.

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171. Muhammad Zaman v. Irshad Begum, P.L.D. 1967 Lah. 1104.

172. See *supra* note 95.

173. In discussion with the Author, December 2020.

174. See Abbasi, *supra* note 13, at 44.

175. *Id.*

176. Haseeb Ahmad v. Wajiha Wakeel YLR 2018 Peshawar 20.

177. Tassadiq Hussain Shah v. Surraya Begum CLC 1980 (AJ & K) 1802.

### C. *The Children*

#### 1. Polygamy as Security

##### a. *Children of the Existing Wife*

Polygamy can function as a security for the existing children through the potential “nanny” function of the subsequent wife. Kanwal from *Simorgh* asserts that in instances where the second wife is living with the first and may not have children of her own, she often takes on the responsibility of the first wife’s children as a quasi-nanny.<sup>178</sup> This is usually done to please the husband and/or form cordial relations with the existing wife. The children of the existing wife, then, benefit from a consistent stream of care work. “If their mother is unwell, the stepmom would cook them dinner or pick them up from the school” Kanwal observed in her fieldwork.<sup>179</sup> Additionally, If the subsequent wife brings children from a previous marriage or thereafter has children with the polygamous husband, these stepbrothers and/or sisters could also provide companionship, care work and support to the existing wife’s children. “I have seen older stepsiblings or halfsiblings help their younger counterparts with their homework” says Kanwal. The nanny function of the subsequent wife may also continue even if she has children of her own.

##### b. *Children of the Subsequent Wife*

For the children who belong to a prior marriage, polygamy offers a male figurehead and financial security. Children with absent fathers (either due to divorce or death) are socially stigmatized and disadvantaged.<sup>180</sup> The family structure in Pakistan is strongly patriarchal, and single mother households are often vulnerable; financially, socially and in terms of physical security.<sup>181</sup> Through polygamy, the children of subsequent wives may receive a home, male protection, and economic stability. Like the existing children, they may also get the benefit of having a “quasi-nanny”, though Kanwal argues its much less common for existing wives to take care of subsequent wives’ children. Having additional stepbrothers and sisters from the existing wife or wives also carries the benefit of friendship and companionship.<sup>182</sup> If the subsequent wife has children with the polygamous husband, then in addition to the benefits listed above, these children are legitimate issue and get the same amount of inheritance as the existing wife’s children.

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178. *Supra* note 18.

179. *Id.*

180. Shumaila Khadim Ali & Sarmad Muhammad Soomar, *Single Parenting: Understanding Reasons and Consequences*, 10(2) JOJ NURSE HEALTH CARE 1, 2 (2019).

181. *Id.*

182. *Supra* note 91.



## 2. Polygamy as a Threat

### a. Children of the Existing Wife

There has been research on the negative psychological effects on children from polygamous marriages.<sup>183</sup> Children are likely to suffer from emotional harm, competition and negative self-esteem.<sup>184</sup> Field workers at *Simorgh* report feelings of betrayal and inadequacy from children of existing wives. They feel betrayed by the treatment of their mothers and develop feelings of inadequacy because they were not “enough” for their father. They also report instances of rivalry with the subsequent wife’s children. Consequently, these children are less close to their fathers and may have an estranged relationship with them, especially since the father has two families to give time to.<sup>185</sup> If the existing wife is being treated inequitably by their father, that breeds further resentment and competition. They are also less likely to do well in school.<sup>186</sup>

Since the father is financially responsible for the subsequent wife and her children, there is an overall reduction of monetary support received from the father to the existing wife’s children. Their standard of living, therefore, might ultimately decrease. If the subsequent wife’s children are legitimate issue, the existing children’s inheritance will also be halved. Ultimately, one of the biggest costs of polygamy for the existing wife’s children is financial.

### b. Children of the Subsequent Wife

Apart from the psychological and emotional harm suffered in a polygamous family, children of subsequent wives are often subjected to a “second-class” treatment. The feelings of competition and inadequacy are more pronounced. Kanwal recounts how these children feel they are less than the existing wife’s children because they came later. If born out of a previous marriage, there’s also a risk of losing custody to the biological father. In *Naghma Rani v. Additional District Judge*, for example, the court granted custody to the biological father because the mother had remarried outside the prohibited degree.<sup>187</sup> Though by no means a general rule, Courts are inclined

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183. See Mohammad Al-Sharfi, Karen Pfeffer & Kirsty A. Miller, *The Effects Of Polygamy On Children And Adolescents: A Systematic Review*, 22(3) J. FAMILY STUD. 272, 277 (2016).

184. *Id.* at 278.

185. Aneeza Pervez & Syeda Shahida Batool, *Polygamy: Chaos in the Relationships of Children*, 14(1) PAKISTAN J. SOC. & CLINICAL PSYCHOL. 30, 32 (2016). (“All participants reported undesirable feelings with regards to their relationship with their father. The fathers’ second marriage led to the formation of distant, impaired and strained relations, characterized by condemnation, conflict, and a lack of trust. Most participants felt that their father was manipulative, materialistic, inaccessible and selfish.”)

186. Al-Sharfi, *supra* note 183, at 278.

187. *Naghma Rani v. Additional District Judge*, Gujrat, 2018 CLC-LHC Lahore 767 (2017).

to award custody to the father if the mother has remarried.<sup>188</sup> This is because it is presumed to be in the best interests of the minor to reside with the unmarried parent, as they can devote more time and money to the ward.<sup>189</sup> This is especially relevant when it comes to a girl, for if the mother has married someone outside the prohibited degree,<sup>190</sup> the husband is a *non-mahram* for the girl-child.<sup>191</sup> Children from previous marriages also don't get any inheritance from stepdads, as adoption is not recognized under Pakistani law.<sup>192</sup> If they are legitimate issue of the polygamous husband, inheritance is shared with children of the existing wives.

#### D. *The Families*

##### 1. Polygamy as Security

###### a. *Family of the Existing Wife*

The biggest surplus generated by Pakistani polygamy law for the family of the existing wife is the *retention* of their female relative's married status. As discussed earlier, divorce is a social taboo and parents often tell their daughters that "*jaa doli par rahi ho, wapis mayyat hee aye gi*" (you're leaving on a wedding carriage, you can only come back in a funeral cart).<sup>193</sup> Part of this taboo stems from the reversal of financial responsibility back to the natal family.<sup>194</sup> Having children carries an additional financial and social burden. This is why families of existing wives go so far as to force their female relatives to stay within unwilling polygamous unions.

###### b. *Family of the Subsequent Wife*

Polygamy allows for the *acquisition* of married status for unmarried daughters/sisters/relatives. This is especially beneficial if the family has experienced difficulties in finding a suitor for them. It could be because of a number of reasons; divorced status, "old" age or because they do not conform to conventional standards of beauty. Either way, families of subsequent wives gain social

188. See PEARL & MENSKI, *supra* note 20, at 321.

189. *Id.*

190. Prohibited degree refers to those relationships with whom a Muslim man cannot marry, according to the Qur'an they are seven: 1, mother; 2, daughter; 3, Sister; 4, paternal aunt; 5, maternal aunt; 6, sister's daughter; 7, brother's daughter. And the same with regard to the other sex. See *Prohibited Degrees Of Marriage*, HUGHES, DICTIONARY OF ISLAM, available at <https://www.juancole.com/library/dictionary-of-islam-hughes/prohibited-degrees-of-marriage>.

191. Non-mahram are relations with whom you can validly marry, i.e., those *not* within the prohibited degree.

192. Muhammad Aslam v. Shazia Bano, 2010 YLR LHC, 1327.

193. *Supra* note 18.

194. See TAHIR MAHMOOD, PERSONAL LAWS IN CRISIS 86 (1986). (Noting that Pakistani parents are customarily expected to house daughters in the event of divorce.)

acceptance through the polygamous marriage.<sup>195</sup> As guardianship is transferred to the husband, financial and social responsibility are also transmitted, including of any children from a previous marriage.

*c. Family of the Husband*

As joint family is the predominant structure of the family in Pakistan,<sup>196</sup> more wives mean more domestic workers to take care of the household. Wives are expected to take care of the husband's parents, grandparents and the younger siblings. Polygamy, thus, ensures a consistent stream of care work for the husband's family. Families also maintain a certain level of power over the wives through polygamy. As Rubya Mehdhi argues, the fact that polygamy is legal "enables emotional pressures to be used as a constant threat to women" by the husband and his family.<sup>197</sup> If disagreement arises between the parties, the threat of polygamy pushes wives to compliance, lest the threat be realized. In addition, more progeny means a higher chance to have sons, who go on to become breadwinners for the family.

2. Polygamy as a Threat

*a. Family of the Existing Wife*

Polygamy *itself* can be socially stigmatizing for the existing wife's family, especially if the subsequent marriage was conducted without the consent and/or knowledge of the existing wife.<sup>198</sup> Families have to weigh the betrayal and shame caused by polygamy with the potential social humiliation of divorce. For most, the latter is by far the worst of the two, but there are instances where natal families have supported existing wives in divorcing polygamous husbands. Kanwal recounts an instance where the brothers of the existing wife felt so affronted by the husband's nonconsensual polygamy that they *forced* her to divorce him.<sup>199</sup> It is embarrassing for existing wife and her family to have been effectively "replaced" by another woman, thereby causing a decrease in status and importance in the in-laws' eyes. Even if the polygamy is consensual, the *risk* of conflict increases. Any pursuant jealousy or competition amongst the cowives impacts their respective families, as they are the next in line to be responsible for them should separation or divorce happen.

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195. See PEARL & MENSKI, *supra* note 20, at 181.

196. Ahmed Itrat, Ather Mohammed Taqui, Fahd Qazi, & Waris Qidwai, *Family Systems: Perceptions Of Elderly Patients And Their Attendants Presenting At A University Hospital In Karachi, Pakistan*, 57(2) J. PAKISTAN MED. ASS. 106, 107 (2007). ("Four hundred subjects aged 65 and above were interviewed, out of which 226 (56.5%) were living in the joint family system (JFS), whereas 174 (43.5%) were living in a nuclear family system (NFS).")

197. MEHDI, *supra* note 3, at 166.

198. *Supra* note 95.

199. *Supra* note 18.

*b. Family of the Subsequent Wife*

Similar to that of the existing wife, the families of subsequent wives also face social stigma for having their daughters/sisters/relatives be the “*doosri waal*” (second one). If for the existing wife’s family it’s the shame of being supplanted, then for the subsequent wife’s family it’s the shame of being subordinate to the “original” wife and her family.<sup>200</sup> There is also research which indicates that polygamous husbands are more abusive than monogamous ones, which increases the risk of conflict amongst the families and the possibility of separation or divorce.<sup>201</sup>

*c. Family of the Husband*

In a joint family system, adult male members work and provide for the rest of the family.<sup>202</sup> This means that the financial responsibility of all the co-wives falls on the family *as a whole*. So whilst the family of the husband gains additional care work, it is at the cost of additional financial responsibility. As discussed earlier, if divorce occurs, courts are more likely to give custody of the children to the mother than the polygamous father, especially if otherwise the children are going to be taken care of by the stepmother.<sup>203</sup> This loss of custody could mean losing potential future workers for the family as a whole, especially if they are sons, as well as transfer of wealth outside of the family should that happens.

## VI. TOWARDS THE “OUGHT”

The preceding Parts focused on explicating the legal options available to unwilling cowives, the rules (both legal and cultural) working in the background to affect the practice of polygamy in Pakistan and the distributional consequences of current legal arrangements on all the parties impacted by polygamy. This concluding Part will offer possible solutions to address the harm caused to unwilling cowives, keeping in view that polygamous marriages can also be beneficial for some of the players. In an ideal world, consent of the existing wife would be a *condition of validity* for the subsequent marriage, but none of the Muslim jurisdictions have taken, or are likely to take, this approach—largely due to the interpretation of religious texts giving way to either permitting polygamy absolutely or outlawing it altogether.<sup>204</sup> There is also a possibility of this reform causing more harm towards the “unknowing” subsequent wife, who would find

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200. *Supra* note 95.

201. Alean Al-Krenawi & Rachel Lev-Wiesel, *Wife Abuse Among Polygamous and Monogamous Bedouin-Arab Families*, 36 J. DIVORCE & REMARRIAGE 151, 152 (2002). (“Results indicated higher levels of potency and lower levels of wife abuse among monogamous as compared to polygamous wives.”)

202. *Supra* note 131, at 108.

203. *See* Abbasi, *supra* note 13, at 44.

204. *Supra* note 34.

that her marriage was invalid and any issue illegitimate because the husband did not take the consent of his existing wife/wives. The distributional analysis above has explicated the range of *conflicting* interests, not just between the husband and co-wives, but amongst the co-wives *themselves* and their families. My approach is based on *minimizing* the threats whilst *maximizing* the security offered by polygamy. The goal is to step beyond the debate of banning or allowing polygamy and redirecting focus on finding ways to better the lives of women in the middle of a nonconsensual polygamous marriage, whilst ensuring that those who want to willingly engage in such unions are able to do so.

I will first identify areas of change within the background rules that can improve wives' bargaining power in marriage—that may deter husbands from polygamy in the first place or make it easier for co-wives to leave the arrangement—and thereafter introduce a restorative justice framework that focuses on restoring the position of the unwilling cowives. I will place the legitimacy of incorporating RJ processes within the Islamic Law custom of *Diyya*, which pertains to monetary restoration for bodily harm, and argue that there is space for extending the *Diyya* to the social, emotional and economic harm caused to unwilling cowives.

#### A. *Changing the Background Rules*

##### 1. Legal Rules

The current legal conception of spousal rights and obligations—based on the husband's authority (*qiwama*) over the wife—that rest the wife's right to maintenance contingent upon her obedience, relegates wives to an inherently inferior position and reinforces the cycle of social and economic dependency.<sup>205</sup> Islamic feminists have criticised these conceptions as a product of patriarchal interpretations of ambiguous sacred texts by pre-twentieth century Islamic jurists.<sup>206</sup> Ziba Mir-Hosseini, for example, argues that traditional spousal rights emphasizing the husband's *qiwama* are in direct contradiction with equality and justice, which are amongst the undisputed objectives of Shariah.<sup>207</sup> Several Muslims jurisdictions have removed the wife's duty of obedience from the "list" of spousal rights and obligations, focusing on a "new concept of cooperation."<sup>208</sup> Morocco and Algeria, for example, have replaced gender-specific spousal rights and obligations with a single provision on mutual rights and duties of the spouses, whilst still keeping the husband's obligation to

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205. See GENDER AND EQUALITY IN MUSLIM FAMILY LAW: JUSTICE AND ETHICS IN THE ISLAMIC LEGAL TRADITION (Ziba Mir-Hosseini et al. eds., 2013).

206. *Id.* at 19.

207. *Id.* at 8.

208. See LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY 94 (2007).

maintain the wife due to socio-economic inequalities.<sup>209</sup> Even though section 9 of MFLO makes no reference to the wife's obedience, the judiciary has consistently interpreted the husband's duty of maintenance based on the wife submitting to his authority.<sup>210</sup> Even going so far as to say that the husband has the right to moderately "correct" his disobedient wife.<sup>211</sup> Thus, cases such as *Abdul Kadir*<sup>212</sup> and *Resham Bibi v. Muhammad Shafi*,<sup>213</sup> that legally endorse the wife's obedience in marriage, need to be explicitly denounced by the Pakistani courts in light of Article 25 of the Pakistani Constitution, which provides for equality before the law and prohibits discrimination on the basis of sex.<sup>214</sup> Spousal rights and obligations based on mutual respect and equality, similar to the codes in Morocco and Algeria, ought to be applied by the courts. Given the law's channelling function,<sup>215</sup> changing this background rule to recognize wives as equal partners within marriage will have positive implications for their bargaining position.

Post-divorce financial support (alimony) and an equitable property division regime can also significantly alter the bargaining power of unwilling co-wives by providing them with the financial security most will need if they are to leave unwilling polygamous marriages. These changes would also make the husband more risk-averse in contracting subsequent marriages without the consent of the existing wife/wives. There already exists a basis for alimony (*mut'at-al-ṭalāq*) in traditional Islamic Law.<sup>216</sup> Traditional interpretation of the Surah al-Baqarah, Verse 236 (2:236) contends that the *mu'at* ("gift of consolation") is a "matter of goodwill and of custom", paid to divorced wives who are not paid the complete mahr because the marriage ended before consummation. Some modern Muslim jurisdictions, however, have relied on (2:236) to provide *mandatory* financial support to divorced wives, irrespective of consummation. In Egypt, under Article 18 of Law 100, a divorced wife has the right to maintenance for at least two years if she was divorced without reason-

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209. THE MOROCCAN FAMILY CODE (MOUDAWANA) of February 5, 2004, Article 51; ALGERIA - THE FAMILY CODE of 1984 modified by ORDINANCE No. 05-02 of 27 February 2005, Article 36.

210. See PEARL & MENSKI, *supra* note 20, at 189.

211. See *Abdul Kadir v. Salima*, (1886) ILR 8 All 149. (The nikkah contract imposes submission on the wife when summoned to the couch and confers on him the power of correction when she is disobedient or rebellious."

212. *Id.*

213. (1967) PLD Azad J & K 32.

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

215. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

216. PEARL & MENSKI, *supra* note 20, at 184; JAMAL NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 144 (2nd ed., 1990).

able cause or was harmed by her husband. She also the right to an independent dwelling during the period she has custody of the children. Similarly, Tunisian Law provides the option for wives to claim financial support which can be awarded “in the form of a life stipend to she who has no income and no regular work, and as a lump sum to other women.”<sup>217</sup> If the ex-wife’s financial position changes or she remarries, the financial support payments become subject to review and/or modification.<sup>218</sup> Pakistan remains one of the only Muslim-majority countries to have not introduced post-divorce maintenance through the concept of *mut’at-al-ṭalāq*.<sup>219</sup> Pearl and Menski contend that this is largely due to entrenched gender roles and the custom of “continued parental liability for married daughters.”<sup>220</sup> Custom and culture here clearly supersede rights which have a clear basis in Islamic jurisprudence. This makes schemes of marital property division even more challenging in Pakistan, for they have no basis in any of the schools of Islamic Jurisprudence; division of property post-divorce strictly follows title.<sup>221</sup> Whilst this means that wives get to keep all of their assets, as noted earlier, most women in Pakistan own little assets to begin with.

One way to secure some property rights for the divorced Pakistani wife would be through the equitable remedy of constructive trusts, similar to that in the United Kingdom. If a female partner/wife has spent years doing domestic labour, taking care of the family home and spending out of pocket on the house, then she acquires an equitable share through a constructive trust (anywhere from 1–100 percent depending on the facts of each case) in the marital home after divorce/separation, even if the property was in the sole name of the husband.<sup>222</sup> This may not work for wives living in joint-family setups, as title to the family home is usually with the father-in-law rather than the husband—though an argument could be made for a trust in the joint family home if the wife’s labor and contributions benefitted the same. In any case, the growth of the nuclear family in Pakistan<sup>223</sup> makes this equitable remedy a viable option in lieu of fully introducing a marital property division regime.

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217. Civil Appellate decision nos. 38013/1994.

218. *Id.*

219. PEARL & MENSKI, *supra* note 20, at 223. (“It seems, however, that Pakistani law has purposely avoided discussion of this important issue and it is remarkable that Pakistani law on this subject seems to be entirely unaffected by the recent developments in Indian Muslim Law in the same field.”)

220. *Id.* (“This would imply an understanding of a particular division of labor in society which is different from that in India and Bangladesh.”); *see also* TAHIR MAHMOOD, PERSONAL LAWS IN CRISIS 86 (1986). (Noting that Pakistani parents are customarily expected to house daughters in the event of divorce.)

221. VIQAR, *supra* note 115.

222. *See* Jones v. Kernott [2011] UKSC 53; Stack v. Dowden [2007] UKHL 17; Abbott v. Abbott [2007] UKPC 53; Geary v. Rankine [2012] EWCA 555.

223. Ra’ana Malik & Farooq-e-Azam, *Nuclearization of family and the status of elderly women: A case study of District Sargodha*, 55(2) J. RES. SOC’Y PAKISTAN 121, 124 (2018).

Within the rules of legitimacy, The Lahore High Court reiterated in the recent case of *Muhammad Aslam v Shazia Bano* that any written agreement purporting to adopt a child does not confer legitimacy thereon, and denied any claim of inheritance for the “adopted” child.<sup>224</sup> The Court did, however, hold that the “adoptive” father is liable to pay maintenance for the child under the “constructive guardian” theory.<sup>225</sup> This is in line with traditional Islamic jurisprudence that encourages sponsorship (*kafala*) of orphaned and abandoned children, without fully bestowing a legal paternity.<sup>226</sup>

Whilst legal adoption has no basis in traditional Islamic law,<sup>227</sup> Joseph Schacht contends that acknowledgement of paternity of a person of *unknown* origin amounts, in a way, to a form of adoption.<sup>228</sup> This is the approach taken in Somalia; Article 114 of the Somali Family Code of 1975 recognizes a full parent-child relationship between the adopted and adoptive person (of unknown paternity), and specifies that the adopted person has the same rights and duties towards the adoptive parents as their biological child.<sup>229</sup> Tunisia has gone even further, the Tunisian Law No. 27 of 1958 empowers any married person (of either gender) of full age and legal capacity to adopt a minor (any person under the age of eighteen, irrespective of paternity) through a court order.<sup>230</sup> The adopted child takes the family name and gains full inheritance rights in the adoptive family.<sup>231</sup>

Given its basis in Islamic law, Pakistan can follow the footsteps of Somalia to recognize a parent-child relationship through acknowledgement of paternity of persons of unknown origin. If so done, women like the infertile wife *Rashida* (or those unable to bear sons) can use this alternative to better bargain against polygamy. The prospect of recognizing full legal adoption like the Tunisian model, however, is bleak in Pakistan.

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224. *Muhammad Aslam v. Shazia Bano*, 2010 YLR LHC, 1327. (“So far as the rights of an adopted child are concerned, it is correct that the adopted child is not entitled to inherit from the estate of a person who adopts such child but there is no such bar in law that an adopted child is not entitled to receive maintenance from the person who adopts him particularly when the petitioner himself pleads that he is ready to pay maintenance to the adopted child if the custody of adopted child is handed over to him.”)

225. *Id.* (“The situation arises where one assumes to act as a guardian or enters upon an infant’s estate, who has not been regularly appointed a guardian. It may result from a voluntary assumption of the duties.”)

226. PEARL & MENSKI, *supra* note 20, at 408.

227. *Id.*

228. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 166 (1964).

229. Law No. 23 of 1975 (Family Law), *Faqfin Rasmi ah*, 31 Mar. 1975 (Som.). English translation used set forth in Nadjma Yassari, *Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law*, 63(4) AM. J. COMP. L. 927, 947 (2015).

230. Law No. 27 of 1958 (Law Concerning Public Guardianship, Kafala and Adoption), *Al-Ra’id Al-Rasmi*, 7 Mar. 1958, art. 9 (Tunis.).

231. Law No. 27 of 1958, arts. 14 and 15.



The laws on zina and fornication, as argued previously, have been disproportionately used against women.<sup>232</sup> Rather than dissuade extramarital intercourse, these laws have only furthered regressive perceptions about sex and provided a justification for husbands to engage in polygamy.<sup>233</sup> Thus, either the courts must adopt a non-discriminatory approach in applying this legislation, or the entire legislation ought to be abolished. This also stands true for the current discriminatory Islamic inheritance laws. So far, Tunisia is the only Muslim jurisdiction to initiate a change in its inheritance laws to provide equal shares for both genders.<sup>234</sup> The political costs associated with promulgating laws that are fundamentally contradictory to Islamic injunctions serves as a powerful political deterrent for the Pakistani legislature. This makes the role of changing cultural background rules even more compelling, and perhaps, more promising.

## 2. Cultural Rules

The stigma associated with divorce is a pervasive norm that negatively impacts wives' bargaining position vis-à-vis the husband in polygamous marriages. As described earlier, husbands are aware that even when wives have economic security, cultural norms based on gendered expectations, as well as pressure from the natal family, dissuades them from obtaining a divorce in the event of nonconsensual polygamy. Changing such an entrenched cultural rule is not easy, but certain pointed state measures can ensure that some change does take place over time. This includes:

- Cultural campaigns with the use of media and community interaction/focus groups to educate the public about the negative impact of staying in abusive marriages;<sup>235</sup>
  - Incorporating non-stigmatizing messages into TV and radio-shows;
  - Engaging religious and community leaders;
  - Organizing awareness drives in educational institutions and the workplace; and
  - Sensitization training of judges, executives and union council administrators to the harms caused by staying in nonconsensual polygamous marriages.

The norm of *chador aur chaar diwari*, that prevents women from accessing public spaces and relegates them to the confines of the home can

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232. See Minah Ali Rathore, *Women's Rights in Pakistan: The Zina Ordinance & the Need for Reform*, 38 SCH. PUB. POL'Y CAPSTONES 38 (2015), [https://scholarworks.umass.edu/cppa\\_capstones/38](https://scholarworks.umass.edu/cppa_capstones/38).

233. *Id.*

234. See George Sadek, *Tunisia: Cabinet Approves Bill Requiring Equal Inheritance Shares for Men and Women*, GLOBAL LEGAL MONITOR (2018), <http://www.loc.gov/law/foreign-news/article/tunisia-cabinet-approves-bill-requiring-equal-inheritance-shares-for-men-and-women> [<https://perma.cc/MGF3-ZRPQ>].

235. Similar campaigns have been launched pertaining to family planning, see for example the "Bright Star" Family Campaign in Pakistan, <https://perma.cc/RXT7-Z6TX>.

be addressed, firstly, through measures for girls' education. Article 25-A of the Constitution already mandates compulsory education till the age of 16, but the lack of effective implementation has meant that nearly twelve million girls are out of school.<sup>236</sup> The State ought to ensure that adequate resources are applied towards improving the educational infrastructure, and parents/community members ought to be encouraged to send their daughters to school. Gaining education will provide opportunities for employment and foster economic independence in marriage, preventing wives from relying on natal economic support in the event of divorce. The restorative justice processes detailed below, can also play a role in changing cultural attitudes.

### B. *Restorative Justice*

Traditional criminal justice, based on retribution and punitive sanctions, has been criticized for neither meeting the victim's needs nor ensuring that the offender takes responsibility, and offers restitution, for the harm caused.<sup>237</sup> Proponents of restorative justice assert that the starting point of inquiry when a crime is committed should not be "what should be done with the offender? Rather, it should be: what should be done for the victim?"<sup>238</sup> RJ processes also focus on rehabilitation and reintegration of the offender back into the community once they are fully aware of the damage they have caused to the victim and repaired it.<sup>239</sup> Crime is understood in terms of the harm caused to individuals, interpersonal relationships and the community, as opposed to a violation of rules.<sup>240</sup> Whilst modern restorative justice practices stem from "a variety of practices developed in very different contexts",<sup>241</sup> with different proponents emphasizing different features as "central" to RJ, my framework also incorporates elements of "transformative justice", which looks to wider community engagement in dealing with the structural causes of the crime.<sup>242</sup>

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236. Sadaf Taimur, *Article 25-A, Transition from Law to Implementation – 7 Years Down the Road, where do we stand?*, PAL NETWORK (2017), <https://palnetwork.org/article-25-a-transition-from-law-to-implementation>.

237. See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATE* 62–85 (2nd ed., 2011).

238. *Id.* at 12.

239. *Id.* at 13.

240. Howard Zehr, *A Restorative Lens*, in *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 186 (Theo Gavrielides ed., 2000).

241. Adriaan Lanni, *Taking Restorative Justice Seriously*, 69(3) *BUFF. L. REV.* 635 (2021).

242. *Id.* at 641, note 15. ("Ruth Morris offers one definition of transformative justice: "[T]ransformative processes enable the wider community to participate in denouncing crime, supporting victims, and building true solutions. They also enable the wider community to take responsibility for the underlying causes of crime: poverty, abused children, unemployment, and other deep social problems." RUTH MORRIS, *STORIES OF TRANSFORMATIVE JUSTICE* 254 (2000).")

## 1. Restorative Justice in Islamic Law: Compensation, Conciliation and Pardon

Traditional Islamic criminal law divides crimes into *Hadd* (crimes against religion), *Jinayat* (private vengeance) and *Ta'zir* (crimes at the discretion of the judge).<sup>243</sup> Whilst *hadd* crimes are punishable through punitive sanctions by the state such as stoning, lashes and/or crucifixion, in *jinayat*, victims of bodily harm (or their kin) have a choice between *Qisas* (retaliation), *Diyya* (blood money), conciliation (*sulh*) or pardon ('*afw*').<sup>244</sup> *Ta'zir*, on the other hand, involves crimes falling below the *hadd* and *jinayat* threshold, such as abuse, bribery, perjury, sodomy, usury and/or breach of trust, and the *qadi* (judge) has absolute discretion to decide the "punishment."<sup>245</sup> It is pertinent to note that in Islamic Law, imprisonment is not a punishment (except in *Ta'zir*), but a "coercive measure which aims at producing repentance (*tawba*) or ensuring a required performance."<sup>246</sup>

The choice given to victims of *jinayat* crimes to get blood money, agree to conciliation (i.e., accept money less than the designated blood money) or pardon the offender embodies a key element of the restorative justice process—that of placing an emphasis on the victim's needs.<sup>247</sup> Both Absar Aftab Absar and Mutaz M. Qafisheh in their respective papers on Islamic Law and restorative justice note the importance placed on reconciliation and pardon in the Quran and Sunnah, so that healing can take place and offenders get to reintegrate back into society.<sup>248</sup> The choice nonetheless lies with the victim, or in the event of their death, the family.<sup>249</sup> Islamic Criminal Law thus recognizes that those who have suffered harm have the right to choose how it can be redressed. If the offender is unable to pay the blood money or the designated compensatory amount, then their *akila* (next of kin) or *diwan* (wider community/tribe/village) has to contribute towards the victim's monetary restitution.<sup>250</sup> Qafisheh argues that:

The system of *akila* or *diwan* can be compared to the community contribution to the settling of disputes between offenders and victims. By such mechanisms, offenders would feel indebted to their communities and might help them in the reintegration process.<sup>251</sup>

243. SCHACHT, *supra* note 228, at 175.

244. *Id.* at 175–181.

245. Absar Aftab Absar, *Restorative Justice in Islam with Special Reference to the Concept of Diyya* 3(1) J. VICTIMOLOGY & VICTIM JUST. 38, 48 (2020).

246. SCHACHT, *supra* note 228, at 175–76.

247. *See* Absar, *supra* note 245, at 49. ("It needs to be pointed out here that *Diyya* is often translated to mean 'blood money', and that is what it is generally known as; but it should better be seen as one of the best examples of restitution from criminal justice systems of world.")

248. *Id.* at 52; Mutaz M. Qafisheh, *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System International*, 7(1) J. CRIM. JUST. SCI. 487, 488 (2012). ("Compensation is favored over a penalty. Conciliation is placed above compensation. Pardon stands on top.")

249. SCHACHT, *supra* note 228, at 175–76.

250. Mutaz M. Qafisheh, *supra* note 248, at 490.

251. *Id.*

In Pakistan, the Qisas and Diyat Ordinance provides victims or their families with the option to get blood money, or compensation or to pardon the offender for murder or bodily harm.<sup>252</sup> The state nonetheless retains the right to prosecute an offender even if such a compromise is reached under the principle of *fasad-fil-arz* (mischief on earth), with up to 14 years in prison.<sup>253</sup>

## 2. Incorporating Restorative Justice in Polygamy Law

As entailed by the ideal types, polygamy can be beneficial to some women when it's consensual. We have also seen that the legally valid status of *nonconsensual* polygamy can benefit subsequent wives, who know that the first wife is either unaware or unwilling.<sup>254</sup> Perhaps these social benefits, together with religious edicts has made outlawing polygamy or substantially restricting it politically undesirable in Pakistan. At the same time, permitting polygamy without any restriction can be very injurious to the unwilling existing and unknowing subsequent wife, their children and natal families. The MFLO restrictions based on penal sanctions upon the husband, however, have failed to minimize the harm caused by nonconsensual polygamy. These harms include:

- Economic harm caused by split in maintenance and inheritance;
- Social harm caused by becoming the “replaced” wife in the case of the existing wife or the “*doosri waali*” (other one) in the case of the unknowing subsequent wife; and
- Psychological harm caused by the dishonesty, betrayal and breach of trust.

The current law presumes that sending the offending husband to prison and fining them provides justice to the aggrieved parties (whether existing or subsequent wives). In reality, it can cause *more* economic harm to dependent co-wives, as the incarcerated husband is prevented from earning.<sup>255</sup> For wives who do not want a divorce, angering their husbands by sending them to jail is the last thing they want. Penal sanctions may demonstrate to unwilling co-wives that “society regards the wrong committed against them as a serious matter”<sup>256</sup> but as Johnstone argues, this does not mean that “the victim’s *injury* is a matter of deep social concern” as nothing is done to heal that injury. By spending a day to a month in prison, offending husbands may also “feel that they are paying their debt to society by undergoing punishment and hence have no further obligations, such as an obligation to compensate their victims.”<sup>257</sup>

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252. Qisas and Diyat Ordinance 1991 (Criminal Law (Amendment) Ordinance (I of 1991)). Bodily hurt is defined as “pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death” in the Ordinance.

253. Act XLV of 1860, No. 311 of 1860, PAK. PENAL CODE (1860).

254. See note 119 and note 120.

255. JOHNSTONE, *supra* note 237, at 67.

256. *Id.* at 69.

257. *Id.*

There is also a risk of retaliation or revenge, if not by the incarcerated husband, then his associates and/or family. Proponents of RJ argue that incarceration of offenders, rather than offering reassurance, can often makes victims feel guilty and anxious.<sup>258</sup> This may be another reason why, as noted in the first section, women seldom initiate criminal proceedings against their husbands. Unwilling co-wives need a legal remedy that allows for healing, conciliation and restitution in the event that polygamy has harmed them.

This is not to say that penal sanctions ought to be *completely* overhauled. Rather, my framework envisages practical ways to incorporate RJ into the existing criminal justice system to resolve some of its shortcomings.<sup>259</sup> The presence of *diyya*, conciliation and pardon in Islamic jurisprudence and Pakistani law also makes the case for both extending existing restorative remedies, and introducing new ones, to address specific harms caused to women in nonconsensual polygamous unions. Pakistani family law already has a mediation and reconciliation infrastructure in place through the Arbitration Council constituted by the Union Council chairman under MFLO.<sup>260</sup> In polygamy cases, The Council's role ends after the consideration of the husband's application to contract a subsequent marriage (if such an application is even sent) and its power is limited to either allowing the subsequent marriage or rejecting it. In light of the disadvantages of going to court,<sup>261</sup> both the temporal role of the Council, as well as its powers of decision-making, can be legislatively expanded to make room for restorative processes.

*a. Application received by the Union Council*

Upon receiving the husband's application, if the existing wife is against the subsequent marriage, the constituted Arbitration Council can conduct a Restorative Circle (hereinafter 'circle'). The circle will be facilitated by sensitized and trained social workers and include the husband, his family, the wife and her family, children of the spouses (above the age of puberty), the Union Council Chairman, and a family lawyer. This circle will proceed on the basis that even though a *crime* has not yet been committed (i.e., marriage without the Arbitration Council's consent), the existing wife is nonetheless *harmed* by the husband's decision to initiate the formal process of contracting a subsequent marriage without her consent. The wife will get to express the negative impact of the proposed subsequent marriage; the betrayal, affront to her social status and the emotional and economic harm on herself and the children (if any). This is key in addressing what RJ proponent term the "victim's need to communicate their

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258. *Id.*

259. There is much controversy in RJ literature about whether adding RJ processes into the existing carceral system dilutes the aims of RJ see Lanni, *supra* note 241. (I tend to agree with Lanni that working in tandem with existing structures can be a stepping-stone in 'mainstreaming' RJ.)

260. See MFLO, No. 8 of 1961 § 2, GAZETTE, 1961.

261. See *supra* note 49.

emotions.”<sup>262</sup> The husband will then get a chance to express his own motivations and feelings towards the polygamous marriage. The circle serves three purposes: it will give wives a voice to explicate the potential harm of nonconsensual polygamy to their husbands and his family; it can be a potential *preventative tool* that can evoke a sense of responsibility and persuade husbands to either abandon their plans altogether or hold husbands’ conscience accountable to their duty of fair dealing; and it can initiate a “transformative” process within wider society by having members of the community participate in the circle process and listen first-hand to the harms caused by nonconsensual polygamy.<sup>263</sup>

If the circle reaches a consensus to proceed or not to proceed with the subsequent marriage, then that is the end of the matter. However, if a consensus cannot be reached, then the next step for the Arbitration Council would be to assess the application on its merits as it does under the current law.<sup>264</sup> In the event that the husband is allowed to proceed with the subsequent marriage, the Arbitration Council must then facilitate an agreement of restitution/compensation between the current spouses. Restitution to the wife can be monetary (like *diyya* for bodily harm), symbolic, or both; spend x number of days with the existing wife and/or her children; give x amount of maintenance; enroll children in x school; transfer x property; offer prayers, fast for 30 days etc. with the wife’s preferences taking precedence as well as the husband’s ability to perform also being a relevant factor. This can alleviate some of the direct material consequences of polygamy, but also holds a powerful symbolic value in that “the imposition of an obligation to pay compensation is tantamount to inviting the offender to admit to the victim that he is in the wrong. Such a gesture can help to restore the victims’ shattered sense of justice and feeling of community.”<sup>265</sup> Any agreement reached would be an enforceable contract, similar to the ones Pakistani Courts already uphold.<sup>266</sup> Compared to the current regime, wherein the unwilling existing wife, her children and family are effectively left to deal with the decision of Arbitration Council with no other option than divorce, the circle process and compensation can provide a powerful source of agency and an acknowledgement of the harm committed against her.

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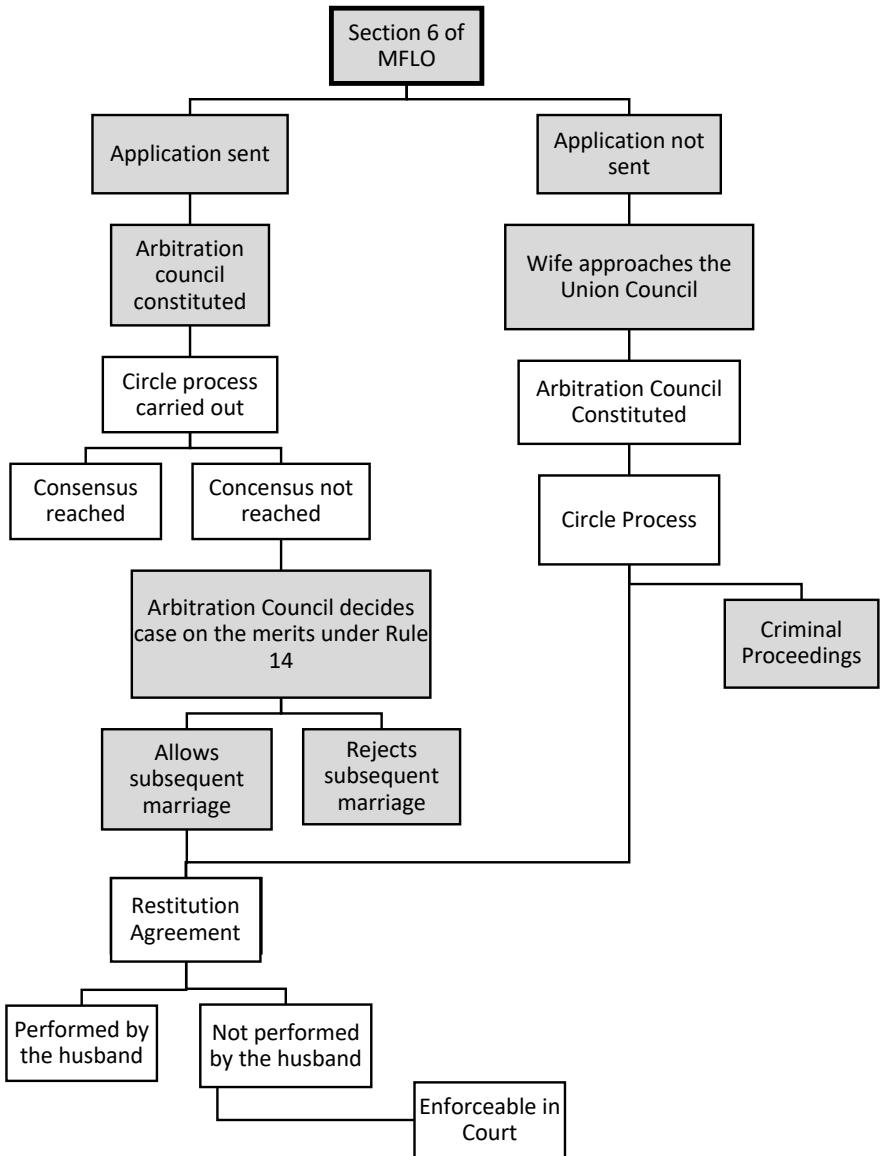
262. JOHNSTONE, *supra* note 237, at 66.

263. See Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1(3) INT’L J. RESTORATIVE J. 372, 377 (2018). (“It invites community members to hear the stories of those who have been harmed and those who have done harm. It relies on community to witness the voices of those who have been harmed and validate their harms and invites the community to contemplate their role in and responsibility for gender-based harms. Restorative justice engages those who otherwise might not be aware of the harms done in their community.”)

264. MFLO, No. 8 of 1961 § 6(3) GAZETTE, 1961.

265. JOHNSTONE, *supra* note 237, at 66.

266. *Awal Zaman v. Nasreen Bibi* YLR 2015 Peshawar 1770.



**Section 6 Procedure with the incorporation of Restorative processes.**

*b. Application not received by the Union Council*

In the event that the husband contracts a subsequent marriage without obtaining a permission from the Arbitration Council, unwilling cowives (whether the unwilling existing wife or the unknowing subsequent wife) will have the option to approach the Union Council to constitute an Arbitration Council for a restorative circle process as the one described above—this time in the presence of a police officer, since the law is breached. The aggrieved co-wife will get to express the harm caused to her, the husband will be encouraged to express remorse and take responsibility, and the Arbitration Council will facilitate an agreement to reconstitute the co-wife. The presence of the police officer, and awareness of penal sanctions in lieu of reaching a consensus will serve as a compelling incentive for the husband to participate in the circle. If a restitutive agreement is not reached, the Union Council, with the consent of the aggrieved wife and oversight by trained social workers, will be responsible for initiating criminal proceedings. The oversight by trained social workers will ensure that Union Council members do not abuse their discretion,<sup>267</sup> and that unwilling co-wives do not have to face the hostile environment of the Court.<sup>268</sup>

This regime is not perfect, but it provides a way for parties who consider polygamy a “security” to proceed with their desires, and at the same time offers a way to address the social, economic and emotional harm caused to those “threatened” by it. Together with the changes in the background rules, unwilling co-wives can also exit the polygamous marriage in addition to receiving restitution. The chart below summarizes the workings of this process. The boxes colored in gray represent legal procedures as they currently exist, whilst boxes in white are my proposed additions based on restorative justice.

3. Administrative changes required for RJ to work

Two challenges arise in ensuring that the RJ processes listed above is effective. The first pertains to assembling a staff that is sufficiently trained and sensitized to facilitate the circle process and oversee criminal proceedings initiated by the Union Council. Feminist critics of RJ point out the prevalence of patriarchal attitudes amongst circle facilitators that inadvertently undermine the harm caused to impacted parties.<sup>269</sup> This is the same criticism currently levied against members of the Union Council. To ensure a safe process, recourse ought to be dedicated to adequately educate and train facilitators involved in polygamy disputes, so that they understand the nature of the distress and suffering of

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267. See *supra* note 49.

268. See *supra* note 48.

269. See *supra* note 119, at 373. (“The likelihood of an unsafe process is exacerbated if the restorative facilitator lacks training in and an understanding of the dynamics of gender-based violence. Without such knowledge and experience, the facilitator would be unlikely to intervene.”)



unwilling co-wives. Unless the background rules listed above that make unwilling co-wives extremely vulnerable are changed, there is a real risk of the circle process revictimizing these women.

The second challenge is notifying the existing or subsequent wife about their husband's secretive polygamy. Even though section 5 of the MFLO requires that all marriages be registered with the Nikah registrar of a Union Council, non-registered marriages are nonetheless considered valid, and liable to penal sanctions.<sup>270</sup> This provides husbands with the freedom to contract hidden polygamous informal marriages. One way to partially deal with this issue is through digitization of the nikah registry and linking it to the NADRA registry. The National Database & Registration Authority (NADRA) regulates registration databases of all national citizens of Pakistan and issues national identity cards. After marriage, Pakistani women update their marital status by going in person to the NADRA office with the *nikkahnama* (marriage paper) and their husband's *ID*. If a NADRA officer finds that another woman is already registered as the wife of the husband, he should notify both the existing and the subsequent wife. Another measure would be to impose a legal obligation on the *imam* that performs the *nikkah* to notify the local nikah registrar about the marriage, and thereafter placing a duty on the nikah registrar to notify both wives about the husband's polygamous status. The latter has been done in Egypt.<sup>271</sup> None of these solutions are perfect, and some hidden polygamous marriages are bound to fall through the cracks in a system where completely informal marriages are regarded as valid, nonetheless, reducing the instances of that happening can go far in ensuring that unwilling cowives can seek justice and restitution.

### CONCLUSION

This paper has attempted to provide a thorough and nuanced understanding of the workings of Polygamy Law in Pakistan. By identifying the myriad of distributions and background rules currently in place, it is possible to recognize the *specific harms* caused to unwilling co-wives. I suggest that these harms can be addressed by changing certain operative background rules in addition to introducing restitutionary remedies based on a restorative justice framework. I have also sought to place these solutions in either traditional Islamic Family and Criminal law or used reformist legislation in different Muslim jurisdictions to make their promulgation in Pakistan politically viable. In doing so, my goal has been to step beyond the debate of banning or allowing polygamy and redirecting focus on finding practical ways to better the lives of women in Pakistan who unwittingly find themselves in the middle of a polygamous marriage.

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270. See MFLO, No. 8, § 5, GAZETTE 1961; Abdul Majid Khan another v. Mst Anwar Begum PLD 1989 SC 362.

271. Law No. 100 of 1985, Article 11.