

## Polygamy and Second Marriage under Muslim Family Law in Pakistan: Regulation and Impact

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### Abstract

*Under classical Islamic family law, a husband has the right to enter into a maximum of four marriages at a time. State regulation under the Muslim Family Laws Ordinance 1961 (MFLO), however, has restricted such privilege of husbands by requiring them to get permission for their polygamous marriages from the Union Council based on valid reason. Failure to do so is a criminal offence liable to punishment including imprisonment and fine. In addition to surveying the statutes and case law on the regulation of polygamy, this paper analyzes the impact of second marriage of parents on their right to the custody of children. Based on this analysis, we argue that the official Muslim family law in Pakistan prefers monogamy not only by regulating polygamous marriages, but also by denying the right of custody of children to polygamous husbands.*

### Keywords

polygamy, state regulation, ground for divorce, custody of children.

### Introduction

In Pakistani society, stepfamilies are formed as a result of a husband entering into a second marriage during the subsistence of his first marriage, or by remarriage of either spouse after divorce or death. Some studies show that stepfamilies face far more challenges than their traditional counterparts do. One study finds that words generally attributed to step relations are often synonymous with “dangerous,” “evil,” “wicked,” “cold,” and “distant,” showing a perception that such

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relations lack a sense of belonging and companionship.<sup>1</sup> Such families also have disproportionately adverse emotional and psychological consequences for women and children. Stepchildren, especially girls, feel more detached from their stepfathers while trying to adjust to new roles.<sup>2</sup> Husbands are also adversely affected in stepfamilies, because of the additional emotional and financial burden.<sup>3</sup>

Families whose structures are based on polygamous marriage are more vulnerable to interfamilial conflicts, parental violence, and negative emotions, which subsequently act as stimuli to psychological dysfunction among children of such stepfamilies.<sup>4</sup> Polygyny/polygamy<sup>5</sup> usually adds to the size of the family, which in return requires more resources for maintaining a sustainable home environment. The addition of wives can add to the mental distress of the existing wife, which can

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<sup>1</sup> Saira Aslam et al., “Stepfamily Stereotypes in Common Discourse and Lived Experiences,” *Pakistan Journal of Social and Clinical Psychology* 13, no. 1 (2015): 3.

<sup>2</sup> Sultan Shuja et al., “Impact of Real versus Step-parental Rejection and Social Competence on Psychological Maladjustment of Pakistani Girls,” *Pakistan Journal of Psychological Research* 32, no. 2 (2017): 353.

<sup>3</sup> Alean Al-Krenawi, Verad Slonim-Nevo, and John R. Graham, “Polygyny and Its Impact on the Psychosocial Well-being of Husbands,” *Journal of Comparative Family Studies* 37, no. 2 (2006): 173. Some studies, however, show positive impacts of stepfamilies especially for women who are financially insecure. Marilyn Coleman, Lawrence Ganong, and Chanel Goodwin, “The Presentation of Stepfamilies in Marriage and Family Textbooks: A Re-examination,” *Family Relations* 43, no. 3 (1994): 289; Caroline Dewilde and Wilfred Uunk, “Remarriage as a Way to Overcome the Financial Consequences of Divorce: A Test of the Economic Need Hypothesis for European Women,” *European Sociological Review* 24, no. 3 (2009): 393.

<sup>4</sup> Aneesa Pervez and Syeda Shahida Batool, “Polygamy: Chaos in the Relationships of Children,” *Pakistan Journal of Social and Clinical Psychology* 14, no. 1 (2016): 30.

<sup>5</sup> *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, 3rd ed. (London: Women Living Under Muslim Laws [WLUML], 2006) 197. The term “polygyny” refers to a form of marriage where the husband is married to two or more women simultaneously. It is used interchangeably with the word “polygamy,” which refers to a form of marriage in which either the husband or the wife has more than one spouse at a time. Since a wife is not allowed to have multiple marriages at the same time under Muslim family law, the precise term to be used is “polygyny.” However, the general term “polygamy” is often understood to refer to a man married to more than one woman at a time.

reduce her level of care and supervision of her children and family.<sup>6</sup> Another possible consequence of polygamy is the appearance of parental alienation syndrome in children when one parent tries to brainwash them against the non-custodial parent during child custody disputes.<sup>7</sup> Remarriage of either parent can give rise to feelings of jealousy, a desire for revenge, and the wish to replace the ex-spouse with the stepparent in the life of the child. These feelings may provoke some parents to try to undermine their children's affection for the other parent.<sup>8</sup> Children bear the brunt of remarriage of parents when they are exposed to custody litigation by the non-custodial parent. Such litigation inflicts severe emotional and psychological harm upon children by exposing them to the conflicting feelings of love and hatred towards the litigating parents. Children from less-preferred co-wives also face difficulty in claiming their rights from their father, and often become a target of bullying and victimization.<sup>9</sup>

Because of the permissibility of polygamous marriages for men and second marriage of widows and female divorcees, step relations are treated in detail under Muslim family law (also called Muslim personal law). Not only do consanguine and uterine relations form part of a family, they also enjoy inheritance rights.<sup>10</sup> Though legally permissible, polygamous marriages are often frowned upon socially, especially among urban dwellers in Pakistan. The same applies to marriages of widows and second marriages of divorcees. In the South-Asian context, the treatment of stepchildren by stepmothers is proverbial for cruelty

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<sup>6</sup> Alean Al-Krenawi and John R. Graham, "A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages," *International Journal of Social Psychiatry* 52, no. 1 (2006): 5; Lindsay Dianne Shepard, "The Impact of Polygamy on Women's Mental Health: A Systematic Review," *Epidemiology and Psychiatric Sciences* 22, no. 1 (2013): 47.

<sup>7</sup> Richard A. Gardner, *The Parental Alienation Syndrome*, 2nd ed. (Cresskill, NJ: Creative Therapeutics, 1998).

<sup>8</sup> Richard A. Warshak, "Remarriage as a Trigger of Parental Alienation Syndrome," *The American Journal of Family Therapy* 28, no. 3 (2000): 229; Warshak, *Parental Alienation Syndrome in Court* (Dallas, TX: Clinical Psychology Associates, 1999).

<sup>9</sup> Mohammad Al-Sharfi, "Psychological Well-being and Bullying/Victimization among Adolescents from Polygamous and Monogamous Families in Saudi Arabia," Proceedings of the European Conference on Psychology and the Behavioral Sciences, UK, 2015, accessed December 13, 2019, [http://papers.iafor.org/wp-content/uploads/papers/ecp2015/ECP2015\\_12619.pdf](http://papers.iafor.org/wp-content/uploads/papers/ecp2015/ECP2015_12619.pdf).

<sup>10</sup> Hamid Khan, *The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries* (Karachi: Oxford University Press, 2007), 78, 90; Shahbaz Ahmad Cheema, *Islamic Law of Inheritance: Practices in Pakistan* (Islamabad: Shariah Academy, 2017), 30-32.

and maltreatment.<sup>11</sup> However, high educational achievements amongst females and their increased participation in the workforce along with the rise of nuclear families and high divorce rates have put constraints on traditional sources of legality, i.e., religion and custom.

Based on our analysis of legislative developments and reported judgments on the issue of polygamy, we argue that the legal system in Pakistan favours monogamous marriage. Various legal developments in statutes and case law over the years confirm that monogamous marriages are the general standard whereas polygamy is an exception. Under Pakistani law, a husband who intends to enter into a second marriage must get permission from the Union Council (a body of elected members at local or village level)<sup>12</sup> based on a reasonable justification. Failure to comply with this requirement may lead to the imposition of punishment with imprisonment and a fine. Furthermore, courts often award custody to the mother in case the husband enters into a second marriage, because judges do not consider the polygamous husband as a suitable person to ensure the welfare of his children.

The rest of this paper is divided into three parts. First part describes the law that regulates polygamous marriages under Muslim family law. Second part of the paper explores the case law under the rule wherein second marriage of a husband provides the first wife the right to dissolve her marriage. The case law shows that courts regard the second marriage of a husband either as a ground *per se* for dissolution of marriage or as cruelty to the first wife/wives, which is a ground for dissolution of marriage under the law. Third part shows that while adjudicating disputes over custody of children, courts are more likely to view polygamous marriages of husbands and second marriages of female divorcees negatively and more likely to not grant them custody of their children. All the above legal and judicial developments emphasize that standard form of marriage in official Muslim family law of Pakistan is monogamous.

### **Regulation of Polygamy in the Islamic Republic of Pakistan**

Muslim family law in Pakistan is based on uncodified *fiqh* (Islamic law) drawn from the Qur'ān and the *sunnah* of the Prophet Muḥammad (peace

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<sup>11</sup> Aslam et al., "Stepfamily Stereotypes in Common Discourse and Lived Experiences."

<sup>12</sup> Under section 2 (e) of the Muslim Family Laws Ordinance 1961, Union Council "means a Union Council, Municipal Committee, Cantonment Board, a Union Administration or, in case of absence of any of these local governments in a local area, any other comparable body constituted under any law relating to the local governments or local authorities."

be on him). Under pre-Islamic law of Arabia, there were no limitations on the number of wives that a man could have.<sup>13</sup> The Qur'ān reformed this law by putting a limit of four wives and by stipulating a condition that such was allowed only if equitable treatment for each was guaranteed by the husband.<sup>14</sup> Traditionalist scholars are of the opinion that polygamy is permissible, and it cannot be prohibited.<sup>15</sup> They rely upon the Qur'ānic verse 4:3:

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.

According to Jamal Ahmad Nasir, polygamy up to four wives with conditions of justice and fairness has been approved under Islamic law since the times of the Prophet (peace be on him) and the Muslims all over the world have been confirming it with their words and deeds for centuries.<sup>16</sup> The debate on regulating polygamy was initiated by Egyptian reformer Muhammad Abduh (d. 1905) in the twentieth century.<sup>17</sup> Since then, modernist scholars particularly women such as Amina Wadud,<sup>18</sup> Asma Barlas,<sup>19</sup> and Shaheen Sardar Ali,<sup>20</sup> claim that polygamy was a cultural concession extended to men considering the societal structure and circumstances at the time of the Prophet Muhammad (peace be on him). They argue that polygamy was not initiated by Islam, rather Islam restricted the practice for the benefit of orphans.<sup>21</sup> Javaid Rehman argues that “monogamous relationship is an ideal form of association” under

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<sup>13</sup> Majid Khadduri, “Marriage in Islamic Law: The Modernist Viewpoints,” *American Journal of Comparative Law* 26, no. 2 (1977): 213.

<sup>14</sup> Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (Leiden: Brill, 2009), 25.

<sup>15</sup> Muhammad Taqi Usmani, *Islam and Modernism*, accessed December 13, 2019, <http://muftitaqiusmani.com/en/books/PDF/islam%20%20modernism.pdf>.

<sup>16</sup> Jamal J. Ahmad Nasir, *The Islamic Law of Personal Status* (Leiden: Brill, 2009), 67.

<sup>17</sup> *Ibid.*

<sup>18</sup> Amina Wadud, *Quran and Woman: Reading the Sacred Texts from Woman's Perspective* (New York: Oxford University Press, 1999).

<sup>19</sup> Asma Barlas, “Believing Women” in *Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin, TX: University of Texas Press, 2002).

<sup>20</sup> Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man* (The Hague: Kluwer Law International, 2000), 73–75.

<sup>21</sup> Javed Ahmed Ghamidi, “Polygamy,” trans. Shehzad Saleem, *Renaissance*, 13, no. 06 (2003), accessed December 2019, <http://www.monthly-renaissance.com/issue/content.aspx?id=336>.

Islamic law and Qur'ānic verses emphasize on “highly restrictive nature of polygamy.”<sup>22</sup> The variety of opinions among scholars is reflected in practice as the current laws in Muslim countries on polygamy range from prohibition to regulation of varying degrees.<sup>23</sup> Contemporary legislations in many Muslim countries, including Pakistan, take the modernist approach by introducing regulation of polygamy with an object to protect the rights of women. These reformist steps include making consent of the first wife compulsory for polygamous marriage, informed consent of the prospective wife based on marital status of would-be husband, granting the first wife the right to dissolution on polygamous marriage of her husband, ascertainment by a judge about necessity of polygamous marriage along with financial position of husband and his capacity to treat wives equitably.<sup>24</sup>

Polygamy in Pakistan remained unregulated until the promulgation of the Muslim Family Laws Ordinance 1961 (MFLO). However, since the Pakistani society was not ready for a complete prohibition of polygamy like Tunisia, regulations in the form of imposing stringent conditions on the practice were promulgated under section 6 of the MFLO. Subsection 2 of this section requires a man to submit an application to the Chairman of the Union Council for securing permission to enter into another marriage. In his application, he is required to “state the reasons for the proposed marriage and whether the consent of existing wife or wives had been obtained thereto.”<sup>25</sup> The Chairman of the Union Council on receipt of such an application is required to call upon the petitioner and his wife to nominate their representatives, and the Arbitration Council so constituted, may grant permission with or without any conditions after satisfying itself that the proposed marriage was “necessary and just.” While assessing whether the proposed marriage is necessary and just, the Arbitration Council considers the following amongst other grounds: “sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife.”<sup>26</sup> Therefore, this section

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<sup>22</sup> Javaid Rehman, “The Shariah, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq,” *International Journal of Law, Policy and the Family* 21 (2007): 114–15.

<sup>23</sup> Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), 78.

<sup>24</sup> For details, see Nasir, *Islamic Law of Personal Status*, 66–68; Nasir, *Status of Women under Islamic Law*, 25–28; Welchman, *Women and Muslim Family Laws in Arab States*, 77–86.

<sup>25</sup> The Muslim Family Laws Ordinance 1961, sec. 6 (2).

<sup>26</sup> The Muslim Family Laws Rules 1961, rule 14.

restricts the practice of polygamy and permits it only in cases where it appears necessary and just to the Arbitration Council.<sup>27</sup>

Though the pre-conditions for a polygamous marriage are set in place, the law does not declare the second marriage contracted without the permission of the Arbitration Council as invalid. However, the husband who enters into such marriage, under section 6 (5) (a), shall have to “pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue.”<sup>28</sup> Moreover, under section 6 (5) (b) of the MFLO, such a violation of law is also “punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.”<sup>29</sup> In 2015, under an amendment in the province of Punjab, the fine has been increased up to five hundred thousand rupees.<sup>30</sup> In addition to the above enhancement of fine, two new offences have been inserted in Section 6 of the MFLO. The first pertains to ensuring proper completion of each entry of *nikāḥnāmah* by *nikāḥ* registrar and the second obliges the Chairman of the Union Council to swiftly and properly proceed with the mechanism of Arbitration Council prescribed. In case these provisions are violated, offenders (*nikāḥ* registrar in the first case and the Chairman in the second) are to be punished with imprisonment for one month and a fine of twenty-five thousand.<sup>31</sup> The object of the above-mentioned amendments is to ensure disclosure of marital status of husband at the time of another marriage, and smooth and solemn functioning of the Arbitration Council’s procedure for regulating the permission of polygamous marriage. It is yet to be ascertained whether and to which extent the new legislative amendments in Punjab have streamlined the procedure for the regulation of polygamy.

Case law on the above provisions might serve as a useful guide on how the courts have dealt with the MFLO. In *Muhammad Aslam v. Ghulam Muhammad Tasleem*, the court held that the second marriage contracted during the subsistence of the first marriage without the permission of the Arbitration Council in contravention of section 6 of the MFLO attracted legal sanctions, but it was not invalid in itself.<sup>32</sup> Therefore, section 6 of the MFLO deters or discourages the practice of polygamy,

<sup>27</sup> Syed Ali Nawaz Gardezi v. Lt-Col. Muhammad Yusuf PLD 1963 SC 51.

<sup>28</sup> The Muslim Family Laws Ordinance 1961, sec. 6 (5) (a).

<sup>29</sup> Ibid., sec. 6 (5) (b).

<sup>30</sup> The Muslim Family Laws (Amendment) Act 2015.

<sup>31</sup> Sections 2(A), 4(i), and 4(ii) of the Muslim Family Laws (Amendment) Act 2015.

<sup>32</sup> Muhammad Aslam v. Ghulam Muhammad Tasleem PLD 1971 Lahore 139.

but does not prohibit it.<sup>33</sup> Even this deterrence would have been insufficient in practice if the courts had adopted a lenient approach while imposing penalties upon husbands who entered into polygamous marriages without the permission of the Arbitration Council. The reported judgments show that courts do apply the legal provision regulating polygamy and punish polygamous husbands for non-compliance.<sup>34</sup> In doing so, courts laid down a three-prong test to determine if an offense has been committed: (a) a previous marriage and an existing wife/wives; (b) absence of a requisite permission from Arbitration Council for taking additional wife; and (c) celebration of marriage in violation of section 6 of the MFLO.<sup>35</sup>

In its famous judgment in *Allah Rakha v. Federation of Pakistan*, the Federal Shariat Court rejected the argument that the regulation or restriction of polygamy under the MFLO violated the injunctions of Islam as laid down in the Qur'ān and the *sunnah*.<sup>36</sup> This issue was also raised before the Supreme Court, which rejected the argument that this section was unlawful and held:

Section 6 of the Ordinance [MFLO] as framed, in no manner places any prohibition in having more than one wife. It only requires that the condition of (عدل) [justice] prescribed by Holy Qur'an itself should be satisfied by the male who wants to have more than one wife. The provisions for constituting an Arbitration Council, therefore, cannot itself be said to be violative of Injunctions of Qur'an as only a procedure has been prescribed how the Qur'anic Verse will be observed in its totality with reference to the condition of (عدل) [justice] placed in the Verse itself.<sup>37</sup>

In this case, the petitioner sought leave to appeal against his conviction under section 6 (5) (b) of the MFLO. The petitioner contested his conviction on two grounds. First, he challenged section 6 as invalid,

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<sup>33</sup> This section of the MFLO represents a compromise between the viewpoints of traditionalists and modernists. Whereas traditionalists are in favour of polygamy, modernists want its prohibition. The compromised position of both resulted in introduction of restrictions on a husband's right to polygamy by confining it to extraordinary circumstances and making it dependent on the consent of the existing wife. Muhammad Khalid Masud, "Modernizing Islamic Law in Pakistan: Reform or Reconstruction?" *Journal of South Asian and Middle Eastern Studies* 42, no. 2 (2019): 73.

<sup>34</sup> *Ishtiaq Ahmad v. the State* PLD 2017 SC 18; *Liaqat Ali Mir v. Additional Session Judge PCrLJ 2017 Islamabad 1026*; *Naseem Akhtar v. Mst. Abida Sultan* MLD 1992 Lahore 93; *Manzoor Bibi v. Muhammad Afzal Haq* PCrLJ 1989 Lahore 749.

<sup>35</sup> *Naseem Akhtar v. Mst. Abida Sultan* MLD 1992 Lahore 93.

<sup>36</sup> *Allah Rakha v. Federation of Pakistan* PLD 2000 FSC 156.

<sup>37</sup> *Ishtiaq Ahmad v. The State* PLD 2017 SC 18.



because of its incompatibility with Islamic law. Second, he contended that his wife had given her consent to him personally and there was no reason to seek permission for contracting a second marriage from the Arbitration Council under section 6 (2) of the MFLO, since the term for which the councils were elected had expired. As stated above, the court rejected the first contention. With regard to the second contention, the court ruled that in the absence of an elected representative, the Administrator or another designated officer, acted as the Chairman. Therefore, the conviction of the husband was maintained under section 6 (5) (b) of the MFLO for disregarding the law.

Keeping in view the deterring nature of section 6 of the MFLO, which regulates polygamy, it is important to note the judicial attitude towards the enforcement of this section. Initially, the courts were reluctant to strictly apply this section as they faced difficulty in deciding the *locus standi* of the party to file a complaint against a husband for the violation of the legal provisions of the MFLO. This eventually led to some confusion and many a times enabled the husband to escape punishment.<sup>38</sup> The confusion stemmed because according to the Muslim Family Laws Rules 1961, courts were not permitted to take cognizance of an offence under the MFLO except on a written complaint by the “Union Council.”<sup>39</sup> This meant that where an Arbitration Council refused to permit a husband to take a second wife during the subsistence of an existing marriage, and in spite of this refusal he took a second wife, the Arbitration Council or the first wife would not be competent to lodge a complaint against him, because only the “Union Council” was capable of doing so.<sup>40</sup> Further, in a number of cases, men who entered into a second marriage could not be prosecuted since the statute was unclear on who was authorized to file a complaint: Was it the Chairman of the Union Council or the Union Council itself? The facts in the following cases illustrate this legal confusion.

In *Muhammad Islam v. the State*, the Chairman of the Union Council filed a complaint under section 6 (5) (b) of the MFLO.<sup>41</sup> The husband objected to the *locus standi* of the Chairman of the Union Council under

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<sup>38</sup> Alamgir Muhammad Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia* (New York: Oxford University Press, 2001).

<sup>39</sup> Rule 21 of the Muslim Family Laws Rules 1961 reads, “No Court shall take cognizance of an offence under the Ordinance or these rules save on a complaint in writing by the Union Council, stating the facts constituting the offence.”

<sup>40</sup> Lucy Carroll, “The Muslim family laws Ordinance 1961,” *Contributions to Indian Sociology* 13, no. 1 (1979): 117.

<sup>41</sup> *Muhammad Islam v. The State* PLD 1967 Peshawar 201.

Rule 21 of the Muslim Family Laws Rules 1961 by stating that the legislature excluded any unilateral action by the Chairman on purpose and provided for the prosecution of a person only in those cases where the Union Council itself agreed to prosecute. The counsel for the State argued that a corporate body had to act through its chief executive and the Chairman, being the executive head of the Union Council, was competent to make a complaint for and on behalf of the Union Council. The court held that “Chairman” and “Union Council” were not synonymous rather they were different entities and, therefore, the complaint must come from the Union Council rather than from its Chairman. Similarly, in *Fateh Muhammad v. Chairman*, the Chairman of the Union Council lodged the complaint against a husband who entered a polygamous marriage in contravention of the law.<sup>42</sup> The court in this instance followed the precedent set in *Muhammad Islam* and strictly interpreted the law to hold that the application should have been filed after the resolution passed by the members of the Union Council. Based on this narrow interpretation of the law, the proceedings against the husband were quashed.

This loophole in the law was remedied in the province of Punjab when an amendment was introduced to replace the words “Union Council” in Rule 21 with “aggrieved party” under a Gazette Notification dated November 26, 1976. North Western Frontier Province (presently Khyber Pakhtunkhwa) followed the footprint of Punjab in 1992 by substituting the term “Union Council” to “aggrieved party.”<sup>43</sup> The umbrella term of “aggrieved party” was deliberately introduced to be inclusive enough to include the wife/wives, their children, or any other person who may be adversely affected by the polygamous marriage of a husband. The Supreme Court of Pakistan considered the question of whether a second wife could be regarded as an “aggrieved party” under Rule 21 and thus be entitled to initiate proceedings against her husband who had not sought the requisite permission under section 6 of the MFLO before contracting the marriage with her.<sup>44</sup> In this case, the counsel for the husband argued that that the Rule 21 was intended for the protection of the first wife, therefore, the second wife could not fall under the definition of “aggrieved party.” The court, however, rejected this argument after observing that a restrictive interpretation of the expression “aggrieved party” would violate the objective of the law by providing the defaulting husbands escape routes. The court further

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<sup>42</sup> *Fateh Muhammad v. Chairman* Ward No. 14/15 Lahore PLD 1975 Lahore 951.

<sup>43</sup> *Waqas Khan v. Dr Seema Hanif* PLD 2019 Pesh 180.

<sup>44</sup> *Faheemuddin v. Sabeeha Begum* PLD 1991 SC 1074.

observed that such husbands were offenders who cheated women without disclosing to them the fact of their first marriage.

The above-mentioned amendments have clarified the law and courts have extended the meaning of “aggrieved party” to give even the second wives the right to sue the defaulting husbands who enter polygamous marriages without following the requirements of the law. Still, reported judgments show that courts are hesitant in awarding defaulting husbands the punishment of imprisonment for polygamy. In a few cases, when courts awarded the punishment of imprisonment to such husbands, it was only for a short period of time.<sup>45</sup> Instead, the courts are more willing to financially penalize the offending husbands to require them to pay deferred dower to their first wives on entering into another marriage.<sup>46</sup>

The above developments in statutes and case law indicate that the road to the regulation of polygamy in Pakistan is replete with a number of obstacles. There remains confusion as to whether polygamy is a private or public offence. This confusion manifests itself in specifying the person who should have the right to initiate prosecution if a husband enters a second marriage without complying with the legal provisions. At present, the largest province of Pakistan, Punjab, and Khyber Pakhtunkhwa confer on the “aggrieved party,” including the first wife, the right to initiate criminal proceedings against the husband. In the other two provinces, Sindh and Balochistan, however, the first wife does not have this right.<sup>47</sup>

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<sup>45</sup> In *Raja Muhammad Azram v. Mst. Jamila Banaras* YLR 2011 Lahore 1595, the husband was handed down one-month imprisonment for entering into a second marriage without the permission from the Arbitration Council. Similarly, one-month imprisonment was handed down to the husband for violating section 6 of the MFLO in *Ishtiaq Ahmad v. The State* PLD 2017 SC 187 and *Liaqat Ali Mir v. Additional Session Judge* PCrLJ 2017 Islamabad 1026.

<sup>46</sup> In *Mst. Manzoor Bibi v. Muhammad Afzal Haq* PCrLJ 1989 Lahore 749, the husband served only four days in prison for entering into a second marriage without the permission from the Arbitration Council and the wife’s revision petition to restore the sentence to one-year imprisonment handed down by the trial court was dismissed. The court held, “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.” *Muhammad Shabbir v. Rehana Kausar* PLD 2013 Lahore 102; *Munazza Noor v. Additional District Judge* CLC 2009 Lahore 374; *Qasim Raza v. Additional District Judge, Mailsi District Vehari* CLC 2 (note 2018); *Tasawar Hussain v. Mst. Farzana Kausari* PLD 2015 Lahore 208.

<sup>47</sup> In *Subedar Malik Sher Muhammad v. The State* PCrLJ 1986 Quetta 1510, the Balochistan High Court held that a private complaint was not maintainable under section 6 of the MFLO unless it were filed by the Union Council. In *Atiq-ur-Rehman v. Mst. Sadia* MLD 2010 Karachi 470, the Sindh High Court quashed proceedings in a private complaint filed

Due to the hurdles that bar the effective regulation of polygamy, first wives are often forced to explore other options for protection of their rights and interests, such as, private agreements. Under Islamic law, conditions can be stipulated in the marital contracts. However, Muslim jurists differ about the nature and extent of such conditions. The conditions are generally inserted to protect the rights of women. The Ḥanbalī school permits incorporating the condition of prohibiting second marriage by the husband during subsistence of his first marriage. Majority of the jurists of other schools, however, do not allow such prohibitive condition on the ground that polygamy cannot be prohibited through private contracts of spouses, because the Qur'ān allows it.<sup>48</sup> The controversy over the extent of permissible stipulations hinges upon the nature of marriage as status or contract.<sup>49</sup> Since Ḥanbalī school regards marriage as a contract, therefore, it allows for greater accommodation of various stipulations and regards their violation as a ground for judicial divorce.<sup>50</sup> In contrast, the Ḥanafī law regards marriage as a status and restricts the role of conditions in it.<sup>51</sup> Despite the fact that an overwhelming majority in Pakistan follows the Ḥanafī school, the superior judiciary has adopted a progressive approach for the implementation of stipulations in marriage. The facts in the following cases depict this phenomenon.

The judge described the controversy in *Awal Zaman v. Nasreen Bibi*, as “unique.”<sup>52</sup> The parties were married for over forty years when the husband asked his wife, Nasrin Begum, that he wanted to contract a second marriage. She provided her consent to the second marriage of her husband, Awal Zaman, on the condition that in case their relations were strained in future, she would be entitled to receive half of his salary for the maintenance and education expenses of their children, half of what he earned in his pension, agricultural property, and house. A written agreement was executed to this effect. After thirteen years of her husband's second marriage, their relations became strained and he

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against the husband under section 6 of the MFLO. For an earlier decision applying the same principle in the province of Sindh, see *Zakir Hussain Siddiqui v. Mst. Nasim Bano* CLC 1989 Karachi 1062.

<sup>48</sup> Raihanah Abdullah, “Inserting Stipulation Pertaining to Polygamy in a Marriage Contract in Muslim Countries,” *al-Jāmi'ah* 46, no. 1 (2008): 153–69.

<sup>49</sup> Lama Abu-Odeh, “Modernizing Muslim Family Law: The Case of Egypt,” *Vanderbilt Journal of Transnational Law* 37 (2004): 1043, 1069–71.

<sup>50</sup> Nasir, *Status of Women under Islamic Law*, 63–64; Welchman, *Women and Muslim Family Laws in Arab States*, 99.

<sup>51</sup> Abu-Odeh, “Modernizing Muslim Family Law,” 1043, 1125

<sup>52</sup> *Awal Zaman v. Nasreen Bibi* YLR 2015 Peshawar 1770.

refused to honour the terms and conditions of the agreement. Therefore, Nasrin Begum filed a suit for declaration and recovery of half share in his salary and pension emoluments and recovery of Rs. 70,000 that she incurred on the marriage of her daughters. During the pendency of the litigation, the husband transferred some of his landed property to his sons born to the second wife, Sakina Bibi, who was also sued as a defendant. The civil court and the district court decided in favour of Nasrin Begum and directed the husband to fulfil the terms of the agreement. The husband challenged the decision before the High Court, which also dismissed the petition. In this way, the first wife was able to acquire substantial financial rights to the property of her husband as a result of a contract.

In *Mst. Zainab Khatoon v. Amir Abdullah Khan*, a husband entered into an agreement to pay certain amounts of money to his wife in case he divorced her or entered into a second marriage without her consent.<sup>53</sup> The wife filed a suit for recovery of money when the husband breached the agreement. The husband argued that such an agreement was null and void under section 26 of the Contract Act 1872 as it put restraint on marriage. The High Court rejected this argument and held that it was a valid agreement, which provided that the amount of prompt dower would increase if the husband divorced his wife against her wishes or if he contracted a second marriage.

In yet another case, *M Ishaque v. Manzooran Bibi*, in addition to arguing that the contract put a restraint on marriage contrary to the law, the husband contended that such an agreement was also not enforceable as it was devoid of consideration.<sup>54</sup> His first wife in question had granted him permission to enter into a second marriage on the condition that the husband would continue to pay Rs. 500 per month as maintenance and transfer one residential room and one shop in her favour. After contracting second marriage, instead of complying with the terms of the agreement, the husband divorced his first wife. The wife then filed a suit for the enforcement of the agreement. Although the wife was unsuccessful in the subordinate courts, she was granted relief in the superior courts (i.e., the High Court and the Supreme Court). These courts held that the granting permission to enter a second marriage itself was a valid consideration for the agreement and the same was required to be specifically enforced against the husband.

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<sup>53</sup> *Mst. Zainab Khatoon v. Amir Abdullah Khan* PLD 2004 Lahore 330.

<sup>54</sup> *M. Ishaque v. Manzooran Bibi* PLD 2003 SC 128.

The above judgments show that “private ordering” to regulate polygamy is very effective especially for the protection of the financial rights of the first wife upon the second marriage of her husband. The courts refused the defenses of husbands based on legal technicalities against the enforcement of validly entered agreements to financially compensate first wives.

### “Broken Hearts of Wives”: Polygamy as a Ground for Divorce

In addition to the regulation of polygamy, the law in Pakistan provides first wives the right to dissolve their marriage upon the polygamous marriage of their husbands. The acknowledgement of this right demonstrates that the Pakistani legal system assumes that the standard form of marriage is monogamy. A Muslim husband is allowed to be married up to four wives at a time subject to equal and fair treatment meted out to each of them. Since such treatment is well-nigh impossible, the second marriage of the husband was added as a valid ground for fault-based divorce by a wife under the Muslim Family Laws Ordinance 1961 (MFLO). Section 13 of the MFLO added sub-section 2 (ii-a) under the Dissolution of Muslim Marriages Act 1939 (DMMA), which provided a wife the right to dissolve her marriage on the ground “that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961.”

Conservative sections of Pakistani society objected to the restriction on a husband’s right to enter into polygamous marriages under the MFLO. Therefore, General Zia-ul-Haq, who justified his military coup to Islamize laws in Pakistan, removed this section in 1981.<sup>55</sup> It is important to note that this legal change did not make much difference, because judges continued to regard second marriage as a ground for dissolution of marriage for the next three decades<sup>56</sup> until 2014 when the Peshawar High Court noted this amendment in the law and refused to accept a husband’s second marriage as a valid ground for the dissolution of

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<sup>55</sup> Section 13 of the MFLO was omitted under section 3 and Schedule II of the Federal Laws (Revision and Declaration) Ordinance 1981 (XXVII of 1981). The term “Islamization of laws” is used in Pakistan for the legislative and judicial processes to bring the laws, primarily of British colonial origin, in conformity with the injunctions of Islamic law. These processes were accelerated during the military regime of General Zia-ul-Haq (in office 1977–1988). Daniel P. Collins, “Islamization of Pakistani Law: A Historical Perspective,” *Stanford Journal of International Law* 24 (1987–88): 511.

<sup>56</sup> *Arshad Habib v. Mst. Ghazala Akbar* MLD 2014 Peshawar 988; *Aurangzeb v. Ejazul Hassan Khan* PLD 1984 Peshawar 49; *Mst. Rabia Rasheed v. Faisal Mir* CLC 2013 Peshawar 1203; *Sadia Sultan v. Additional District and Sessions Judge, Hafizabad* PLD 2012 Lahore 98.

marriage.<sup>57</sup> In its judgment of 2015, the Lahore High Court, however, still regarded a husband's second marriage as a valid ground for the dissolution of marriage.<sup>58</sup>

Despite the confusion in law regarding the second marriage of a husband as a valid ground for fault-based dissolution of marriage, the codified law in Pakistan also regards second marriage as "cruelty" to the first wife or wives if the husband does not treat each of them equitably. Section 2 (viii) (f) of the DMMA provides that if a man has more than one wife, and he does not treat them equitably in accordance with the injunctions of the Qur'ān, this amounts to cruelty. In an important development, courts have equated second marriage without the permission of the first wife to "cruelty," which is one of the most relied upon grounds for the dissolution of marriage by wives under the DMMA. In *Allah Ditta v. Judge Family Court*, Justice Muhammad Naseem took into account the second marriage of the husband without the permission of the first wife and observed that the first wife felt insulted when her husband contracted a second marriage.<sup>59</sup> Justice Naseem passed the poignant remark: "Such conduct of the husband towards the wife certainly breaks her heart if not the bones and when heart is broken it is simply immaterial if the bones are intact."<sup>60</sup>

The courts also consider the second marriage of a husband while adjudicating cases in which wives want to exercise their unilateral right to no-fault-based judicial divorce (*khul'*).<sup>61</sup> In *Mst. Zahida Bibi v.*

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<sup>57</sup> Syed Rashid Ali Shah v. Mst. Haleema Bibi PLD 2014 Peshawar 226.

<sup>58</sup> Sajjad Hussain v. Judge Family Court, Malisi CLC 2015 Lahore 1347.

<sup>59</sup> Allah Ditta v. Judge Family Court MLD 1995 Lahore 1852.

<sup>60</sup> *Mst. Rabia Rasheed v. Faisal Mir* CLC 2013 Peshawar 1203. The court held that the husband's behaviour amounted to cruelty to his wife when he not only neglected her but also entered into a second marriage without her permission by ignoring the formalities under section 6 of the MFLO. Similarly, in *Chanzeb v. Mst. Yasmeen Bibi* MLD 2015 Peshawar 1140, the court took into account the second marriage of the husband while deciding in favour of the wife in her suit for dissolution of marriage.

<sup>61</sup> Under Muslim family law, a spouse may dissolve the marriage either without assigning a cause (no-fault based) or after assigning a cause (fault-based) pertaining to the conduct of the other spouse. A husband can pronounce a *ṭalāq* (divorce) without assigning any reason. Likewise, a wife may seek the dissolution of her marriage on the basis of *khul'*. The distinction between the two lies in the procedure; while a husband may dissolve the marriage without judicial intervention by pronouncing the word "*ṭalāq*," the wife needs to justify her decision in a court by declaring that her marriage has irretrievably broken down. If the marriage is dissolved without any fault of the husband on the basis of *khul'*, the wife has to return the dower, which her husband paid her at the time of marriage.

*Muhammad Maqsood*,<sup>62</sup> the court considered the second marriage of the husband while accepting the wife's suit for dissolution of marriage on the basis of *khul'*. In *Dr Fakhr-ud-Din v. Kausar Takreem*,<sup>63</sup> the Peshawar High Court held that while determining the amount of consideration for *khul'*, the court shall take into account the second marriage of the husband.<sup>64</sup>

The above judgments show that courts regard the second marriage of a husband as a valid ground for dissolution of marriage *per se* or as "cruelty" to the first wife/wives in suits for dissolution of marriage.

### Effect of Second Marriage on Child Custody Disputes

Often the second marriage of either spouse leads to litigation over guardianship and custody of children. Under Muslim family law, maintenance of children is a father's responsibility. However, the custody of a child may be given to either parent, depending on who bears the greater responsibility for the daily well-being and physical supervision of minors. While deciding cases of custody, courts apply the principle of welfare of minors.<sup>65</sup> The principle of welfare of minors was grafted onto Anglo-Muhammadan law (later called Muslim personal law) under the Guardians and Wards Act 1890 ("Act") during British rule in India. Section 17 of the Act lays down the factors, which the courts must consider while deciding the issue of custody of children. This provision empowers the courts to grant custody of the child to either parent or any other person that the court may deem to be fit for the welfare of the child. Such factors include the age, sex, and religion of the minor along with the minor's "intelligent preference" if they are old enough.

A general survey of reported judgments on custody shows that courts have laid down some general principles. According to these principles, if a father contracts second marriage with or without dissolving the first marriage, he will not be given the custody of children. The custody of children in this situation will be given to the mother. To justify this principle, judges assume that a mother is in a

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<sup>62</sup> *Mst. Zahida Bibi v. Muhammad Maqsood* CLC 1987 AJK 57.

<sup>63</sup> *Dr Fakhr-ud-Din v. Kausar Takreem* PLD 2009 Peshawar 92.

<sup>64</sup> This principle was endorsed in *Saima Gul v. Haider Zaman* PLD 2015 Peshawar 14 and *Nasir v. Mst. Rubina* MLD 2012 Peshawar 1576.

<sup>65</sup> *Mehmood Akhtar v. District Judge, Attock* 2004 SCMR 1839. The Supreme Court held that as a general principle of Islamic law a father was the natural guardian of the minor and had the preferential right to the custody of the minor, but subject to the welfare of the minor, which was the prime consideration in determination of the question of custody of children.



better position to take care of children when the father enters into a polygamous marriage.<sup>66</sup> Under Islamic law, a mother has the right to the custody of her son until he attains seven years of age and of her daughters until she attains the age of puberty.<sup>67</sup> This right however discontinues if she contracts a second marriage with a man who does not fall within the prohibited degree of marriage with her daughter(s), but this does not apply when a father enters a second marriage.<sup>68</sup> Over time, the courts have relaxed this rule by giving preference to the principle of welfare or best interests of minors while adjudicating custody disputes. The courts have ruled that no objective criterion for determining welfare of minor can be devised. Rather, a subjective approach evaluating the specific circumstances of each case determines the welfare of a child. The following cases demonstrate how the court applies a contextual approach in child custody disputes.

In *Naghma Rani v. Additional District Judge*, the court denied custody to a mother after taking into consideration her second marriage with a person not falling within the prohibited degree of marriage to the children.<sup>69</sup> Other factors justifying the court's decision were the sound financial position of the father and good academic results of the children, which indicated that the father's custody ensured their welfare. Similarly, in *Maham Shabbir v. Additional District Judge*, the court denied a mother the custody of her children reasoning that she had entered into a second marriage when her daughter was about to reach the age of puberty.<sup>70</sup>

This approach is not limited to cases where a woman has contracted a second marriage. While adjudicating custody disputes, courts are equally hesitant to grant custody to husbands who have contracted a

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<sup>66</sup> Haseeb Ahmad v. Wajiha Wakeel YLR 2018 Peshawar 20. However, if a mother contracts another marriage after her divorce and the father does not, he may have custody of the children provided female members, such as a grandmother or paternal aunt, could share his responsibility for the well-being of the children.

<sup>67</sup> This principle is based on the opinion of Ḥanafī jurists. Jurists of other three Sunnī schools partially agree with this principle. According to Muḥammad b. Idrīs al-Shāfi'ī and Aḥmad b. Ḥanbal, a mother has the right to custody of her son and daughter until they are seven years of age. According to Shī'ī jurists, a mother has the right to custody of her son until he is two-year-old and of her daughter until she is seven-year-old. Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Hamdard Academy, 1978), 718–25, 735–45; D. F. Mulla, *Principles of Mahomedan Law*, 20th ed. (Haryana: LexisNexis, 2013), 438–39; Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, ed. and rev. Tahir Mahmood, 5th ed. (New Delhi: Oxford University Press, 2008), 161–62.

<sup>68</sup> Ibid.

<sup>69</sup> *Naghma Rani v. Additional District Judge* CLC 2018 Lahore 767.

<sup>70</sup> *Maham Shabbir v. Additional District Judge* CLC 2018 Islamabad 452.

second marriage during the subsistence of their first marriage. In *Haseeb Ahmad v. Mst. Wajiha Wakeel*,<sup>71</sup> the father had contracted a second marriage during the subsistence of his first marriage. The mother filed a suit before the family court for the dissolution of marriage and custody of children, which the court allowed. The subsequent appeal filed by the father contesting the custody of his children was dismissed on grounds of his second marriage. While doing so, the High Court observed,

The prime principle in this case is the welfare of minors, so during subsistence of marriage, the father contracted second marriage and did not think about the future of his minor children by giving preference to second marriage over the minors and the first wife. Moreover, it is centuries-old human experience that behavior of father changes when he contracts second marriage, as his conduct and behavior towards the minors do not remain affectionate and filled with love. . . .<sup>72</sup>

The possibility of handing over the custody and supervision of children, particularly minors, to a stepmother in preference to their real mother is frowned upon by the courts. In *Tassadiq Hussain Shah v. Surraya Begum*,<sup>73</sup> the Supreme Court of AJ & K observed that the stepmother could not replace the real mother in taking care of children. The court held that proverbial maltreatment of stepmother weighs against handing over the custody to the father under the principle of welfare of minors. On a similar issue, the Supreme Court of Pakistan refused leave to appeal to the father for custody of children on the ground that he had remarried and had children from the second marriage.<sup>74</sup> In another case, while handing the custody to the mother, the Peshawar High Court observed that “it would otherwise be very harsh to leave these children at the mercy of their stepmother who has herself a child,” particularly when their father is working abroad for livelihood.<sup>75</sup> In another case of the custody of children dispute, the father had contracted another marriage after dissolving his first marriage.<sup>76</sup> On the petition of the mother, who was the first wife, the court granted the custody of the minor daughters to her.<sup>77</sup> The father filed an appeal against this judgment. While dismissing the appeal, the Sindh High Court observed

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<sup>71</sup> YLR 2018 Peshawar 20.

<sup>72</sup> Ibid.

<sup>73</sup> CLC 1980 (AJ & K) 1802.

<sup>74</sup> Muhammad Ashraf v. Sakina 1989 SCMR 1277.

<sup>75</sup> Anwar Ali v. Naheed YLR 2019 [Peshawar] 734.

<sup>76</sup> Fazlur Rehman v. Shazia Bibi CLC 2015 [Sindh] 116.

<sup>77</sup> The court, however, gave the father the custody of the male children, who were above seven years of age.

that the stepmother could not maintain minors particularly girls like a real mother.

The above judgments show that the courts do not give the custody of children to a father who has entered a second marriage. For the sake of clarity, it is stated that mere second marriage of one of the spouses is not a sole criterion for determining the custody disputes. The courts under the overarching principle of welfare of minors engage in an exercise to evaluate what serves the best interests of children. As pointed above, the courts follow contextual approach for weighing welfare of minors if any of the spouses enters into another marriage and this approach may lead them to allow the custody to that spouse who has contracted another marriage. For instance, in *Nazeer Begum v. Abdul Sattar*,<sup>78</sup> despite the mother's second marriage with a stranger and having a child therefrom, while the father remained unmarried, the court held that it was in interest of two minor daughters to continuously remain in custody of their mother. In this case, the court noted that the father never made any genuine attempt to be in contact with his daughters despite living few hundred meters away from them and to provide them maintenance for almost five years.

Who gets the custody of children if both parents enter a second marriage after divorce? This question was answered in *Muhammad Alam v. Nazish Qazi*, where the mother filed a suit for dissolution of marriage on the ground of no-fault-based judicial divorce (*khul'*) and for the custody of her minor daughter.<sup>79</sup> The court decreed dissolution of marriage but denied the custody of the minor to either parent. After the dissolution of her marriage, the mother had contracted a second marriage with a person who did not fall within the prohibited degree of marriage with the minor. The father of the minor had also contracted a second marriage. In appeal, the custody of the child was decreed in favour of the mother. The father filed a writ petition against this decision before the High Court, which decided in favour of the father on the ground of the second marriage of the mother and ruled,

Although the mother is entitled to the custody of her minor child, such right discontinues when she takes [a] second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. However, this is not an absolute rule. If there are exceptional circumstances to justify such departure in view of [the] welfare of the child, the court may depart from this principle. There may also be a situation where despite [the] second

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<sup>78</sup> PLD 1963 Karachi 465.

<sup>79</sup> Muhammad Alam v. Nazish Qazi YLR 2018 Quetta 1771.

marriage of the mother, the welfare of [the] minor may still lie in her custody.<sup>80</sup>

The court did not find that such “exceptional circumstances” existed for the sake of the welfare of the minor in this case, but there are cases in which the courts have expanded this principle. In *Javed Hassan v. Mst. Farkhanda Yasmin*, both parents of a female child had contracted their second marriages.<sup>81</sup> The age of the female child was six years at the time of filing the case and she had turned sixteen when the writ petition was decided after a decade of litigation. The father filed the petition for the custody of his daughter on the ground of the second marriage of the mother. The court took into account the fact that the mother was an educated person and a *ḥāfīz-i Qur’ān* (a person who has memorized the Qur’ān) while the father was an illiterate labourer with no permanent source of income. By giving paramount importance to the psychological and mental well-being of the daughter, the court granted the mother the custody of her daughter despite her second marriage. Building upon the principle of welfare of minor, the court observed that the mere fact of the second marriage of the mother could not exclude her altogether from obtaining the custody of her female minor child. In another case, after dissolution of their marriage, each of parents entered into another marriage.<sup>82</sup> They had a daughter from their first marriage who at the time of the present litigation was living with her maternal grandparents owing to her mother’s health issue. The father petitioned to have her custody contending that her mother contracted another marriage with a stranger and left her with maternal grandparents. The court observed that the rule relating to second marriage of mother with a stranger was not absolute rather it was subject to the principle of welfare of minors. While refusing the father the custody, the court pointed out that the father was an employee in police department and in his absence from the house, his daughter would have to remain in supervision of her stepmother who could not be expected to render such affectionate love and care as her real mother could.

In several judgments, the courts have made adjustments to the rules of Islamic law in favour of the best interest of child and have granted the custody of the child to the mother despite her second marriage. One of the main factors that the courts consider in such cases is whether the

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<sup>80</sup> Ibid, para [9]. The court referred to the SC judgment in *Shabana Naz v. Muhammad Saleem* 2014 SCMR 343.

<sup>81</sup> *Javed Hassan v. Mst. Farkhanda Yasmin* CLC 2018 Lahore 273.

<sup>82</sup> *Muhammad Zaman v. Ameer Hamza* 2009 CLC 230 [Shariat Court (AJ & K)].

father is genuinely interested in the welfare of the children while claiming their custody. Generally, the courts reject a father's claim for custody of children if such claim is made subsequent to the decree of maintenance of children. In such cases, even when the mother remarries, the courts give her preference over the father for the custody of children. In *Mst. Hifsa Naseer v. A. D. J. Gujar Khan*,<sup>83</sup> the mother had contracted a second marriage with a person who did not fall within the prohibited degree of marriage with the child, but the father did not contract a second marriage after divorce. The mother filed a petition for the custody of her minor daughter and the court ruled in her favour by observing that the father had desired the custody of the child only when a suit for recovery of maintenance was decreed in favour of the mother. Otherwise, the court found, the conduct of the father was such that he was never willing to obtain the custody of his minor daughter. Hence, welfare of the minor required that the mother should retain the custody of the minor despite her second marriage. Similarly, in *Faisal Mushtaq v. Sumera Safdar*, the father filed a petition for the custody of his two minor daughters on the basis that the mother had contracted a second marriage.<sup>84</sup> The lower courts rejected his suit and he approached the High Court. His argument was again rejected since the court observed that the father had filed the suit for obtaining the custody of the minor daughters only after he was ordered to provide maintenance for them. In *Mehmood Akhtar v. District Judge, Attock*, both the parents contracted a second marriage.<sup>85</sup> The father did not pay maintenance for the children that had been agreed on by both the parties. Based on this fact, the court drew the conclusion that he was disinterested in the welfare of minors and decided in favour of the mother.

While generally, in case of a mother's second marriage with a person not falling within the prohibited degree of marriage to children, the custody is granted to fathers, the courts have carved out exceptions to this principle by expanding the principle of welfare of minors. These exceptions include the lack of genuine interest by the father in the custody of children, which is reflected when he neglects the payment of maintenance for the child or claims custody of the child when the mother files for the maintenance of the child; higher educational achievement of the mother and lack of education of the father; and psychological and emotional attachment of the child to the mother. This jurisprudence is based upon the principle of welfare of minors enshrined

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<sup>83</sup> *Mst. Hifsa Naseer v. A. D. J. Gujar Khan* PLD 2017 Lahore 153.

<sup>84</sup> *Faisal Mushtaq v. Sumera Safdar* MLD 2018 Lahore 862.

<sup>85</sup> *Mehmood Akhtar v. District Judge, Attock* 2004 SCMR 1839.

in the Guardians and Wards Act 1890, which was challenged before the Federal Shariat Court on the ground that it contravened the injunctions of Islam, as it was enacted during the British colonial rule by marginalizing Islamic law. The court rejected this argument and did not find the law in conflict with any injunction of Islam as laid down in the Qur'ān and the *sunnah* of the Prophet (peace be on him).<sup>86</sup>

## Conclusion

This paper has explored the rules of Muslim family law regarding polygamy and second marriage in Pakistan. Our analysis of statutes and case law demonstrates that official Muslim family law in Pakistan favours monogamy as the standard form of connubial relationship. The legislature and judiciary do not view polygamy positively by acknowledging its adverse impact on women and children within the institution of marriage. This argument is supported by three grounds: firstly, the law has been put in place for the regulation of polygamy and the courts impose the punitive sanctions under the MFLO for unauthorized polygamous marriages; secondly, the courts accept the right of first wives to dissolve their marriages if their husbands enter into polygamous marriages either considering polygamous marriage as a ground for divorce *per se* or treating it as cruelty towards the existing wife; and finally, judges do not take a sympathetic view of the polygamous marriages of husbands while adjudicating disputes regarding custody of children. Such husbands are rarely given the custody of their children from their first marriages. This shows that monogamy is the preferred form of marriage under official Muslim family law in Pakistan.

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<sup>86</sup> Mrs Ambreen Tariq Awan v. Federal Government of Pakistan MLD 2013 FSC 1885.