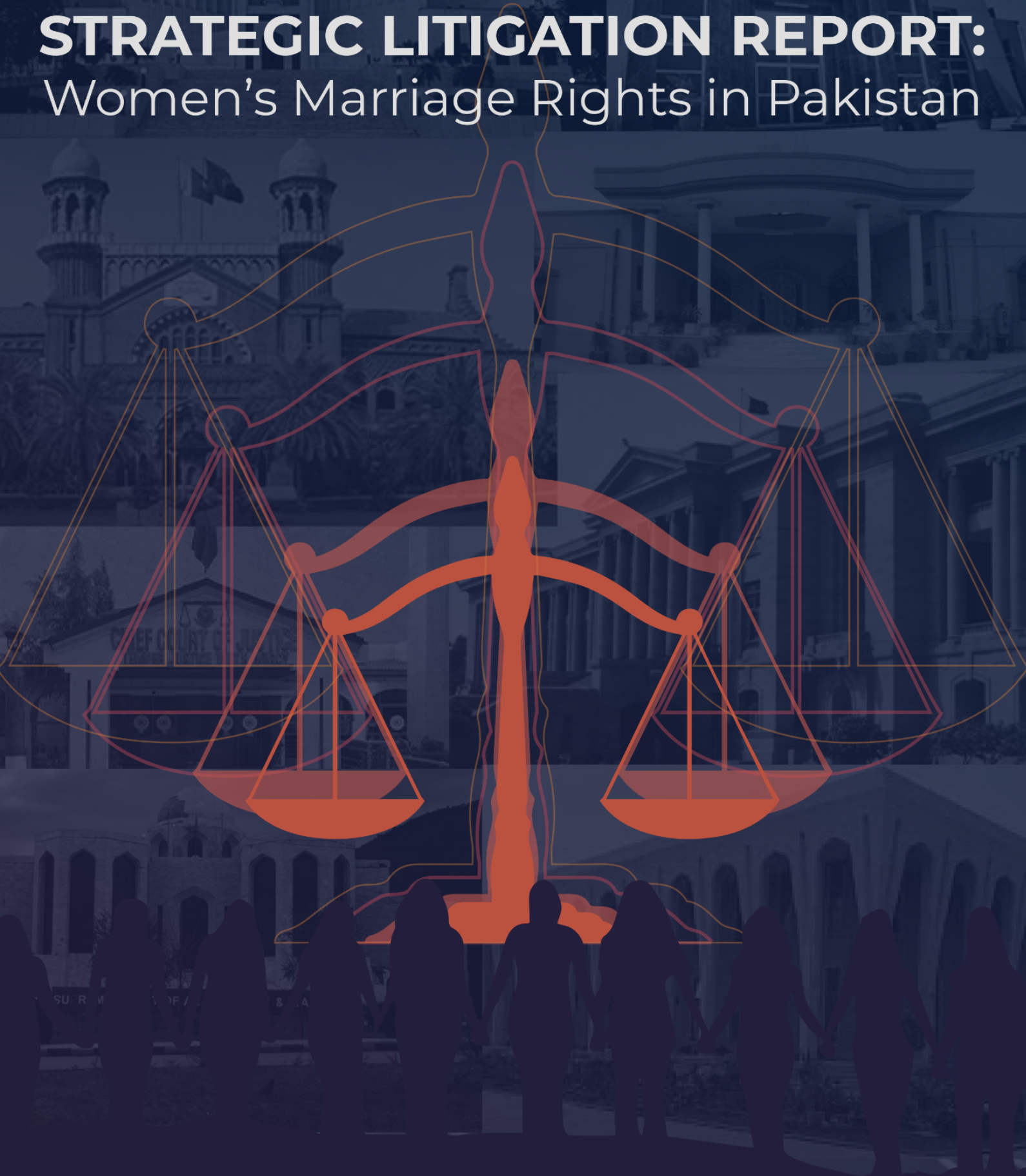


STRATEGIC LITIGATION REPORT: Women's Marriage Rights in Pakistan



Strategic Litigation Report: Women's Marriage Rights in Pakistan

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The Centre for Human Rights, housed in Universal College Lahore, is a legal research institute that actively researches issues of human rights, and works on legal policy, due process, rule of law and criminal justice reforms in Pakistan. The Centre aims to provide legal analysis which are rights-based, human-centric and aimed at enhancing the constitutional freedoms of equality and non-discrimination.

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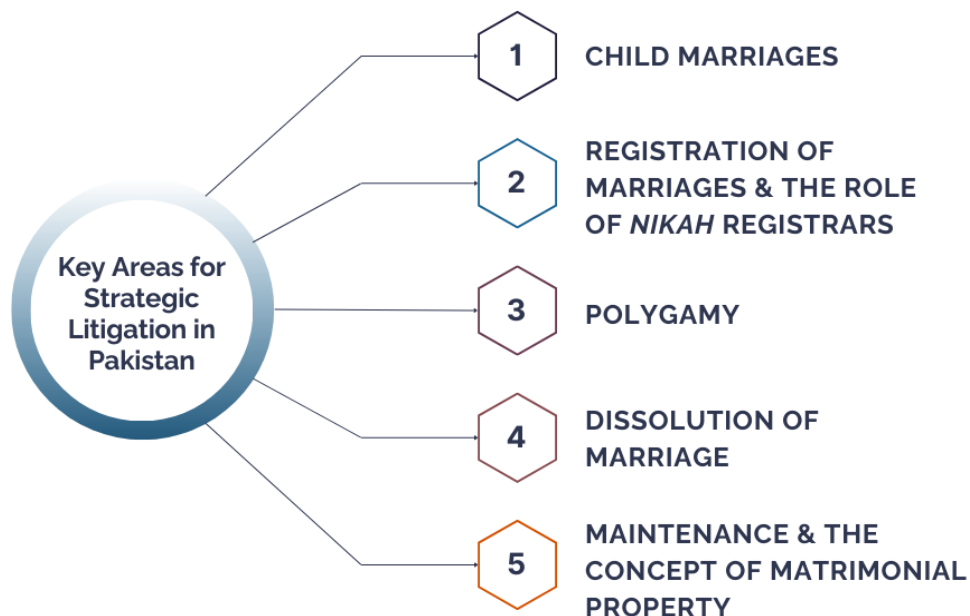
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EXECUTIVE SUMMARY

This Strategic Litigation Report analyzes existing federal and provincial legislation and judicial precedents related to marriage rights and family laws in Pakistan. The report identifies potential issues that strategic litigation can address, including the enforcement, clarification, creation, or nullification of laws, by filing constitutional petitions before the High Courts of Pakistan. These issues include the need for a uniform minimum age of marriage for females and males across all provinces in Pakistan, regulations for *Nikah* Registrars, creating a burden to obtain consent for subsequent marriages, prescribing time limits for providing notice of divorce to the Chairperson of the Arbitration Council of a concerned Union Council, and strengthening financial rights of women post-divorce.

Fig. 1: Key Areas for Strategic Litigation in Pakistan



The above-mentioned issues were selected after a holistic and multifaceted process of the following: (i) a review of all relevant federal and provincial laws pertaining to marriage rights in Pakistan; (ii) an examination of existing case law from the superior courts of Pakistan involving such laws in order to understand the legal and regulatory landscape and identify areas/issues that lend themselves to strategic litigation; (iii) an analysis of secondary sources, including news articles, papers published by non-governmental organizations, scholarly articles etc.; (iv) a review of similar laws operating in other countries, including Muslim majority countries, to ascertain if any issues have been raised by the respective courts in other jurisdictions which would serve as good reference points to determine if similar issues could be raised in Pakistan for the purposes of strategic litigation; and (v) gap analysis to help decide on issues that would be viable and achievable for strategic litigation, while taking into account the likelihood of their respective success. The issues identified in this report are those which have a good likelihood of success vis-à-vis the current legal and regulatory landscape concerning marriage rights and family laws in Pakistan for women.

Key Areas for Strategic Litigation in Pakistan:

Child Marriages

1. The report focuses on the issue of child marriages in Pakistan and the loopholes in the existing laws that fail to effectively address and resolve this perennial problem. It highlights several key issues and proposes strategic litigation as a means to drive legislative reform and enhance the protection of children's rights.
2. One major gap in the legislation is the lack of consideration for the validity of child marriages once they are solemnized. This places an unfair burden on child victims to initiate legal action to have their marriages declared void. Additionally, Islamic law requires child brides to repudiate the marriage before the age of eighteen and before its consummation, further complicating the process.
3. The Pakistan Penal Code (PPC) criminalizes sexual acts with minors but does not explicitly cover cases where the minor is married to the perpetrator. Courts have held that a valid marriage with a minor is an exception to these provisions. This inconsistency needs to be addressed to ensure the protection of minors in such situations.
4. This report identifies potential strategic intervention on this issue through a constitutional petition before one of the High Courts of Pakistan by challenging the applicable legislation in order to seek:
 - a. the government (federal or provincial) to amend relevant laws to raise the minimum age for marriage to eighteen, aiming for a uniform minimum age of marriage in line with that in Sindh;
 - b. clarification on the law to prohibit sexual activity with young girls under the age of eighteen, even if they are married to the perpetrator;
 - c. the government to amend laws to impose stricter punishments for conducting child marriages; and
 - d. the government to harmonize the Child Marriage Restraint Act, 1929 with the Muslim Family Laws Ordinance, 1961 (the “**MFLO 1961**”) and the Dissolution of Muslim Marriages Act, 1939 (the “**DMMA 1939**”). This would ensure that the age of consent for marriage is set at eighteen across Pakistan, and the age for exercising the option of puberty under the DMMA 1939 is also raised to eighteen. Furthermore, underage marriage should be recognized as a valid reason for divorce.

Registration of Marriages & the Role of *Nikah* Registrars

5. The report examines the registration of marriages and highlights the lack of strict regulation in this area. *Nikah* Registrars, often local *imams*,¹ have been found to abuse the system by falsely raising the age of young brides and favoring the groom's family in the marriage contract. The majority of *Nikah* Registrars have not received formal training and lack knowledge of critical aspects, such as the minimum age for marriage and informed consent.
6. To address these issues, the report recommends that the existing West Pakistan Rules under the MFLO 1961 (the “**MFLO Rules**”) be amended to include qualifications and penalties for *Nikah* Registrars, making their license renewal subject to greater scrutiny, and requiring them to provide counseling to the parties and verify age documents. The report also recommends the constitution of a committee to develop training programs and conduct awareness workshops for *Nikah* Registrars.
7. Furthermore, this report highlights the need for mandatory registration of marriages with the National Database and Registration Authority (NADRA) and proposes the inclusion of NADRA laws and registration requirements within the MFLO 1961 or the MFLO Rules. Stricter penalties may be imposed for non-registration to ensure compliance.

Polygamy

8. It is well known that there are several discriminatory clauses within the MFLO 1961, which allow for the practice of polygamy.
9. The MFLO 1961 only requires a husband to inform and receive consent from his first wife to contract a second marriage. Failing to obtain consent or inform the first wife does not render the subsequent marriage illegal, and the punishment for non-compliance is nominal. The Arbitration Council, responsible for granting permission for subsequent marriages, is seen as an ineffective mechanism due to non-compliance and lack of awareness among men and women. This leads to a disconnect between the MFLO 1961 and other laws, such as the PPC, which penalizes the concealment of a previous marriage.
10. Harmonizing these laws is crucial for improved enforcement. Litigation may be one means to amend the law, placing the onus on the Chairperson of the relevant Union Council to ensure that consent and other rights are protected by undertaking meetings with existing wives.

Dissolution of Marriage

11. The report highlights gender inequality in divorce rights, as under the MFLO 1961, a man can simply send a notice of *talaq* to the Arbitration Council, attempt reconciliation, and if unsuccessful, the divorce is finalized, whereas women must be delegated this right

¹ In common parlance, an *imam* usually refers to the head clergyman of a local mosque, who also leads prayers and offers sermons.

through the *nikahnama*. If a woman is not provided the delegated right to pronounce *talaq*, she must apply for a judicial pronouncement of divorce (i.e., *khula*), which can be a long and cumbersome process.

12. In terms of giving notice to the Arbitration Council, issues arise with the requirement of applying for a divorce certificate and the ninety-day statutory *iddat* period. Islamic law allows reconciliation attempts after one or two pronouncements, whereas the MFLO 1961 requires the reconciliation period to follow the initial pronouncement. Furthermore, the notice to the Chairperson of the Arbitration Council has become redundant in practice, enabling husbands to verbally pronounce divorce and withhold notice to harass their wives. This creates uncertainty, especially if a wife intends to remarry.
13. To address these issues, the MFLO 1961 should be amended, and carefully planned litigation may be one way to bring about changes that include setting a time limit for husbands to provide notice of *talaq* to the Arbitration Council after verbal pronouncement, and granting wives the right to submit notice to the said Council if the husband fails to do so, within the prescribed time limit.

Maintenance & the Concept of Matrimonial Property

14. There exists inadequate legal protection for women in the context of matrimonial property upon divorce in Pakistan. Our findings reveal inherent inequalities and systemic challenges faced by women due to the absence of proper legal mechanisms and infrastructure to safeguard their rights.
15. The report highlights that current laws do not provide for the provision of maintenance for wives after divorce, except during the three-month *iddat* period, or in cases where a woman is pregnant, until childbirth (in the form of subsistence support). Additionally, there is no provision in Pakistan's Muslim family laws for the division of matrimonial property, which refers to property acquired during the marriage with contributions from both spouses. This absence of legal recognition and protection for matrimonial property exacerbates financial hardships for women seeking financial security post-divorce.
16. The existing Muslim family laws in Pakistan related to women's maintenance after separation or divorce demonstrate rigidity and inequality, leaving women economically vulnerable. Maintenance is limited to the *iddat* period or pregnancy period, and in the case of *khula* (divorce at the wife's request), there is no obligation on the husband to provide maintenance. Consequently, women who have dedicated their lives to homemaking, raising children, and contributing to the marriage (financially or otherwise) often have no independent source of income.
17. Addressing these issues requires reforming the current laws governing maintenance and property rights. This report argues that the current legal regime violates constitutional principles of equality (enshrined under Articles 9 and 25 of the Constitution of Pakistan, 1973) and fails to fulfill Pakistan's international commitments to women's economic empowerment and gender equality. Pakistan is obliged to reconsider its provisions on

matrimonial property to eliminate discrimination against women in property division upon divorce.

18. To ensure greater financial protection for women after the dissolution of marriage, strategic litigation may be possible to seek intervention from superior courts to lead to the codification of women's rights to matrimonial property, and to align the relevant laws with constitutional guarantees of fundamental rights and international legal instruments ratified by Pakistan.

1. INTRODUCTION

1.1 This Strategic Litigation Report (the “**Report**”) follows an extensive review of existing federal and provincial legislation relevant to marriage rights and family laws in Pakistan and the analysis of jurisprudence developed by the superior courts of Pakistan² relating to women’s marriage rights. Further, a detailed gap analysis was undertaken with respect to national laws relevant to marriage rights in Pakistan for the purpose of strategic litigation, and international laws, rules, and regulations pertaining to marriage rights were examined as well.

Fig. 2: Understanding Strategic Litigation



1.2 The term *strategic litigation* refers to cases that are filed to address significant legal points or practice(s), and the remedies sought in such cases affect not just the party instituting the case, but also other extended groups or classes of persons as well as the public-at-large. As such, strategic litigation is a method through which to bring about significant changes in laws or their implementation and related practices by seeking to enforce, challenge, create or clarify the meaning of laws.³ In light of the above, the issues identified in this Report as being viable for strategic litigation in respect of women’s marriage rights in Pakistan, are those which can potentially be raised before the High Courts of Pakistan (through filing constitutional/writ petitions under Article

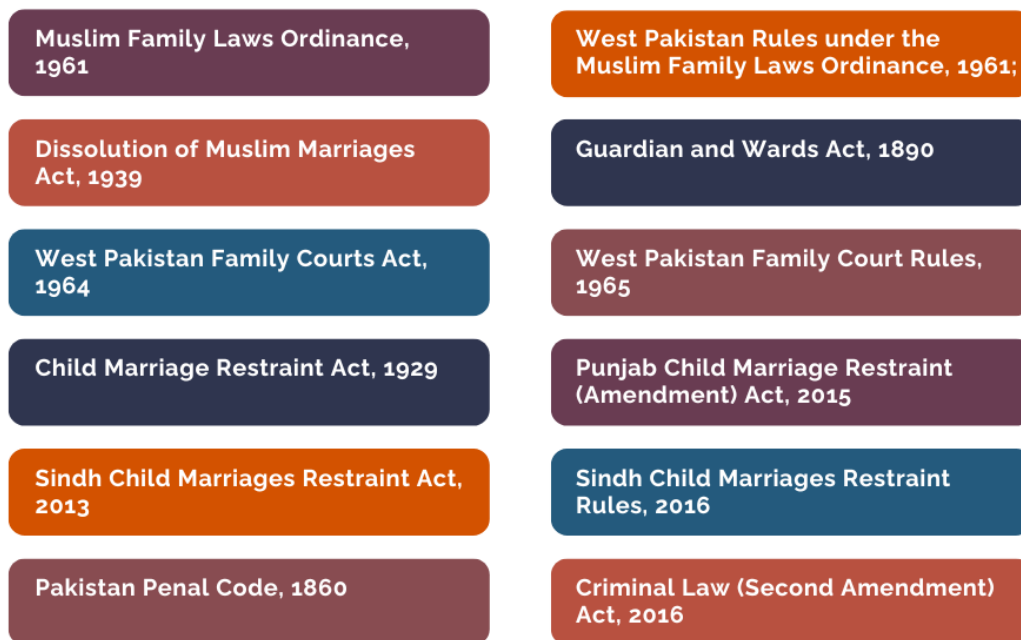
² By the “*superior courts of Pakistan*”, this report means the provincial High Courts and the Supreme Court of Pakistan. See Supreme Court of Pakistan. ‘The Judicial System of Pakistan’ (2015) <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/Judicial_System_of_Pakistan/thejudicialsystemofPakistan.pdf> accessed 17 July 2023.

³ Public Law Project, ‘Guide to Strategic Litigation’ (2013) <https://publiclawproject.org.uk/content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf> accessed 17 July 2023.

199 of the Constitution of Pakistan, 1973 (the “**Constitution**”),⁴ seeking for the said courts to issue orders for the: (i) enforcement of already existing laws; (ii) clarification of the meaning of these laws; (iii) the creation of new laws; or (iv) nullification of portions of existing laws.

- 1.3 It is also important to note that marriage and divorce, as subject matters, devolved to the provinces after the passing of the Constitution (Eighteenth Amendment) Act, 2010 (the “**Eighteenth Amendment Act**”).⁵ By virtue of the above, the provincial legislature(s) now have the mandate to regulate the laws mentioned below, and may make amendments to the same accordingly. However, in the case of most of the laws, very few (if any) provincial amendments have been made. For the purposes of this Report, a detailed review of the following laws was undertaken (see Section 2 of this Report):

Fig. 3: Laws reviewed for the Report

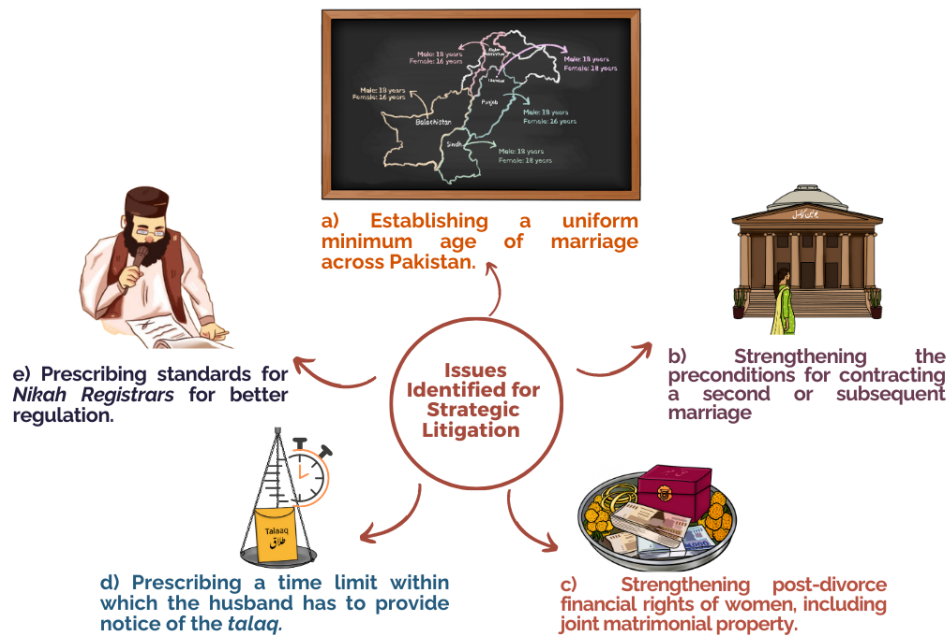


⁴ The High Courts in Pakistan have the authority to exercise their constitutional jurisdiction for the enforcement of fundamental rights guaranteed under the Constitution of Pakistan, 1973. Article 199 can be accessed at: <https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2Fvbpw%3D-sg-jjjjjjjjjjjj>.

⁵ National Assembly of Pakistan, ‘Constitution (Eighteenth Amendment) Act, 2010’ <http://www.na.gov.pk/uploads/documents/1302138356_934.pdf> accessed 17 July 2023.

1.4 Through the review of the aforementioned laws, the following areas/issues have been identified where strategic litigation may be viable, namely:

Fig. 4: Issues Identified for Strategic Litigation



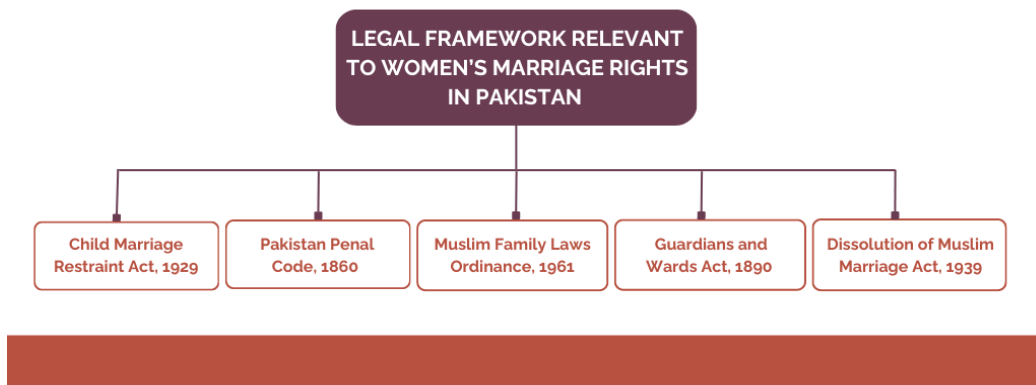
- There is need for reform in the provinces of Punjab, Khyber Pakhtunkhwa (“KP”), Balochistan and the Islamabad Capital Territory (“ICT”) to formally prescribe a standard minimum age of marriage for males and females both, as currently in the aforementioned provinces the minimum age for females is 16;
- Prescribing standards for the qualifications required for persons to act as a *Nikah* Registrar to better regulate *Nikah* Registrars, their licensing and the process for registration of marriages;
- Making it mandatory for an application to conduct a second or subsequent marriage to contain all the material facts, and for the onus of obtaining and ensuring consent has been given for the proposed marriage (in whatever form) by the existing wife/wives, to be placed on the Chairperson of the relevant Union Council, by meeting the existing wife/wives separately in chamber in order to satisfy himself that consent has been voluntarily and freely given;
- Prescribing a time limit within which the husband has to provide notice of the *talaq* to the Arbitration Council after verbal pronouncement of the same as well as providing the wife with the right to submit notice to the Arbitration Council concerning the verbal pronouncement of *talaq* if the husband fails to do so within the prescribed time limit; and
- Strengthening the financial rights of women post-divorce through the introduction of principles such as joint matrimonial property which entails the according share

in the property to women on the basis of their direct/indirect contributions (whether financial or not), to the extent of their shares under Islamic law.

2. OVERVIEW OF THE LEGAL FRAMEWORK RELEVANT TO WOMEN'S MARRIAGE RIGHTS IN PAKISTAN

2.1 This section of the Report provides an overview of the select federal and provincial laws identified as relevant to women's marriage rights in Pakistan. These include:

Fig. 5: Relevant Laws for Women's Marriage Rights



Muslim Family Laws Ordinance, 1961 (the “MFLO 1961”)

2.2 Muslim family laws in Pakistan have long been rooted in Islamic principles as a result of which they can be seen as a mixture of codified law and customary laws based on religious and cultural norms. In the 1950s, the All Pakistan Women's Association (APWA) pushed for reform of Muslim family laws in an aim to discourage polygamy and regulate divorce. For this purpose, the Commission on Marriage and Family Laws was formed by the Government of Pakistan to provide recommendations for reform.⁶

2.3 Based on the recommendations of the Commission on Marriage and Family Laws, Muslim family laws were codified by way of the MFLO 1961 which, today, covers legal aspects pertaining to succession, registration of marriages, polygamy, dissolution of marriages, maintenance, and dower.

MFLO 1961: Role of *Nikah* Registrars

2.4 The MFLO 1961 requires all marriages under Muslim family laws in Pakistan to be registered by a *Nikah* Registrar,⁷ who is a person duly licensed by a Union Council⁸ to act as such.⁹ If a marriage is not solemnized by a *Nikah* Registrar, then the same must

⁶ A Hassan, MA Qadri, and M Saleem, 'The Muslim Family Law Ordinance 1961: Pioneer of Women Empowerment in Pakistan' (2021) 58(1) Journal of the Research Society of Pakistan 210.

⁷ Section 5(1) of the MFLO 1961.

⁸ Ibid, Section 2(d) which defines a "Union Council" to mean the "Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959, and having in the matter jurisdiction as prescribed". In practice, Union Councils are local government bodies consisting of elected representatives performing various functions.

⁹ Section 5(2) of the MFLO 1961.

be reported to them by the person solemnizing such marriage.¹⁰ Anyone who does not report the solemnization of a marriage to a *Nikah* Registrar shall be liable to punishment of either imprisonment or a fine.¹¹ In addition to registration by the *Nikah* Registrar, marriages are required to be reported to District Registrars of the National Database and Registration Authority (“NADRA”), who serve as registration officers for the authority.¹²

Fig. 6: Duties of *Nikah* Registrar



NIKAH REGISTRAR

- As per Section 5 of the MFLO 1961, a *Nikah* Registrar is a person duly licensed by a Union Council to register a marriage.

Duties of a *Nikah* Registrar include:

- Filling in the columns of the *nikahnama*
- Taking signatures of the parties, registering the *nikah* and;
- Providing copies to the parties and the Union Council

2.5 The license to act as a *Nikah* Registrar is granted under the West Pakistan Rules to the MFLO 1961 (the “**MFLO Rules**”). The law does not stipulate any particular qualifications for a person applying for appointment as a *Nikah* Registrar, and any person deemed competent to solemnize a marriage can apply for this license.¹³ While a license granted under the MFLO Rules is permanent, it may be revoked if any of the conditions outlined in the license are breached.¹⁴

MFLO 1961: Registration of Marriages

2.6 The instrument that is registered by a *Nikah* Registrar and serves as evidence of a valid Muslim marriage in Pakistan is the *nikahnama*, which documents the facts and conditions of a marriage and consists of various columns that have to be filled out by the parties involved. A *nikahnama* is a public document and is accessible at a Union Council by the general public for a fixed fee.¹⁵ The form of the *nikahnama* is prescribed under Form II of the MFLO Rules.

2.7 The columns of the *nikahnama* concern primarily factual information pertaining to both parties, the marital status of the parties, and the conditions and settlements in the

¹⁰ Section 5(3) of the MFLO 1961.

¹¹ Section 5(4) of the MFLO 1961.

¹² Section 21(2) of the NADRA Ordinance, 2000.

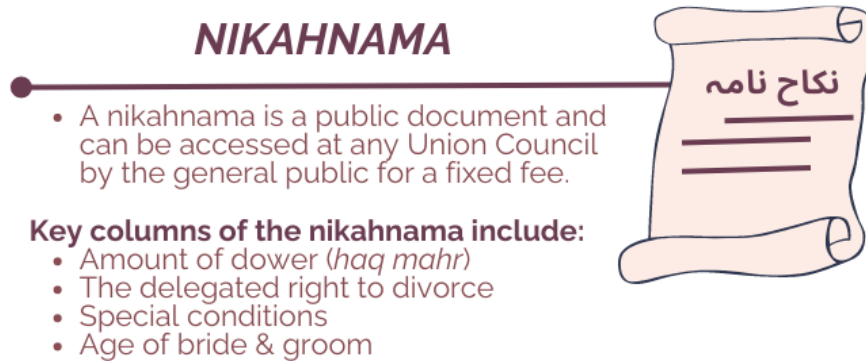
¹³ Rule 7(1) of the MFLO Rules.

¹⁴ Ibid, Rule 7(3).

¹⁵ Section 5(6) of the MFLO 1961.

marriage, such as the amount of dower (*haq mahr*),¹⁶ the delegated right to divorce for the bride,¹⁷ and any other conditions which the parties may wish to stipulate.¹⁸

Fig. 7: Nikahnama and its Significant Columns



2.8 The columns of the *nikahnama* concern primarily factual information pertaining to both parties, the marital status of the parties, and the conditions and settlements in the marriage, such as the amount of dower (*haq mahr*),¹⁹ the delegated right to divorce for the bride,²⁰ and any other conditions which the parties may wish to stipulate.²¹

MFLO 1961: Polygamy

- 2.9 Pursuant to section 6(1) of the MFLO 1961, a man cannot contract another marriage during the subsistence of an existing marriage, unless prior permission from the Union Council is sought.²² An application is to be submitted along with the prescribed fee and such application must include reasons for the proposed marriage and whether the consent of the existing wife/wives has been obtained.²³
- 2.10 On receipt of the application to enter into another marriage, the Chairperson of the relevant Union Council shall ask the applicant and his existing wife/wives to appoint a spokesperson to form an Arbitration Council.²⁴ The Arbitration Council, if it is satisfied with the proposed marriage as indispensable and just, shall grant the permission, subject to conditions as it may deem fit.²⁵ In case of the groom's failure to provide the previous permission of the Arbitration Council, he shall immediately pay the entire

¹⁶ Columns 13 to 16 of the *nikahnama*.

¹⁷ Ibid, Column 18.

¹⁸ Column 17 of the *nikahnama*.

¹⁹ Columns 13 to 16 of the *nikahnama*.

²⁰ Ibid, Column 18.

²¹ Column 17 of the *nikahnama*.

²² Section 6(1) of the MFLO 1961.

²³ Ibid, Section 6(2).

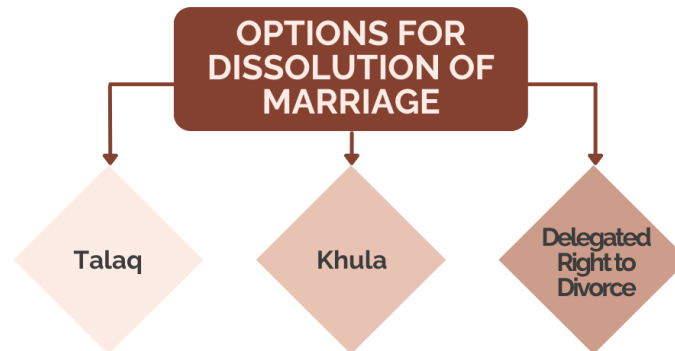
²⁴ Section 2(a) of the MFLO 1961 which defines 'Arbitration Council' as "a body consisting of the Chairperson and a representative of each of the parties to a matter dealt with in this Ordinance".

²⁵ Ibid, Section 6(3).

amount of dower, due to his existing wife/wives, and can be convicted upon a complaint with up-to one year's detention or with fine of Rs. 5000/- or with both.²⁶

MFLO 1961 & Dissolution of Muslim Marriages Act (DMMA) 1939: Dissolution of Marriage

Fig. 8: Forms of Dissolution of Marriage



- 2.11 In the event of the dissolution of a marriage (i.e., divorce) under the MFLO 1961, a husband is required to notify the Chairperson of the relevant Union Council of the pronouncement of divorce (*talaq*) upon his wife and send a copy of such notice to his wife.²⁷ The relevant Union Council (to which the divorce notice is sent to) must ordinarily be the Union Council in the city in which the wife is residing at the time of pronouncement of *talaq*.²⁸ Contravention of the requirement to inform the Union Council of the pronouncement of *talaq* is punishable with imprisonment of one (01) year, or the imposition of a fine which may extend to Rs. 5,000/- or with both.²⁹
- 2.12 Within thirty (30) days of receipt of such notice, the Chairperson is required to constitute an Arbitration Council to aid in the possible reconciliation of the spouses,³⁰ and in practice, at least three hearings are held before the Arbitration Council for reconciliation. If the attempts for reconciliation fail, the divorce becomes effective upon the expiration of ninety (90) days from the date on which notice of pronouncement of *talaq* was given to the Chairperson.³¹
- 2.13 Thereafter, the Chairperson issues a Certificate of Effectiveness of Divorce, recognizing that the divorce has taken place. In the event that the wife is pregnant at the time of the pronouncement of *talaq*, it shall not be effective till the expiry of ninety (90) days from the date the notice of divorce is delivered to the Union Council, or the end of the pregnancy, whichever ends later.³²

²⁶ Section 6(5) of the MFLO 1961.

²⁷ Ibid, Section 7(1). The same procedure would apply where a wife exercises her delegated right to divorce.

²⁸ Rule 3(b) of the MFLO Rules.

²⁹ Section 7(2) of the MFLO 1961.

³⁰ Ibid, Section 7(4).

³¹ Section 7(3) of the MFLO 1961.

³² Ibid, Section 7(5).

- 2.14 For women seeking a divorce, if their *nikahnama* does not contain the delegated right to divorce (under column 18 of the *nikahnama*), then they must first obtain a judicial pronouncement of divorce by way of *khula*, and then the procedure outlined above must also be followed by submitting the divorce decree to the Chairperson as a notice. It is important to highlight that in the case of *khula*, women must also forego/return their dower.
- 2.15 The DMMA 1939 lays out the conditions and circumstances that a woman must satisfy in order to obtain a decree for dissolution of marriage.³³ These grounds expand into the husband's lack of whereabouts, his failure to provide maintenance, his taking on another wife, him suffering diseases or him being impotent. Under the DMMA 1939, a woman is also able to seek dissolution of her marriage if she had been given into marriage before obtaining the requisite minimum age, provided that the marriage has not been consummated.³⁴ The DMMA 1939 also delves into what cruelty means under the said law, and what entails a husband ill-treating his wife or displaying attitudes that are inconsistent with Islamic principles.

MFLO 1961: Maintenance for Wives and Children Post-Divorce

- 2.16 Under section 9 of the MFLO 1961, upon the dissolution of a marriage, a husband is obligated to provide maintenance to his former wife for the support of their child/children.³⁵ While the term "*maintenance*" has not been defined under the legal framework relating to Muslim family laws in Pakistan, its meaning can be inferred from the jurisprudence that has been developed by the superior courts of Pakistan to include the provision of food, clothing, housing, and other necessary expenses to promote the mental and physical well-being of a child.
- 2.17 In the event that a husband fails to provide maintenance to his wife, she can pursue legal proceedings under the West Pakistan Family Courts Act, 1964 (the "**FCA 1964**") in order to enforce her legal right/entitlement to such maintenance. Further, under section 7 of the FCA 1964, a suit for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property etc.³⁶
- 2.18 The 2015 Amendment to the FCA 1964 in Punjab clearly stipulates that pursuant to section 17-A of the FCA 1964,³⁷ in a suit for maintenance, the relevant family court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for a wife or a child. If the defendant fails to pay the maintenance by the fourteenth day of each month, the defence of the defendant shall stand struck off and the said court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.³⁸ A plain reading of this

³³ Section 2 of the DMMA 1939.

³⁴ Ibid, Section 2(vii).

³⁵ Section 9 of the MFLO 1961.

³⁶ Section 7 of the FCA 1964.

³⁷ Punjab Family Courts (Amendment) Act, 2015.

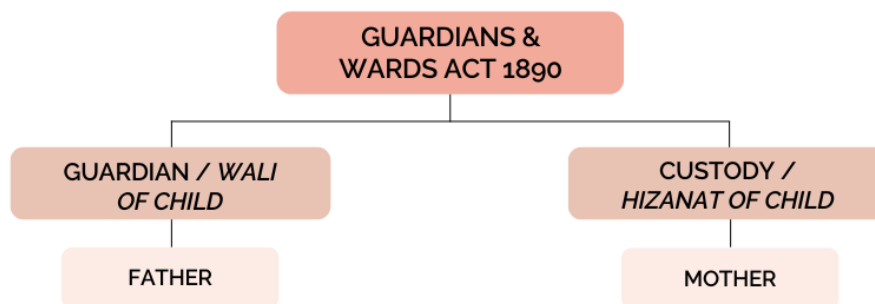
³⁸ Section 17-A of the FCA 1964 (as amended in 2015 for Punjab).

provision indicates that there is a clear mechanism in place under the law which is meant to ensure that a husband cannot waive off the obligations placed on him by law in regard to maintenance.

- 2.19 It is important to note that currently, under Pakistan’s laws, husbands are only to provide maintenance for their children after the dissolution of marriage. There is no provision for maintenance for a wife after divorce, the only exceptions being the *iddat* period or where the woman is pregnant, she becomes liable to be supported by her ex-husband.

Guardians and Wards Act, 1890 (the “GWA 1890”): Guardianship & Custody

Fig. 9: Custody and Guardianship



- 2.20 According to Islamic jurisprudence, the natural guardian (i.e., *wali*) of a minor child is the father of the child, and guardianship concerns the person and property of the minor child. Custody, however, pertains to the physical custody of the child and the guardian may not necessarily also have custody of the child. Custody, referred to as ‘*hizanat*’, typically lies with the mother of a minor child. While the terms ‘custody’ and ‘guardianship’ may be used interchangeably, they have varying legal implications.
- 2.21 The GWA 1890 regulates the interest and welfare of minors and highlights the degree of preference for the purpose of establishing guardianship. As per the GWA 1890, courts have the authority to make an order, upon satisfaction as to the welfare and best interests of the minor, to appoint a guardian for the purpose of the minor child’s person or property, or to declare such person to be the guardian of the minor.³⁹
- 2.22 Under the GWA 1890, in appointing or declaring the guardian of a minor, the court is required to be guided by the welfare of the minor.⁴⁰ The court must give regard to the age, sex, and religion of the minor, and the character and capacity of the proposed guardian and the nearness of kin to the minor, the wishes of a deceased parent (if any), and any existing or previous relations of the proposed guardian with the minor or his/her property.⁴¹

³⁹ Section 7 of the GWA 1890.

⁴⁰ Ibid, Section 17(1).

⁴¹ Section 17(2) of the GWA 1890.

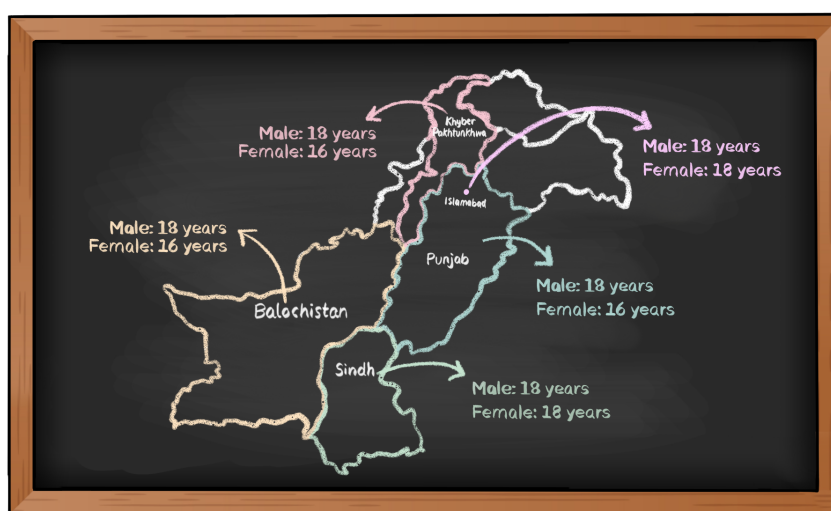
2.23 The GWA 1890 also lists the duties, right and liabilities of the guardian towards their ward, which includes but is not limited to not making any profit out of this role and looking to the support,⁴² health and education of the minor.⁴³

Child Marriage Restraint Act, 1929 (the “CMRA 1929”)

2.24 The CMRA 1929 is the law relevant for the purpose of child marriages as it aims to prohibit the solemnization of child marriages in Pakistan by prescribing a minimum age for entering into a marriage, and punishments for contravening its provisions.

2.25 The CMRA 1929 is applicable to the ICT as well as the provinces of Punjab, KP and Balochistan, with only Punjab having made a few amendments, to the extent of punishments since the law came into force in 1929.

Fig. 10: Minimum Age of Marriage in Pakistan



2.26 The CMRA 1929 defines a “*child*” as a male under the age of eighteen (18), and a female under the age of sixteen (16).⁴⁴ The CMRA 1929 prescribes punishments (in the form of imprisonment and a fine) for the following scenarios/cases:

- (i) adult males who marry children;⁴⁵
- (ii) any person who performs, conducts or directs a child marriage;⁴⁶ and
- (iii) the parent or guardian of the child involved in a child marriage.⁴⁷

⁴² Ibid, Section 20(1).

⁴³ Section 24 of the GWA 1890.

⁴⁴ Section 2 of the CMRA 1929.

⁴⁵ Ibid, Section 4.

⁴⁶ Section 5 of the CMRA 1929.

⁴⁷ Ibid, Section 6.

- 2.27 Sindh has enacted the Sindh Child Marriages Restraint Act, 2013 (the “**Sindh CMRA**”), which repealed the CMRA 1929, to the extent of its application to the province of Sindh, and the Sindh CMRA follows the form of the CMRA 1929 in prescribing punishments for individuals involved in performing, conducting, or entering into child marriages. However, the main difference between the CMRA 1929 and the Sindh CMRA, is that the Sindh CMRA prescribes a uniform age for both males and females, such that under the Sindh CMRA a “*child*” is defined to be a person, whether male or female, who is under the age of eighteen (18).⁴⁸
- 2.28 Under the Sindh CMRA, the Sindh Child Marriages Restraint Rules, 2016 (the “**Sindh CMRA Rules**”) have been made which, amongst other things, regulate measures to be taken by a person solemnizing a marriage so that they are satisfied that the bride and groom are eighteen (18) or above. The Sindh CMRA Rules lay down the mechanism for complaints to be filed, and also put in place safeguards for a child during the pendency of trial.
- 2.29 Unfortunately, to date, all of the provinces in Pakistan, excluding Sindh, have attempted to introduce bills in their respective assemblies to better regulate the issue of child marriage, but these are yet to be enacted as laws.
- 2.30 In Balochistan, a draft law called the Balochistan Child Marriage Prohibition Act, 2021 (the “**Balochistan Bill**”) came about during the pendency of a trial concerning the marriage of a five-year old girl.⁴⁹ The Balochistan Bill was submitted to the cabinet for approval first in 2015, however it has been pending before the Balochistan Assembly for several years. The Balochistan Bill provides the only framework that states that a child marriage must be declared void/dissolved after it comes to the attention of the court. Furthermore, the Balochistan Bill also covers issues of maintenance for the child bride, and custody of any children born out of a child marriage.

Pakistan Penal Code, 1860 (the “**PPC**”) and its amendments

- 2.31 In tandem with existing laws on child marriage, certain amendments to Pakistan’s criminal laws have been made to provide legal protection to women, and particularly, to girls.
- 2.32 The Criminal Law (Second Amendment) Act, 2016 (the “**2016 Act**”) inserted section 377A to the PPC,⁵⁰ which categorizes the attempt to persuade, induce or entice a person

⁴⁸ Section 2 of the Sindh CMRA.

⁴⁹ T Ahmad, ‘Pakistan: Balochistan Government Drafts Bill Outlawing Child Marriage’ *Library of Congress* (20 April 2023) <<https://www.loc.gov/item/global-legal-monitor/2023-04-19/pakistan-balochistan-government-drafts-bill-outlawing-child-marriage/>> accessed 17 July 2023.

⁵⁰ Section 377A of the PPC states: “Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.”

who is under the age of eighteen (18) to engage in any sexually explicit conduct as sexual abuse, whether the consent of the person is obtained or not.⁵¹ This means that inducing a person who is under the age of eighteen (18) (i.e., a child) into committing sexual acts has been criminalized, by virtue of prescribing a minimum age under the law.

- 2.33 Furthermore, section 375 of the PPC criminalizes sexual intercourse with a woman under the age of sixteen (16),⁵² deeming it to be rape within the eyes of the law, whether the consent of the woman is obtained or not. This means that entering into sexual relations with a person under the age of sixteen (16) (i.e., a child) has been criminalized, by virtue of prescribing a minimum age under the law for committing the said act.

⁵¹ Section 7 of the 2016 Act.

⁵² Section 375 of the PPC states: “A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,—

(i) against her will;

(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) with or without her consent when she is under sixteen years of age.”

3. JURISPRUDENTIAL ANALYSIS OF CASE LAW PERTAINING TO WOMEN'S MARRIAGE RIGHTS IN PAKISTAN

Child Marriages

3.1 According to UNICEF, there are 19 million child brides in Pakistan, with 4.6 million girls married before the age of fifteen (15).⁵³ This statistic highlights that child marriage, especially in the case of girls, remains a widespread practice in Pakistan, primarily rooted in entrenched traditions and customs. A multitude of evidence suggests that child brides lose out on their childhood and future prospects and are at higher risk of becoming victims of domestic violence as well.⁵⁴

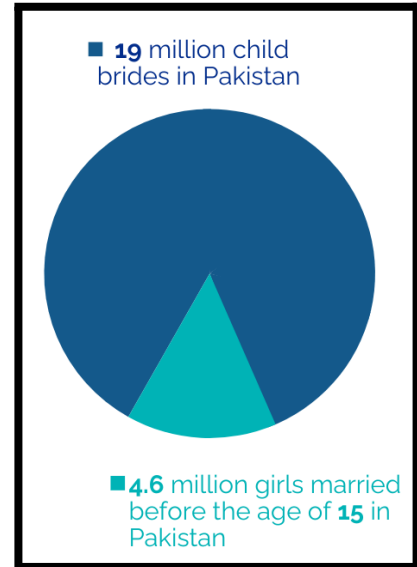


Fig. 11: UNICEF, 'Statistical Profile on Child Marriage: Pakistan' (2022)

3.2 While there have been a multitude of cases involving child brides in Pakistan that have captured news headlines, a recent case, that of *Dua Zehra*, has garnered immense attention. *Dua Zehra* is a young girl who vanished outside her home in Karachi in April 2022 and was found shortly after, married to a young man, allegedly twenty-one (21) years of age.⁵⁵

3.3 From that point onwards, Pakistani news channels were inundated with updates on the tussle between whether she was in fact a minor, (i.e., under the age of eighteen),⁵⁶ or not, and the seemingly simple predicament of whether she should be returned to live with her father, or continue to live with her new husband who she claimed she wanted to marry of her own free will. It was not until January 2023 that the Sindh High Court ordered *Dua Zehra* to go with her parents, after she herself requested for the same. *Dua's* alleged abduction and subsequent marriage sparked debate on whether a minor can validly enter into a marriage contract, or whether such a marriage is liable to be declared as void.

3.4 *Dua's* case is important because it highlights the undue importance courts place on whether a minor has consented to a child marriage, or has instigated it at their own will. Furthermore, in an attempt to circumvent provincial laws regulating child marriage, girls are routinely moved from provinces like Sindh, where the minimum age for entering into a marriage for females is eighteen (18), to provinces like Punjab or KP,

⁵³ UNICEF, 'Statistical Profile on Child Marriage: Pakistan' (2022) <<https://www.unicef.org/pakistan/media/4151/file/Child%20Marriage%20Country%20Profile.pdf>> accessed 17 July 2023.

⁵⁴ Ibid.

⁵⁵ Dawn, 'Timeline: A Complex Case of a Karachi Teenage Girl's Alleged Kidnapping vs Legal Marriage' (4 July 2022) <<https://www.dawn.com/news/1696486>> accessed 17 July 2023.

⁵⁶ As per the Sindh CMRA.

where the minimum age is sixteen (16). Similar cases have been presented before the courts in Pakistan at an alarming rate, and they indicate a need for substantial legislative changes to effectively address the issue of child marriage in Pakistan, in order to curtail the same.

- 3.5 The fact that the applicable child marriage laws in Pakistan do not confront the issue of the validity of a child marriage has been an issue that has been discussed by the superior courts of Pakistan since as early as 1962. In the case of *Mushtaq Ahmad*,⁵⁷ a girl just over the age of fifteen was said to be in a valid marriage. The Sindh High Court observed that while the CMRA 1929 renders conducting or entering into a child marriage a punishable offence, there is nothing in the said Act which renders such a marriage to be invalid.
- 3.6 In the 1962 *Mushtaq Ahmad* case, the Sindh High Court further held that the validity of a marriage must be determined according to Muhammadan Law,⁵⁸ which stipulates that the minority of a child terminates when he/she attains puberty, which is presumed to have occurred upon the completion of the fifteenth year of life. The aforementioned principle was also enshrined by the Supreme Court of Pakistan (the “SCP”) in the case of *Bakhshi*.⁵⁹ In the aforementioned cases, the courts were satisfied with receiving confirmation or claims from the girls (in the child marriages in question) that they wanted to be with their respective husbands of their own free will, and therefore, the courts held the marriages to be valid.
- 3.7 In the 2013 case of *Allah Nawaz*,⁶⁰ the Lahore High Court held that even if a girl is under the age of sixteen, but she has attained puberty, she can validly enter into a marriage contract as long as her consent has been obtained. The Court, in the aforementioned case, also elaborated on whether sexual intercourse within marriage with a girl under the age of sixteen, as per section 375 of the PPC, would constitute the criminal offense of rape. In its judgment, the Court held that section 375 of the PPC does not apply to a case where the minor girl is in a valid marriage. The Court extended consent to enter into the marriage as consent to have sexual intercourse and that the performance of conjugal rights cannot be termed as rape. The Court relied on the definition for “rape” provided in Black’s Law Dictionary (Sixth Edition), which excludes a wife as capable of being subjected to rape by her husband. What is particularly noteworthy in this case is that the presiding judge referred to the intention of the legislators of the CMRA 1929, stating that “*the Child Marriage Restraint Act (XIX of 1929), does not declare marriage of a girl who is pubert but under the age of sixteen years to be invalid or void. Had the legislators any intent to declare the marriage of a girl below the age of majority invalid, a specific clause could be inserted*

⁵⁷ *Mushtaq Ahmad vs. Mirza Muhammad Amin* [PLD 1962 Karachi 442].

⁵⁸ The term ‘*Muhammadan Law*’ refers to Muslim personal law, which is distinct from the civil or family law applicable in Pakistan.

⁵⁹ *Bakhshi vs. Bashir Ahmad* [PLD 1970 SC 323]. See also *Mauj Ali vs. Syed Safdar Hussain Shah* [1970 SCMR 437], *Allah Bakhsh vs. Safdar* [2006 YLR 2936], *Muhammad Khalid vs. Magistrate First Class* [PLD 2021 Lahore 21].

⁶⁰ *Allah Nawaz vs. Station House Officer* [PLD 2013 Lahore 243].

*in the Child Marriage Restraint Act (XIX of 1929). In the absence of any such specific provision in the Act, ibid, it would be highly unjust to import a negative intent which was not considered by the legislators at the time when said law was being formulated.*⁶¹ The reluctance of the judiciary to expand their interpretation so as to declare a marriage invalid suggests that the Act itself ought to be reformed.

- 3.8 A major recognition of the need to implement a uniform minimum age of marriage across the country for males and females surfaced in the case of *Tahira Bibi vs. SHO*.⁶² This case involved a girl who married of her own accord without the consent of her parents, and she contended that police authorities had been harassing her at the behest of her parents. While the Lahore High Court upheld the validity of her marriage as she was *sui juris*, in its judgment, the Court described in detail the negative effects of child marriages. The Court outlined the connection between child marriages and the likelihood of early pregnancies, which makes women more exposed to prolonged domestic violence. The Court further noted that child marriages “*not only restrict women from socio-economic opportunities, but also affects their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.*”⁶³ Child marriages were also described as hampering “*...the development process of a region or a country...given that a substantial part of human population, the women, remain uneducated or less educated, unemployed and underprivileged with poor health measures and no decision making power.*”⁶⁴
- 3.9 Additionally, in the recent case of *Farooq Omar Bhoja*,⁶⁵ the petitioner challenged the CMRA 1929 before the Federal Shariat Court of Pakistan (the “FSC”), on the grounds that sections 4, 5 and 6 of the CMRA 1929 were contradictory to Islamic law and rules on the basis of a hadith narrating the age of the Holy Prophet’s youngest wife, Aisha, as being nine years old and other such narrations. In its judgment, the FSC determined that it is not against the Quran and Sunnah for the state to determine the permissible age for entering into a marriage contract as it is a duty of the state to curtail or curb those things which may lead to harmful consequences for society at large, or to any of its segments.⁶⁶ The FSC also held that a legal requirement of girls being at least sixteen years old (i.e., the presence of a minimum age requirement of marriage) in order to enter into a marriage contract is warranted. Through its judgment, the FSC also noted that the requirement of a minimum age for marriage is beneficial to society, seeing as how it is in line with Islamic principles and advantageous for society.
- 3.10 Furthermore, the FSC in March 2023, has similarly held that the Sindh CMRA is in accordance with the injunctions of Islam, and therefore does not violate any

⁶¹ *Ibid*, para 4.

⁶² *Tahira Bibi vs. Station House Officer* [PLD 2020 Lahore 811].

⁶³ *Ibid*, para 9.

⁶⁴ *Ibid*.

⁶⁵ *Farooq Omar Bhoja vs. Federation of Pakistan* [PLD 2022 FSC 1].

⁶⁶ *Ibid*, paras 6-7.

constitutional or Islamic provisions. The FSC further held that the minimum age for marriage being eighteen in Sindh is in line with Islamic teachings that prioritize protecting the rights of children and ensuring their well-being.⁶⁷

- 3.11 There has also been a recent judgment rendered by the Islamabad High Court in 2022, however, which has more adequately confronted all the loopholes present in the CMRA 1929. In the *Mumtaz Bibi* case,⁶⁸ a woman filed a constitutional petition before the Islamabad High Court seeking to recover her fifteen-year old daughter who she claimed was abducted and subsequently found to have been married to the respondent. In this case, the Islamabad High Court reiterated the view of the FSC in the *Farooq Omar Bhoja* case, that the state can regulate the permissible age for entering into marriage, and such regulation is not an un-Islamic practice. Furthermore, the Court held that since there is no agreement amongst religious scholars on what the minimum age of consent for entering into a marriage is, such age must be determined in view of the laws in force to promote the Principles of Policy prescribed in Chapter 2 of the Constitution.
- 3.12 It is important to highlight that the *Mumtaz Bibi* case distinguished the *Bakhshi* case, which is widely cited for upholding the validity of child marriages, on the principle that the *Bakhshi* case was decided before the promulgation of the 1973 Constitution which provides for an institutional framework to determine the compliance of statutory laws with the injunctions of Islam. Moreover, Pakistan has since then adopted the United Nations Convention on the Rights of Child (“UNCRC”), and is under an obligation to comply with its provisions. Broadly, the UNCRC requires state parties to ensure that its laws and policies protect the best interests of the child.
- 3.13 In the *Mumtaz Bibi* case, the Islamabad High Court also addressed the applicability of sections 375 and 377A of the PPC to married minors, by stating that in view of the serious criminal liability imposed on a perpetrator under sections 375 and 377A of the PPC, it cannot be conceived that the civil law applicable in Pakistan would continue to treat such a contract, for the specific purpose of engaging in sexual conduct with a child, to be a legal or valid contract. The Court opined that the mere invitation to a child to enter into a marriage contract may constitute an offence under section 377A of the PPC, and neither the state nor a court of law can facilitate or enforce a contract forbidden under the law. Additionally, the Court emphasized that the mere attainment of puberty by a female child does not grant her the agency to enter into a marriage contract, nor can it be the test to determine legal competence.
- 3.14 A similar issue was also presented before the Supreme Court of India (“**Indian SC**”) in 2017 in the case of *Independent Thought*.⁶⁹ In this case, the issue before the Indian SC was whether sexual intercourse between a man and his wife (being a girl aged between fifteen and eighteen) can amount to rape, as per the provisions of the Indian Penal

⁶⁷ *Ali Azhar vs. Province of Sindh* [Shariat Petition No. 05-I of 2022].

⁶⁸ *Mumtaz Bibi vs. Qasim and 4 Others* [PLD 2022 Islamabad 228].

⁶⁹ *Independent Thought vs. Union of India* [(2017) 10 SCC 800].

Code, 1860 which created an exception to the offence of rape by stating that sexual intercourse in a marriage with a girl over the age of fifteen does not amount to rape. The Indian SC held that the concerned exception should only apply to girls over the age of eighteen, thereby criminalizing sexual intercourse with a female aged between fifteen and eighteen, even if she is married.

3.15 The recent trend of the superior courts in Pakistan has been to pursue the issue of child marriages with an open mind, as also emphasized in the case of *Abdul Razaq vs. State*.⁷⁰ In this case, a man of 21 years had married a girl of 16 years and 5 months. However, it was held that she was not *sui juris* under the Hanafi school of Islamic jurisprudence, and hence, could not marry without the consent of a guardian. In its judgment, the Court accepted the existing anomalies in law with respect to the age of a person to contract *nikah*. The Court further posited that “...it is not only puberty which is the criteria for granting consent but there is also requirement of being 'Rushd' i.e. a person being able to decide for himself and exercise good judgment.”⁷¹ This is an interesting notion, seeing as how the Court attempted to balance two differing views involving the same school of Islamic jurisprudence, in one instance mentioning how the Hanafi school deems the minimum age of marriage “as per Imam Abu Hanifa (R.A), for male is 18 years and for female 17-years”,⁷² while also noting that Islamic legal scholar “...D.F. Mullah in Muhammadan Law has mentioned the age for Hanafi woman as 15 years.”⁷³ Highlighting this very discord and inconsistency would be important in persuading a court that the minimum age of marriage across the board should be eighteen years, which would also be in line with Pakistan’s obligations under the UNCRC.⁷⁴

3.16 Potentially, the best course of argument to take in order to tackle the issue of child marriage and advocate for raising the minimum age of consent to enter into a marriage, would be to rely on recent case law (i.e., the *Abdul Razaq, Mumtaz Bibi, Tahira Bibi* and *Farooq Omar Bhoja* cases). The case of *Allah Nawaz* can be distinguished from the cases above, on the ground that it mainly relies on Muhammadan Law as per D.F Mullah, as a means of defining the capacity to enter into a marriage as being when puberty is reached. The cases listed above refute such reliance, and demonstrate that factors other than attaining puberty should also be considered in determining whether parties to a marriage contract were legally competent to enter into the same. Further, as evident from the *Mumtaz Bibi* case and the *Abdul Razaq* case, there is no agreement between religious scholars on what the minimum age of consent for entering into a marriage is, and in fact, scholars referring to the minimum age of consent under the same Islamic school of jurisprudence can end up citing different age estimates (a

⁷⁰ *Abdul Razaq vs. State* [2022 PCrLJ 953 (Islamabad)].

⁷¹ *Ibid*, para 7.

⁷² *Abdul Razaq*, note 70, para 12.

⁷³ *Ibid*.

⁷⁴ Pakistan became a signatory to the United Nations Convention on the Rights of the Child in 1990 and accepted setting the minimum age of marriage at eighteen years (as this is an obligation under the above convention).

situation that is referred to in the *Abdul Razaq* case). Such inconsistencies suggest that the issue is not with a particular judge’s deviation in interpreting the provisions of the CMRA 1929, but rather the legislature’s failure to modernize the said laws’ antiquated provisions, which has led to judicial contradictions. The *Tahira Bibi*, *Farooq Omar Bhoja*, *Mumtaz Bibi* and *Abdul Razaq* cases, however, appear to have opened the gate for reform, and can be relied upon to build further momentum vis-à-vis the issue of child marriage.

Table 1: Significant Cases to Rely Upon for Strategic Litigation on Child Marriages

Case	Court	Relevance to Marriage Rights
1) <i>Abdul Razaq vs. State</i> (2022)	Islamabad High Court	<ul style="list-style-type: none"> Puberty is not the only criteria for granting consent. A person must be able to decide for themselves and exercise good judgment as well.
2) <i>Tahira Bibi vs. Station House Officer</i> (2020)	Lahore High Court	<ul style="list-style-type: none"> Child marriages affects the reproductive health of young girls leading to forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.
3) <i>Mumtaz Bibi vs. Qasim</i> (2022)	Islamabad High Court	<ul style="list-style-type: none"> Any marriage with a minor under the age of 18 violates sections 375 and 377A of the PPC, incurring serious criminal liability. Such a marriage cannot be considered valid.
4) <i>Farooq Omar Bhoja vs. Federation of Pakistan</i> (2022)	Federal Shariat Court	<ul style="list-style-type: none"> The State can regulate the permissible age for entering into marriage, and such regulation is not unIslamic.

Registration of Marriages: Duty of Nikah Registrars

3.17 The superior courts of Pakistan have held that the *Nikah* Registrar is a “public officer”,⁷⁵ and as such, they are public servants exercising a public duty, which they should exercise cautiously, with due diligence and care.

3.18 A *Nikah* Registrar’s duty includes filling in the columns of the *nikahnama*, taking signatures of the parties, registering the *nikah*, and providing copies to the parties and the Union Council, etc. In the case of *Shah Din*,⁷⁶ the Lahore High Court held that the

⁷⁵ *Razia Begum vs. Jang Baz* [2012 CLC 105].

⁷⁶ *Shah Din vs. the State* [PLD 1984 Lahore 137].

duty to be performed by a *Nikah* Registrar is “*sacred*” as it related to succession, maintenance, dower, divorce, legitimacy of children and several other rights flowing out of a valid marriage. As public servants, *Nikah* Registrars should demonstrate a greater sense of responsibility before authenticating a *nikah* by making proper enquiries as to the competency of the parties to understand the nature of their act, their ages, and whether or not they are acting of their own free will and without any compulsion.

3.19 The Lahore High Court further casts a heavy duty on *Nikah* Registrars to probe into the circumstances surrounding the marriage before solemnizing or registering the *nikah*, specifically looking out for pernicious circumstances. If they fail to do their due diligence, *Nikah* Registrars are responsible for the resulting complications leading to any civil or criminal litigation.⁷⁷ The duty of the *Nikah* Registrar was also emphasized in the *Tahira Bibi vs. SHO* case, in which the Court also shed light on how *Nikah* Registrars, in shirking their duties, promote underage marriages as “...instead of requiring any proof of age from the parties to the marriage which should be in the shape of some authentic document ... proceed to rely upon a self-declaration of the concerned party in respect of his/their age at the time of registration of their marriage”.⁷⁸

3.20 Furthermore, in a recent judgment rendered in 2021,⁷⁹ a Division Bench of the Lahore High Court in the *Wasif Ali* case directed the federal as well as the provincial government in Punjab to prescribe minimum educational qualification standards for the grant of license to a *Nikah* Registrar and also to make arrangements for their proper training. The Lahore High Court also emphasized that negligence on the part of *Nikah* Registrars would make them liable to be proceeded against in accordance with the law.

Table 2: Significant Cases to Rely Upon for Strategic Litigation on the Role of *Nikah* Registrars

Case	Court	Relevance to Marriage Rights
1) <i>Shah Din vs. the State</i> (1984)	Lahore High Court	<ul style="list-style-type: none"> <i>Nikah</i> Registrar must responsibly confirm the parties’ ages and consent to marriage.
2) <i>Tahira Bibi vs. Station House Officer</i> (2020)	Lahore High Court	<ul style="list-style-type: none"> Failure of <i>Nikah</i> Registrar to exercise due diligence before registering the <i>nikahnama</i> can result in civil or criminal litigation.
3) <i>Wasif Ali vs. Mrs. Fakhra Jabeen</i> (2013)	Lahore High Court	<ul style="list-style-type: none"> <i>Nikah</i> Registrars must have minimum educational qualifications and receive proper training to be licensed.

⁷⁷ Ibid.

⁷⁸ *Tahira Bibi vs. Station House Officer* [PLD 2020 Lahore 811].

⁷⁹ *Wasif Ali vs. Mrs. Fakhra Jabeen* [WP No. 2111/2013].

3.21 The reported case law on this issue is scarce, with the *Shah Din, Tahira Bibi* and *Wasif Ali* cases being the fundamental pieces of judicial precedent. All these cases refer to the legal obligation to scrutinize credentials at the time of *nikah* in order to determine whether the marriage is solemnized in accordance with the free will of the parties. The three cases can be relied upon for strategic litigation, as they point to the same overall premise, and do not recognize any objections with regard to the importance of a *Nikah* Registrar's duties.

Polygamy

3.22 In recent years, the superior courts of Pakistan have continued to comment on the ineffectiveness of the Arbitration Council, the derogation from section 6 of the MFLO 1961 and penalization not serving as an effective form of preventive punishment. A second marriage continues to be contracted without the permission of the first wife, and the court has no choice but to decree dissolution in her favor, if asked for, whilst the second marriage stands substantiated.⁸⁰

3.23 Furthermore, in the case of *Faheemuddin*,⁸¹ the SCP considered the importance of marriage, misrepresenting one's marital status, the unhappiness that may result as a cause thereof, and the mandate of doing justice between wives when deciding upon whether the provisions of section 6 of MFLO 1961 can be extended to a second wife who files a complaint against her husband for concealing his existing wife from her. The husband urged that the wife has no *locus standi* to file a complaint under the MFLO 1961 as the relevant provision intended to protect existing wives, however, the SCP disagreed. In its judgment, the SCP noted that it “...is so important in our society that some social workers and organizations try to influence and prevail upon the second would-be wives not to go through such a marriage as according to them it might prove harmful for both the wives or one of them on account of the nature of a husband in not being observant of limits of God in doing justice between them in accordance with Islamic principles.”⁸²

3.24 Most recently, the SCP in *Muhammad Jamil vs. Sajida Bibi*⁸³ and *Ishtiaq Ahmad vs. the State*⁸⁴ has reaffirmed the importance of seeking permission before entering into a second marriage in order to regulate society as a whole. The *Muhammad Jamil* case related to the recovery of dower by the first wife wherein the facts were such that the petitioner had contracted a second marriage during the subsistence of his first marriage, without obtaining permission from his first wife. In this regard, the SCP noted that since the petitioner had contracted a second marriage without seeking the first wife's permission, dower was immediately payable. In the latter judgment, the SCP specifically stated that “concealment by a husband of his previous marriage/s or

⁸⁰ *Muhammad Jamil vs. Sajida Bibi* [PLD 2020 SC 613].

⁸¹ *Faheemuddin vs. Sabeeha Begum* [PLD 1991 SC 1074].

⁸² *Ibid.*

⁸³ *Muhammad Jamil vs. Sajida Bibi* [PLD 2020 SC 613].

⁸⁴ *Ishtiaq Ahmad vs. the State* [PLD 2017 SC 187].

*contracting another marriage with callous disregard of his wife may disrupt the love, tranquility and mercy ordained by Allah Almighty.*⁸⁵ Subsequently, it is apparent that the apex court has consistently recognized the importance of protecting the first wife in a state of polygamy, and hence the aforementioned case law can be relied upon in judicial proceedings for expanding the effectiveness of the Arbitration Council.

Dissolution of Marriage: Notice of Talaq

- 3.25 One of the main issues pertaining to divorce (*talaq*) that appears in Pakistani jurisprudence, which incidentally was the first question that had to be interpreted by the judiciary on this subject matter, was the consequence of failure to give notice of *talaq* to the Chairperson of the relevant Union Council. The courts essentially looked into what would be the effect if a husband failed to give any notice of *talaq* in writing to the Chairperson. In the case of *Syed Ali Nawaz Gardezi*,⁸⁶ the SCP held that where the husband did not give notice of *talaq* to the Chairperson, he would be deemed to have revoked the *talaq*.⁸⁷
- 3.26 The Gardezi case later became the Gardezi rule (i.e., failure to give notice of *talaq* amounts to revocation of the *talaq*). There have only been two exceptions to the Gardezi rule (present in two reported cases) but this is because of the peculiar circumstances of the two cases.⁸⁸
- 3.27 In *Kaneez Fatima vs. Wali Muhammad*,⁸⁹ the SCP, while discussing the Gardezi rule, held that failure to send notice of *talaq* to the Chairperson of the Union Council does not by itself lead to the conclusion that *talaq* has been revoked. It may only be ineffective but not revoked. This is the first time that the infamous Gardezi rule was overruled by the SCP itself.
- 3.28 In the case of *Kaneez Fatima*, the SCP held that in cases where, with the consent of both the parties, divorce is effected and confirmed in writing under their undisputed signatures, section 7 of the MFLO 1961 should not be strictly construed. The SCP also opined that the notice can be sent at any time thereafter to comply with the provisions of section 7. Commenting on the Gardezi rule, the SCP held that in so “...*far the observations made in Syed Ali Nawaz Gardezi's case, it may be observed that failure to send notice of Talaq to the Chairperson of the Union Council does not by itself lead to*

⁸⁵ Ibid.

⁸⁶ *Syed Ali Nawaz Gardezi vs. Muhammad Yusuf* [PLD 1963 SC 51] at 74-75 (per Justice SA Rahman).

⁸⁷ This remark by SA Rahman, J. could only be considered as a dictum because failure to give notice of *talaq* was not an issue in that case. However, the SCP as well as the High Courts of Pakistan raised it to the status of a celebrated ratio in subsequent cases, such as *State vs. Tauqir Fatima* [PLD 1964 Karachi 306], *Abdul Aziz vs. Rezia Khatoon* [21 DLR 1969], *Abdul Mannan vs. Safrun Nessa* [1970 SCMR 845], *Ghulam Fatima vs. Abdul Qayyum and Others* [PLD 1981 SC 460], *Muhammad Salahuddin Khan vs. Muhammad Nazir Siddiqui* [1984 SCMR 583], *Junaid Ali vs. Abdul Qadir* [1987 SCMR 518].

⁸⁸ *Noor Khan vs. Haq Nawaz* [PLD 1982 FSC 265] and *Chuhar vs. Ghulam Fatima* [PLD 1984 Lahore 234].

⁸⁹ *Kaneez Fatima vs. Wali Muhammad* [PLD 1993 SC 901].

*the conclusion that Talaq has been revoked. It may only be ineffective but not revoked.*⁹⁰

- 3.29 However, in the case of *Farah Naz*,⁹¹ the SCP once again upheld the controversial Gardezi rule. In *Farah Naz*, the SCP held that the oral allegation of *talaq* would neither be effective nor valid and binding on the appellant. The SCP has not been very consistent regarding this issue. The *Farah Naz* decision has apparently reactivated the Gardezi rule. However, the case of *Farah Naz* (a divisional bench's decision) cannot overrule the *Kaneez Fatima* case (a five-member bench's unanimous decision) because a larger bench of the SCP binds a smaller bench.
- 3.30 In the case of *Allah Rakha*,⁹² the FSC declared sub-sections (3) and (5) of section 7 of the MFLO 1961 as repugnant to the injunctions of Islam, as these prescribe, it was held, that the period of *iddat* is not always ninety (90) days, therefore this would have to be brought in conformity with Islamic principles to account for various situations that may arise. However, the decision in *Allah Rakha* has been appealed before the Shariat Appellate Bench of the SCP, and a final decision on this point is still awaited.
- 3.31 For the purposes of the issue of notice of *talaq*, the ideal approach would be the one adopted in the *Kaneez Fatima* case. As mentioned above, since this judgement is of a larger bench of the SCP as compared to the one given in the *Farah Naz* case, it can be argued that even though the SCP upheld the Gardezi rule in a later case, it should not be followed in the future since there is a contrary ruling pronounced by a larger bench of the SCP on the same matter.

Recognition of the Concept of Matrimonial Property: A means through which to strengthen financial rights of women post-divorce

- 3.32 As stated above, there is no provision for maintenance for a wife after divorce, apart from during the *iddat* period or during pregnancy. Furthermore, there is no formal recognition of the concept of matrimonial property under Muslim family laws in Pakistan. There are, however, a number of judgments that have been passed by the superior courts of Pakistan which support and recognize the reciprocal benefits that a wife may receive after the dissolution of her marriage for her contributions made during the marriage.
- 3.33 This principle was first laid out in the case of *Balqis Fatima* by the Lahore High Court.⁹³ The case concerned an appeal that was filed for dissolution of marriage on two grounds: (i) that the husband had failed to provide maintenance for a period of more than two years; and (ii) that the husband was associating with women of 'evil repute'.

⁹⁰ Ibid, para 11.

⁹¹ *Farah Naz vs. Judge Family Court* [PLD 2006 SC 457].

⁹² *Allah Rakha vs. Federation of Pakistan* [PLD 2000 FSC 1].

⁹³ *Balqis Fatima vs. Najm-ul-Ikwan Qureshi Niaz Ahmed* [PLD 1959 Lahore 566].

The Lahore High Court, in accepting the appeal, granted a decree for dissolution of marriage.

- 3.34 More importantly, the Lahore High Court held that “[i]f the husband is not in any way at fault, there has to be a restoration of property received by the wife and ordinarily it will be the whole of the property”.⁹⁴ However, the Court also held that “...the Judge may take into consideration reciprocal benefits received by the husband...” in determining the extent of the property to be restored to the husband.⁹⁵ In an unprecedented way, the Court considered the benefits afforded to the husband.
- 3.35 In the case of *Tuharat Firdos* which revolved around the issue of benefits,⁹⁶ the Peshawar High Court recognized that the court may take into consideration reciprocal benefits received by a husband from his wife, and continuous living together also may be a benefit received, so while going for divorce, the courts can adjust the financial matters so as to direct partial or total restoration of the benefits received. In the aforementioned case, the Court permitted the petitioner/wife to retain the marital home, keeping in view the principle of reciprocal benefits.
- 3.36 In another case titled *Aurangzeb vs. Gulnaz*,⁹⁷ the Sindh High Court raised questions as to the return of benefits in lieu of dower. While the Court directed the wife to return her dower (which included gold, cash and constructed premises), the Court allowed the wife to retain the constructed property on the basis of the principle of reciprocal benefits. The Sindh High Court, while relying on the seminal case of *Balqis Fatima*, stated that upon dissolution of a marriage, the judge may take into consideration reciprocal benefits received by the husband and continuous living together may be a benefit received. The principle of reciprocal benefits has also been recognized in various other judgements.⁹⁸
- 3.37 While the concept of matrimonial property is not recognized under the existing legal framework of Muslim family laws in Pakistan, several Muslim majority countries have adopted the legal concept of joint marital property in their family laws. Therefore, Pakistan can draw inspiration from these instances. For example, in Indonesia, under Article 35 of its Marriage Law No. 1, 1974,⁹⁹ the state has legally recognized a wife’s share in the property and assets acquired by the husband during the course of their marriage, notwithstanding the absence of any direct financial contribution by her.¹⁰⁰ The general rule of “*joint marital property*” (as it is adopted in the first paragraph of

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ *Tuharat Firdos vs. Imtiaz Khan* [2019 CLC 1562 (Peshawar)].

⁹⁷ *Aurangzeb vs. Gulnaz* [PLD 2005 Karachi 563].

⁹⁸ *Nasir Mehmood vs. Additional District Judge, Islamabad* [2023 CLC 350 (Islamabad)]; *Razia Begum vs. Saghir Ahmed* [1982 CLC 1586 (Karachi)].

⁹⁹ Law No.1/1974 (Indonesia) <<https://www.scribd.com/doc/53066173/Undang-undang-Republik-Indonesia-No-1-Tahun-1974-Tentang-an>> accessed 17 July 2023.

¹⁰⁰ SZ Bandial, ‘The Homemaker’s Inheritance: Property Rights and Gender Disparity’ *Arab News* (29 April 2019) <<https://www.arabnews.pk/node/1489806>> accessed 17 July 2023.

Article 35 of the above-mentioned law) may be exempted in the event the husband and wife had concluded a prenuptial contract, which is a specific contract of marriage for a separation of marital property, decided prior to entering into their marriage. In the prenuptial contract, it can be agreed by them whether they want to apply a full separation of joint marital property or regulate the rights and obligations of each of them as to the marital property.

3.38 Further, under the Malaysian Islamic Family Law Act 1984,¹⁰¹ specifically at section 58, when determining the share of a spouse in an asset for which she/he did not contribute to financially, the law specifies that a court must take into account the interests of a minor, and the spouse's contribution to the family welfare (for instance through care-giving). The law states that the court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale. Moreover, subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable, but in any case, the party by whose efforts the assets were acquired shall receive a greater proportion. Additional statutes that have ordered equal division of assets after divorce include section 59 of the Islamic Family Law Act of Brunei,¹⁰² section 52 of the Administration of Muslim Law Act of Singapore 1966,¹⁰³ and Article 202 of the Civil Code of Turkey.¹⁰⁴

3.39 In terms of matrimonial property, the legal principles of Pakistan promote archaic gender stereotypes that are out of touch with modern reality and fail to account for the variety of roles that men and women play in families and households.¹⁰⁵ Given that recent local jurisprudence has not been in favor of women's right to matrimonial property, an argument on the grounds of the Constitution citing Article 25 (which provides for equality before the law and prohibits discrimination on the basis of sex),¹⁰⁶ and Article 35 (which obligates the state to protect the marriage, the

¹⁰¹ Section 58, Malaysian Islamic Family Act 1984 <http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument> accessed 17 July 2023.

¹⁰² Section 59, Islamic Family Law Act of Brunei, <http://www.agc.gov.bn/agc%20images/laws/act_pdf/cap217.pdf> accessed 17 July 2023.

¹⁰³ Section 52, Administration of Muslim Law Act of Singapore 1966 <<https://sso.agc.gov.sg/Act/AMLA1966>> accessed 17 July 2023.

¹⁰⁴ Article 202, Turkish Civil Code <https://www.tusev.org.tr/usrfiles/files/Turkish_Civil_Code.pdf> accessed 17 July 2023.

¹⁰⁵ Legal Aid Society, 'Matrimonial Property Rights in Muslim Family Laws and International Human Rights Frameworks' (2021) <<https://www.las.org.pk/wp-content/uploads/2022/04/Policy-Paper-Matrimonial-Property-International-Human-Rights.pdf>> accessed 17 July 2023.

¹⁰⁶ Article 25 of the Constitution reads as: "**25. Equality of citizens**—

(1) *All citizens are equal before law and are entitled to equal protection of law.*

(2) *There shall be no discrimination on the basis of sex.*

(3) *Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.*"

family, the mother and the child),¹⁰⁷ may be brought forth. Further reference can be made to Pakistan’s international treaties which include the Universal Declaration of Human Rights (UDHR)¹⁰⁸ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹⁰⁹ which, under Article 16, protects equal rights in marriage and dissolution of marriage.

Table 3: Significant Cases to Rely Upon for Strategic Litigation on Matrimonial Property

Case	Court	Relevance to Marriage Rights
1) <i>Tuharat Firdos vs. Imtiaz Khan</i> (2019)	Peshawar High Court	<ul style="list-style-type: none"> • During divorce, courts can consider reciprocal benefits received by a husband from his wife, and adjust the financial matters to direct partial or total restoration of the benefits received.
2) <i>Aurangzeb vs. Gulnaz</i> (2005)	Sindh High Court	<ul style="list-style-type: none"> • Continuous living together may be a reciprocal benefit received by the husband from his wife.

¹⁰⁷ Article 35, Constitution of Pakistan 1973.

¹⁰⁸ UN General Assembly, Convention on the Rights of the Child, 20 November 1989 <<https://www.refworld.org/docid/3ae6b38f0.html>> accessed 17 July 2023.

¹⁰⁹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 <<https://www.refworld.org/docid/3ae6b3970.html>> accessed 17 July 2023.

4. GAPS IN LEGAL FRAMEWORK AND VIABLE AREAS FOR STRATEGIC LITIGATION

Child Marriages

- 4.1 A perusal of the laws penalizing adults involved in conducting or being involved in child marriages demonstrates that the primary reason such laws do not effectively resolve this issue is that the laws in each province do not address the question of the validity of a child marriage once it has been solemnized. This glaring lacuna in the relevant legislation places an undue burden on a child (who is the victim of the marriage), to instigate the case for the marriage to be declared void.
- 4.2 Placing the aforementioned burden on a child/victim of a child marriage to seek redressal is unfair and unreasonable. Furthermore, as per Islamic law, if a child bride wants to exercise her right to repudiate a child marriage that she was forced to enter into, she must do so before the age of eighteen, and before the marriage has been consummated. This is seen to be true in practice before the superior courts of Pakistan as well.
- 4.3 Additionally, it is important to highlight that while the PPC criminalizes sexual acts and intercourse with a minor, it does not take within its purview the circumstance where the minor may be married to the perpetrator. Pakistani courts have also maintained the position that a valid marriage with the minor is an exception to these provisions.
- 4.4 Lastly, a lack of uniformity in the various provincial laws attempting to prohibit the prevalence of child marriages creates space for individuals to circumvent one province's laws by carrying out the marriage in a different province where the provisions are more lax in terms of age (i.e., in Punjab or KP instead of Sindh, if the girl is under the minimum age for marriage under the relevant law in Sindh). Therefore, the need to stipulate a uniform minimum age to be able to enter into a marriage contract for males and females is paramount.
- 4.5 The existing legislation and judicial precedent on child marriages in Pakistan highlight the need for streamlined legislative reform as the current laws exist with several loopholes that allow for non-enforcement of the laws to prevail.
- 4.6 The *Mumtaz Bibi*, *Independent Thought* and *Tahira Bibi* cases (discussed above at paragraphs 3.8 to 3.14) shed light on an important and disturbing peril of child marriages, which is that they subject young females to sexual activity, and potentially abuse, at an early age which is then given the cover of legality, as such marriages are presumed and held to be validly contracted marriages.
- 4.7 Therefore, based on the foregoing, this issue is ripe to pursue through strategic litigation. The recent judgments of the High Courts in Lahore (*Tahira Bibi*) and Islamabad (*Abdul Razaq* and *Mumtaz Bibi*) as well as the judgment rendered by the FSC (*Farooq Omar Bhoja* case) should all be highlighted, emphasizing the incongruence in the existing laws as well as the need to raise the minimum age to enter

into a marriage for males and females. Concomitantly, the *Allah Nawaz* case can be distinguished, primarily on the ground that it defines the capacity to enter into a marriage to be based solely on the attainment of puberty, and does not consider other factors (unlike recent case law on this issue). The other grounds on which the *Allah Nawaz* case can be distinguished have been provided in paragraph 3.16 of the Report.

- 4.8 Furthermore, the crux of a constitutional petition on this issue ought to pivot around Article 25(3) of the Constitution,¹¹⁰ which supplements the idea that “special” provisions may be developed for the protection of women and children, and that the relevant law in question is discriminatory in its application. A constitutional petition can be filed before any of the High Courts in Pakistan (such as the Lahore High Court) seeking, *inter alia*, the following relief from the court (as applicable):
- a. for a direction to the government (federal or provincial, as applicable)/competent authorities to amend the relevant law(s) in order to raise the minimum age to enter into a marriage contract to eighteen for males and females, in an effort to push for a uniform minimum age of marriage;
 - b. for a clarification of the law entailing the forbidding of sexual activity with young girls (under the age of eighteen), even if the said victim is married to the perpetrator;
 - c. for a direction to the government (federal or provincial, as applicable)/competent authorities to amend the relevant law(s) in order to prescribe enhanced punishments for solemnizing a child marriage to act as a deterrent; and
 - d. for a direction to the government (federal or provincial, as applicable) to harmonize the CMRA 1929 with the MFLO 1961 and DMMA 1939 to ensure that the age to provide consent for marriage is eighteen years across Pakistan, and that under the DMMA 1939, the age to exercise the option of puberty should be raised to eighteen years as well, and an under-age marriage should be made a valid reason for divorce.

Registration of Marriages

- 4.9 The lack of strict regulation surrounding the registration of marriages, specifically who may be qualified to solemnize *nikahs* and register them, leaves room for abuse of the system and ties in with the increasing number of underage marriages and the signing of *nikahmamas* skewed in the favor of the groom and/or his family. Oftentimes, in practice, considering the relaxed attitude of federal and provincial governments towards

¹¹⁰ Article 25, note 106.

birth registrations, *Nikah* Registrars find an opportunity to falsely raise the age of young brides and enter them into *nikahs*.¹¹¹

- 4.10 Furthermore, considering that the position of a *Nikah* Registrar is commonly held by local *imams*, the families that approach them to conduct *nikah* proceedings place a great deal of trust in them. It is reported that in a baseline survey conducted by the Punjab Commission on the Status of Women of approximately twenty thousand (20,000) *Nikah* Registrars in Punjab, it was found that the majority of them are involved in offering critical information/advice to families, including but not limited to offering advice as to whether the bride should be granted the delegated right to divorce under column 18 of the *nikahnama*.¹¹² This study also showed that ninety percent (90%) of the *Nikah* Registrars had never received formal training for undertaking such an important role, even so far as not being informed about the minimum age for marriage or the notion of informed consent.¹¹³
- 4.11 Currently, there are no formal codified requirements for qualifications that a *Nikah* Registrar must have in order to act as such, nor is there a requirement for such persons to partake in formal training or have their license permissions subject to review. Therefore, there is a strong need for amending the existing MFLO Rules to include requisite qualifications and detailed infractions that could result in a *Nikah* Registrar losing their license to act as such, and possibly, also be subject to other penalties.
- 4.12 There is potential to push for reform to make the licensing and renewal process of *Nikah* Registrars more structured and methodical, as opposed to the arbitrary form in which it exists presently. A constitutional petition filed on this issue would focus on setting out precise qualifications, including minimum age and educational qualification, for licesing of *Nikah* Registrars. Further, *Nikah* Registrars shall be statutorily required to have their licenses renewed periodically, with the periodic review process for renewal set in clearly defined and robust guidelines to avoid malpractice and abuse of power. In addition, *Nikah* Registrars may be obligated to counsel the bride and groom on the implications of the contract, and perform obligatory checks on documents verifying the age of the parties. As stipulated in paragraph 3.21 above, the reported cases on this issue all emphasize the legal obligation of *Nikah* Registrars to scrutinize credentials at the time of *nikah* in order to determine whether the marriage is solemnized in accordance with the free will of the parties, and therefore, lend support to the reform measures mentioned above.

¹¹¹ Shirkat Gah, ‘Submission on Child, Early and Forced Marriage’ (2013) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/WomensResourceCentrePakistan.docx>> accessed 17 July 2023.

¹¹² K Vyborny, E Field, and H Zahir, ‘Informed Consent is Needed in Pakistan’s Marriage Contracts’ (Oxford Policy Management, May 2019) <<https://www.opml.co.uk/blog/informed-consent-is-needed-in-pakistan-s-marriage-contracts>> accessed 17 July 2023.

¹¹³ Ibid.

4.13 Additionally, strategic litigation on this issue may also call for the constitution of a committee by the Lahore High Court (or any other High Court in Pakistan) to provide recommendations from experts to develop training programs for *Nikah* Registrars and conduct awareness workshops.¹¹⁴

4.14 Furthermore, it is notable that under the NADRA Ordinance, 2000, while marriages are required to be reported to NADRA by “*such authority or officer as may be prescribed by regulations*”,¹¹⁵ no such regulations have been prescribed which would make it compulsory for *Nikah* Registrars to mandatorily register marriages with NADRA, and no penalties have been outlined for the failure to do so. Therefore, in a petition seeking to pursue this issue, the relevant court may also be requested for reference to NADRA laws/registration be made within the MFLO 1961 or the MFLO Rules. Moreover, the penalty for non-registration with the appropriate authorities may be enhanced to ensure strict compliance.

4.15 The above-mentioned petition can be based on, *inter alia*, the following grounds:

- (i) A case may be made under Article 14 of the Constitution¹¹⁶ (which enshrines the dignity of man as a fundamental right) read with Article 4 of the Constitution (which codifies the individual right of protection under the law and to be treated in accordance with the law).¹¹⁷ It can be argued that the lack of subordinate legislation on the issue of registration of marriages by *Nikah* registrars with NADRA is violative of these articles, since the primary legislation/parent law requires that regulations ought to be prescribed in accordance with which *nikahs* ought to be registered. However, the government has failed to promulgate anything to this effect, leading to a violation of not only a constitutional right (i.e., Article 4 of the Constitution), but also of a fundamental right guaranteed to all individuals under the Constitution (i.e., Article 14 of the Constitution).

¹¹⁴ It is notable that in Writ Petition No. 30364 of 2021, the Lahore High Court gave a direction for the drafting of the Punjab Empowerment of Persons with Disabilities Act, 2021 and recommendations for this law were gathered through consultative meetings of various experts, stakeholders and government officials. Furthermore, in Writ Petition No. 13537 of 2020, the case concerning the two-finger virginity test, the Lahore High Court directed the Government of Punjab to devise appropriate medico-legal protocols and guidelines, and include regular training and awareness programs for all stakeholders to better understand that virginity tests have no clinical or forensic value. Therefore, it can be seen that such directions are commonly made by the High Courts in Pakistan, mandating the government to take appropriate actions.

¹¹⁵ Section 21(2) of the NADRA Ordinance, 2000.

¹¹⁶ Article 14 of the Constitution provides: “**14. Inviolability of dignity of man, etc.—**

(1) *The dignity of man and, subject to law, the privacy of home, shall be inviolable.*

(2) *No person shall be subjected to torture for the purpose of extracting evidence.*”

¹¹⁷ Article 4 of the Constitution reads as: “**4. Right of individuals to be dealt in accordance with law, etc.—**

(1) *To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*

(2) *In particular:*

(a) *no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*

(b) *no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*

(c) *no person shall be compelled to do that which the law does not require him to do.*”

- (ii) Furthermore, failure of the *Nikah* registrars to provide complete information and as a result wrongly advise the bride and her family in respect of her rights under the *nikah*, can be argued to be a violation of Article 19A of the Constitution¹¹⁸ (right to information) as well as Articles 14 and Article 4 of the Constitution.

Polygamy

- 4.16 There are a number of contentious and discriminatory clauses in the MFLO 1961, including the right to contract a second marriage. While this has been illegalized in some Muslim countries, it remains legal in Pakistan. For a husband intending to marry polygamously, the only condition is to inform and obtain consent from the first wife. Not obtaining consent of the first wife does not make the marriage illegal and only attracts a nominal punishment.
- 4.17 Additionally, the functionality and the effectiveness of the Arbitration Council has been an issue that has yielded much debate. When the husband applies to the Arbitration Council to contract another marriage, his application must include reasons for the proposed marriage and whether the consent of his existing wife or wives has been obtained. It also mandates the Arbitration Council to permit the subsequent marriage only if it is satisfied that the proposed marriage is necessary and just, subject to such conditions, if any, as may be deemed fit.
- 4.18 According to information gathered from secondary sources, media reports, and in-field legal practice, the Arbitration Council is an ineffective mechanism because there is a lack of acceptance by men of the law stipulating the Council's authority and a lack of awareness of the same law by women. As such, many men do not seek the permission of the Arbitration Council and in instances where they do, the permission of the Arbitration Council is deemed a mere formality.¹¹⁹ The lax attitude of the Arbitration Council and the continued ineffectiveness is alarming, since under section 495 of the PPC, the concealment of a previous marriage may be awarded a penalty of up to ten (10) years imprisonment, or a fine. This goes to show a disjoint between the provisions of the MFLO 1961 and other laws in Pakistan. Therefore, efforts spent at harmonizing these laws is essential and can provide improved enforcement of Muslim family laws.
- 4.19 As such, litigation can be pursued, seeking a direction to amend relevant law(s) to make it mandatory for an application to conduct a second or subsequent marriage during the subsistence of an existing marriage, to contain all the material facts, and the onus of obtaining and ensuring consent has been given for the proposed marriage, in whatever form, from the existing wife/wives should be placed on the Chairperson of the relevant Union Council. The Chairperson should be required to meet the existing wife/wives

¹¹⁸ Article 19(A) of the Constitution provides: “**19A. Right to information** — Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law”.

¹¹⁹ 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) <<http://www.refworld.org/docid/52eb9ea04.html>> accessed 17 July 2023.

separately in chamber and satisfy himself that consent has been voluntarily and freely given, and that other rights such as the right to a separate residence, financial status and dower are being maintained. Given that the superior courts of Pakistan have constantly recognized the importance of protecting the first wife in a state of polygamous marriage, reported judgments on this issue (notably, the *Muhammad Jamil* and *Ishtiaq Ahmad* cases) should be relied upon in litigation centered around improving the effectiveness of the Arbitration Council.

Dissolution of Marriage

- 4.20 According to a civil society 2012 Shadow Report to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee,¹²⁰ a closer examination of divorce rights between women and men shows that divorce rights between the two genders are unequal. For instance, in Pakistan, a man may (by way of *talaq*) need only send a notice to the Arbitration Council of the pronouncement, attempt reconciliation and, if reconciliation is not possible, the divorce stands.
- 4.21 The most notable implication of the provision pertaining to divorce in the MFLO 1961 is that it refers to the issue of divorce to an administrative body for reconciliation, and the *talaq* is not effective for ninety (90) days during which reconciliation is to be attempted. The period of reconciliation does not precede the pronouncement of *talaq*, it follows it. However, a big issue then arises relating to the requirement of applying to the Arbitration Council for the divorce certificate and the requirement of the ninety (90) days *iddat* period which is distinct from the ‘Islamic’ method. According to Islamic law, the procedure for reconciliation is only possible if one or two pronouncements are made.¹²¹
- 4.22 Under section 7 of the MFLO 1961, a third pronouncement of divorce will be effective after ninety (90) days have passed from the date of the receipt of the notice by the Chairperson (and not from the date of pronouncement of *talaq*). Secondly, under Islamic law, *iddat* is counted from the time of the pronouncement, but under section 7 of the MFLO 1961 it is counted from the time the notice is received by the Chairperson. Finally, under the abovementioned section, the effectiveness of *talaq* is dependent on the notice of *talaq* to the Chairperson and reconciliatory efforts by him.
- 4.23 In practice, it is important to highlight that section 7 of the MFLO 1961 has become almost a redundant provision, as the provision of notice of divorce to the Arbitration Council is considered directory, at best. This creates a vacuum where husbands may make verbal pronouncements of divorce and then subsequently withhold the notice to

¹²⁰ Aurat Foundation, ‘Pakistan: NGO Alternate Report on CEDAW, Submission to the CEDAW Committee for the 54th Session’ (2012) <<https://www.af.org.pk/Reports/NGO%20Alternative%20Report%20on%20CEDAW%202012.pdf>> accessed 17 July 2023.

¹²¹ This is according to the *jamhur* (majority opinion of Islamic scholars). Reconciliation is possible according to Ibn Taymiyya, Ibn al-Qiyyam, the majority of the *ahl al-hadith* and the Shi‘a Imamiyya because they treat three repudiations in one session to be one.

the Arbitration Council to blackmail, torture and harass their wives. This can be particularly troublesome where the wife would want to remarry as then the husband may dispute the pronouncement of *talaq* at all.

4.24 A constitutional petition on this issue can be filed before any High Court in Pakistan seeking for the court to:

- a. direct the government (federal or provincial, as applicable) to amend the MFLO 1961 to prescribe a time limit within which the husband has to provide notice of the *talaq* to the Arbitration Council after verbal pronouncement of the same; and
- b. direct the government (federal or provincial, as applicable) to amend the MFLO 1961 to provide the wife with the right to submit notice to the Arbitration Council concerning the verbal pronouncement of divorce if the husband fails to do so within the time limit prescribed.

4.25 A strategic litigation in respect of this issue can also raise the argument that failure to give notice to the Arbitration Council under the MFLO 1961 of the *talaq* infringes upon a woman's right to be treated in accordance with the law, which right has been protected under Article 4 of the Constitution.¹²² Furthermore, it may also be contended in the petition that only allowing a husband to notify the Arbitration Council as regards the dissolution of marriage/*talaq* amounts to discrimination and therefore, such law should be amended/reformed in order to uphold Article 25 of the Constitution (*a fundamental right*),¹²³ which unequivocally states that all citizens are equal before the law and are entitled to equal protection of law, and more importantly, that there should be no discrimination on the basis of sex. Moreover, the *Kaneez Fatima* case can be relied upon in a potential strategic litigation, for the reasons and along the grounds provided under paragraphs 3.29 to 3.31 above.

4.26 It is important to note that as far as law reforms to the MFLO 1961 are concerned, there are also institutional mechanisms in place that focus on law reforms, such as the Law and Justice Commission of Pakistan (LJCP).¹²⁴ A strategic intervention in the issue of dissolution of marriage can also call for the LJCP to draft and recommend amendments on this matter to the MFLO 1961.

Matrimonial Property

4.27 The systemic and inherent inequality of women becomes prevalent at the time of divorce due to the lack of a proper legal mechanism/infrastructure that accords protection to women.

¹²² Article 4, note 117.

¹²³ Article 25, note 106.

¹²⁴ The LJCP is a statutory authority of the Government of Pakistan established under the Law and Justice Commission Ordinance, 1979. It is responsible for the development and improvement of the legal system in Pakistan and has been designed to recommend reforms in statutes.

- 4.28 For example, a perusal of the relevant laws demonstrates that there is no provision for maintenance after divorce, with the exceptions being the *iddat* period of three (03) months or, when a woman is pregnant, in which case she becomes entitled to subsistence support until she delivers the child. Similarly, there is no provision in any of the Muslim family laws in Pakistan for any division of matrimonial property (i.e., a property which is created or acquired during the life of marriage and has contribution in kind and sometimes in cash from the wife) between a husband and wife upon their divorce.¹²⁵
- 4.29 In the absence of any provision under the existing laws relating to marriage and divorce in Pakistan that recognizes the concept of matrimonial property or stipulates any requirement for maintenance following separation or divorce, women face continued hardships in seeking any sort of financial protection.
- 4.30 The current Muslim family laws relating to women's maintenance following separation and divorce encapsulate the rigidity and inequality between the relationship of a husband and wife. As a result, women are more susceptible to economic vulnerability and are left with maintenance only during the period of *iddat* or pregnancy. In the case of *khula*, there is no such obligation on the husband to provide any maintenance to his divorced spouse. Having devoted their entire life to home-making and upbringing of children as well as providing other contributions during the time of the marriage (financial and non-financial), women in most cases are left with no independent source of income.
- 4.31 The incorporation of the principle of reciprocity or any mechanism that ensures women are adequately compensated post-divorce will not only fulfil the mandate of Pakistan's international commitment to the economic empowerment of women but also to the fundamental rights to property and gender equality guaranteed under the Constitution.
- 4.32 In order to ensure that women receive greater financial protections upon the dissolution of their marriages, there is a vital need to reform the existing laws relating to maintenance and property rights. An argument that can be made for the above is that the current legal regime violates Articles 9 and 25 of the Constitution in so far as it fails to observe equality between a husband and wife.¹²⁶ Moreover, Pakistan is under an obligation to reconsider its provisions on matrimonial property and eliminate any chance of discrimination against women resulting from the division of property on divorce.
- 4.33 Therefore, based on the foregoing, this issue is also ripe to pursue through strategic litigation. Accordingly, an intervention from the superior courts in Pakistan can be sought on this issue to codify rights to matrimonial property that women have, to bring such laws fully in compliance with the fundamental rights enshrined under the

¹²⁵ F Viqar, 'Financial Protection Upon Divorce' *The Express Tribune* (20 February 2020) <<https://tribune.com.pk/story/2160220/financial-protection-upon-divorce>> accessed 17 July 2023.

¹²⁶ Article 25, note 106.

Constitution as well as the international legal instruments Pakistan has ratified. An additional justification for the need to codify these rights can be made by relying on the principle of reciprocal benefits that has been recognized through various judgments issued by the superior courts of Pakistan, and the case law mentioned in paragraphs 3.33 to 3.36 of this Report can be used in this regard. Furthermore, in a constitutional petition involving this issue, reliance can be placed on Article 25(3) of the Constitution to contend that the government has the discretion to enact laws and policies which protect the rights of children and women. Since there is no prohibition in Islam as regards the division of matrimonial property after divorce, and the fact that the current regime is in violation of Articles 9 and 25 of the Constitution, therefore, it could be prayed for the courts to direct the government to adopt such law that would enable women to establish that they have rights to matrimonial property.