



**musawah**

For Equality in the Family

**THEMATIC REPORT ON ARTICLE 16, MUSLIM FAMILY LAW  
AND MUSLIM WOMEN'S RIGHTS IN  
PAKISTAN**

**75th CEDAW Session  
Geneva, Switzerland  
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In 2013, the minimum legal age for marriage in the Sindh province as per Section 2 of the Sindh Child Marriages Act was raised to 18 years for both females and males, without exceptions. The Act criminalises and penalises acts relating to child marriages.<sup>21</sup>

According to women's rights activists there is a lack of implementation of the law. A gap remains regarding girls who have been previously married below 16 or 18 years. In cases of elopement or when minor brides cannot be sent back to their families for whatever reason, they are being referred to the Women's Crisis Centers which does not provide them the services they need.

### **Recent attempts at law reform**

In April 2018, Senator Sherry Rahman representing the Pakistan People's Party presented the Child Marriage Restraint Bill (which proposed raising the minimum age of marriage to 18 without exceptions) in the Senate. In April 2019, the Bill was passed in the Senate despite opposition from Senators from religious parties including Jamiat Ulema-e-Islam and Jamaat-e-Islami who opposed the bill, citing that it was against Islamic values.

The Bill was referred by the National Assembly to the Standing Committee on Law and Justice for further consultations including with the Council of Islamic Ideology (CII) before being presented once again before the National Assembly.<sup>22</sup> In August 2019, the bill was rejected by the National Assembly's Standing Committee on Law and Justice, with strong opposition from the likes of Minister for Religious Affairs and Minister of State for Parliamentary Affairs.<sup>23</sup>

Resistance to the Bill has been primarily from conservative groups who argue that Islam allows for minor girls to be given in marriage after puberty. This is despite the fact that data and cases of lived realities and evidence pertaining to health and wellbeing of women and girls have been presented by women's rights advocates. The government must move to consider positive legal developments from other Muslim countries, that have raised the minimum age of marriage to 18 years, using Islamic jurisprudential evidence and various tools from Islamic legal tradition, as well as international human rights principles.

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*Mai* (PLD 1957 Lahore 651); *Bakhshi v Bashir Ahmed* (PLD 1970 SC 323) *Zafar Khan v Muhammad Ashraf Bhatti and another* (PLD 1975 Lahore 234).

<sup>21</sup> In February 2017, Pakistan toughened penalties for those guilty of being involved in child marriages. Under the new law, offenders will face a minimum of five years in prison and may serve up to 10 years. They also face a fine of up to one million rupees. More info: Saleem Shaikh and Sughra Tunio, "Pakistan seeks to curb child, forced marriages with harsher punishment", *Reuters*, 7 February 2017, <http://www.reuters.com/article/us-pakistan-child-marriage-idUSKBN15M274>

<sup>22</sup> Ahmed, Ashfaq (May 1<sup>st</sup> 2019). Pakistani parliamentarian again oppose the child marriage prohibition bill. Gulf News Asia <https://gulfnews.com/world/asia/pakistan/pakistani-parliamentarian-again-oppose-the-child-marriage-prohibition-bill-1.1556720215025>

<sup>23</sup> Muhammad Anis, 22 August, 2019. Ahmed Ashfaq (May 2019) NA body on Law rejects Child Marriage Restraint Bill <https://www.thenews.com.pk/print/515514-na-body-on-law-rejects-child-marriage-restraint-bill>

<b>MUSAWAH JUSTIFICATION FOR REFORM</b>	
<p>Attempts to set and strictly enforce the minimum age of marriage at 18 for both men and women are often met with resistance from conservative religious authorities, who claim that this is 'un-Islamic.'</p>	
<b>NEW HISTORICAL EVIDENCE NOW AVAILABLE</b>	<ul style="list-style-type: none"> <li>• Commonly, the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. The marriage was supposedly consummated when Aishah was nine years old.</li> <li>• However, there are new studies asserting that Aishah was likely to have been 19 at the time of her marriage (source: <a href="http://www.sistersinislam.org.my/news.php?item.997.41">http://www.sistersinislam.org.my/news.php?item.997.41</a>).</li> <li>• The question arises as to why the Prophet's marriage to Aishah is used as a model, while his marriage to Khadijah, a widow 15 years older than him, or his marriage to other widows and divorcees, are ignored as exemplary practices.</li> </ul>
<b>QUR'AN STATES CONDITION OF PERSON FIT FOR MARRIAGE</b>	<ul style="list-style-type: none"> <li>• While the <i>Qur'an</i> does not provide any specification for the age of marriage, Surah an-Nisa' 4:6 requires that orphans should be of sound judgment before they marry.</li> <li>• This indicates that a person must have sufficient judgment and maturity to marry.</li> <li>• Equating the age of majority with the age of puberty and/or rationality (<i>baligh</i>), as is traditionally done, forces adulthood on children under 18, even onto those who start menstruating at the age of nine.</li> <li>• The onset of puberty is no indication of sufficient maturity for marriage.</li> </ul>

<b>MINIMUM AGE OF MARRIAGE</b>	<b>POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY</b>
<b>MINIMUM AGE OF MARRIAGE 18 WITH NO EXCEPTIONS</b>	<p><b>EGYPT</b></p> <p>The minimum age for marriage is 18 for both females and males. The registration of the marriage of a person below 18 is prohibited and penalised.</p> <p><b>KENYA</b></p> <p>The minimum age for marriage is 18 for both females and males regardless of religion. Any person who marries or knowingly celebrates or witnesses the marriage of a person below 18 commits an offence and will be liable to a penalty (imprisonment, fine or both).</p>

## **1.2. FORCED MARRIAGE**

Despite legal provisions in place penalising forced marriages, the practice continues to occur across Pakistan. In rural areas in particular, the practice is exacerbated by poverty, insecurity and lack of access to support services.<sup>24</sup> Activists report that most of the marriages in Pakistan are arranged by families, and in many instances some degree of coercion is involved. In recent years, there has been a surge of reporting of young women living abroad in countries like the UK<sup>25</sup> and Scotland<sup>26</sup> who are brought to Pakistan and forced or coerced into marriage. So called 'honor-based' violence and killings have also been reported of women and men who have chosen to marry against family wishes.<sup>27</sup>

<sup>24</sup> VOA News, July 28, 2019. Access here: <https://www.youtube.com/watch?v=YEhV0lnkVws> and here <https://www.youtube.com/watch?v=0xPpxokogPY>

<sup>25</sup> Wilkinson, Bard. May 23, 2018. CNN 'UK mother jailed for forcing daughter to marry in Pakistan'. Access here: <https://edition.cnn.com/2018/05/23/asia/forced-marriage-uk-pakistan-intl/index.html>

<sup>26</sup> BBC News Scotland. 12 July 2019. 'I was forced to marry my cousin'. Access here: <https://www.bbc.com/news/uk-scotland-48949483>

<sup>27</sup> Baloch, Meer Shah. May 17, 2019. The Guardian. 'Pakistan authorities record a dozen cases of 'honour' killing in a fortnight'. Access here: <https://www.theguardian.com/global-development/2019/may/17/pakistan-authorities-record-a-dozen-cases-of-honour-killing-in-a-fortnight>

## RECOMMENDATIONS

### We recommend the CEDAW committee to urge the State party to:

- Ensure that government passes and enacts legislation to raise the minimum age to 18 without exceptions and for this standard minimum age of marriage to apply uniformly across all religious groups and provinces in Pakistan.
- Establish a dedicated program and service to combat child and forced marriages with outreach to rural and high-risk areas. The Forced Marriage Unit in the UK is a good example of government led effort to address the issue.
- Provide support services (including specialized shelters and legal aid) for minor girls who have undergone and/or are vulnerable to child and forced marriages, especially in high risk areas.
- Ensure proper data collection of the number of cases of child and forced marriages and number prosecutions and penalties imposed on persons responsible for child and forced marriages.

## 2. POLYGAMY

Section 6 of the MFLO<sup>28</sup> requires the husband to apply for written permission from the Arbitration Council (Union Council Chairperson plus a representative each of the husband and wife or wives) 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 polygamous 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.

The Arbitration Council is obligated to record its reasons for its decision regarding the proposed polygamous marriage. It is a criminal offence for any man who contracts a polygamous marriage without the permission of the Arbitration Council. According to information gathered by the Immigration and Refugee Board of Canada and media reports, the Arbitration Council is not effective as a procedural check against polygamous marriages that do not meet the injunctions of the Qur'an for reasons that include: (i) lack of acceptance of the law by men; (ii) lack of awareness of the law by women; (iii) As such, many men do not seek the permission of the Arbitration Council and instances where they do, the permission of the Arbitration Council is a mere formality.<sup>29</sup>

According to women activists, in many cases of polygamy husbands find it difficult to provide maintenance to support multiple families and the implementation of maintenance of children provisions via the courts remains weak. Usually only a small percentage of the maintenance awarded to the mother as the per the decision of the courts.

## RECOMMENDATIONS

### We recommend the CEDAW committee to urge the State party to:

- Undertake research and collection of data, cases and evidence of the impacts of polygamy on Pakistani families, especially women and children.
- Ensure family law reform to prohibit polygamy by Pakistani Muslim men, following examples of other Muslim countries like Tunisia and Turkey which have abolished the practice in the best interest of family well-being.

<sup>28</sup> Section 6 of the Muslim Family Laws Ordinance (1961), <http://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cJyX-sg-ijiiiiiiiiiii>

<sup>29</sup> 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", *Responses to Information Requests*, 18 December 2013, <http://www.refworld.org/docid/52eb9ea04.html>

## MUSAWAH JUSTIFICATION FOR REFORM

Musawah believes Islam promotes monogamy and only permits polygamy as an alternative in exceptional circumstances. *Surah an-Nisa' 4:3* in the Qur'an states: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly [with your wives] then marry only one.... That will be more suitable, to prevent you from doing injustice'.

### QUR'AN PROMOTES MONOGAMY

- When the Qur'an was revealed, it imposed limitations upon the pre-Islamic practice of polygamy.
- The verse in *Surah an-Nisa'* that allows polygamy if a man can treat all his wives justly was revealed after a battle which had resulted in many men being killed, leaving behind war widows and orphans.
- As men were breadwinners in that society, the widows found it difficult to provide for their children. It was in this context that polygamy was tolerated in Islam: to provide for the welfare of widows and the orphaned children.

### CHALLENGING POLYGAMY

- Polygamy is not an intrinsically 'Islamic' practice, as some Muslims believe.
- Polygamy was a practice that existed in various civilizations, religions, and cultures in many parts of the world until it was abolished by law as governments acknowledged the injustices it inflicted on women and children.
- Tunisia has forbidden polygamy on the ground that it is impossible for a man to deal justly with more than one wife. Thus, the continuum of reform suggests that polygamy should be even more restricted than it was in the situation discussed in the Qur'an.

## 3. UNEQUAL PROVISIONS FOR DIVORCE

Pakistani law provides for different mechanisms<sup>30</sup> for divorce, including: 1) Divorce by way of unilateral repudiation (*talaq*) by husbands; 2) divorce by mutual consent of both parties (*mubarat*); 3) redemptive divorce (*khul'*) by wife after repayment of compensation to husband and; 4) divorce by way of judicial decree (*faskh*) by wife based on fault grounds.

According to a civil society groups, a closer examination of divorce rights between women and men shows that divorce rights between the two genders are unequal. For instance, a man may by way of *talaq* need only send a notice to the Arbitration Council of the pronouncement, go through a reconciliation and if reconciliation is not possible, the divorce stands.

However, a woman has to prove a ground for divorce in court if her husband does not consent to a divorce or she has not been delegated the right to divorce. With regard to the latter, often times, families and elders cross out the clause delegating the right of divorce in the standard marriage contract at the time of marriage saying that it is a 'bad omen' to talk about divorce. Redemptive divorce (*khul'*) is available to the wife, but she may not necessarily be able to compensate her husband for such a divorce.<sup>31</sup>

<sup>30</sup> Shaqufta Omar, "Dissolution of Marriages: Practices, Laws and Islamic Teachings" *Institute of Policy Studies Policy Perspective 4:1*, <http://www.ips.org.pk/islamic-thoughts/1120-dissolution-of-marriage-practices-laws-and-islamic-teachings>

<sup>31</sup> Aurat Foundation, "Pakistan: NGO Alternate Report on CEDAW" *Submission to the CEDAW Committee for the 54<sup>th</sup> Session*, 2012, pp. 91-92, [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT\\_CEDAW\\_NGO\\_PAK\\_13269\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT_CEDAW_NGO_PAK_13269_E.pdf)

## RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

- Embark on a consultative process with full involvement of women's groups and National Commission for the Status of Women to assess the areas of discrimination faced by women and men pertaining to divorce and family matters and access to justice in family courts.
- Undertake family law reform including equalizing conditions and procedures of divorce for women and men.
- In the short term, ensure training of Marriage (Nikah) Registrars for accurate filling of the marriage contract and full implementation of the family law on delegated right of divorce to the woman.

### MUSAWAH JUSTIFICATION FOR REFORM

It is cruel and unjust to continue to allow men the right to divorce their wives at will. Given today's realities and contemporary conceptions of justice, the urgent necessity to provide equal and just grounds for divorce to both men and women must be undertaken.

#### QU'RAN PROMOTES JUST & FAIR DIVORCE

- The man's unilateral right to divorce his wife at will contradicts Qur'anic teachings, and specifically the message of kindness, justice, fairness and to do what is right and good.
- The Qur'an calls on parties to the marriage to 'either hold together on equitable terms (*ma'ruf*), or separate with kindness (*ihsan*)' (Surah al-Baqarah 2:229).
- The proceedings for arbitration and mediation in Surah an-Nisa' 4:35 place both spouses on an equal footing: '*If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people.*'

### DIVORCE

### POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY

#### EQUAL RIGHT TO DIVORCE

#### TUNISIA, TURKEY:

All divorces must go through the court. The grounds for divorce are equally available to both spouses. Divorce through unilateral repudiation (*talaq*) by husband is not recognized.

#### KHUL' DIVORCE

#### ALGERIA, EGYPT

A wife can obtain a khul' divorce in court without the consent of the husband upon payment of compensation.



## ANNEXE 1:

### MUSAWAH VISION FOR THE FAMILY

Musawah asserts that in the twenty-first century, there cannot be justice without equality. Many provisions in Muslim family laws, as defined by classical jurists and as reproduced in modern legal codes, are neither tenable in contemporary circumstances nor defensible on Islamic grounds. Not only do these family laws fail to fulfill the *Shari'ah* requirements of justice, but they are being used to deny women rights and dignified choices in life. These elements lie at the root of marital disharmony and the breakdown of the family.

Musawah believes that Qur'anic principles and the richness of the Islamic juristic tradition enable us to formulate Muslim family laws today that are egalitarian and reflect the needs of contemporary societies. Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible and are dynamic and constantly evolving, based on changing times and circumstances. Inspired by the Qur'anic vision of justice and gender relations, Musawah contends that gender equality and non-discrimination can only be achieved with laws that transform power relations in the family and in society in the direction of just outcomes.

It is our hope that the CEDAW Committee will encourage Governments everywhere, and particularly those purporting to speak for and in the name of Islam and Muslim communities, to:

- Recognize the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognizes equality and justice and the possibility and necessity for reform of Muslim family laws today.
- Promote human rights standards as intrinsic to the teachings of Islam, national guarantees of equality and non-discrimination, and the lived realities of men and women today.
- Encourage open and inclusive public debate regarding diversity of opinion and interpretations in Muslim laws and principles relating to family laws and practices.

