



Comparative analysis of Family Laws in Pakistan and Islamic Injunctions in this Regard

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Abstract: *“No nation can ever be worthy of its existence that cannot take its women along with the men.” Mohammad Ali Jinnah, Founder of Pakistan” (Russell & Catharine, 2007). The legal status of Muslim women, especially in family relations, has been the subject of considerable international academic and media interest. The right to marital freedom is a constitutional right in Pakistan and demonstrates that in a country in which women’s rights are notoriously and brutally violated, female divorce rights stand as a ray of light amidst the “darkness” of the general legal status of Pakistani women. Contrary to the conventional wisdom construing Islamic law as opposed to women’s rights, the constitutionalization of Islam in Pakistan has proven to be a potent tool in the service of women’s interests.*

Key Words: MFLO, Traditionalist, Modernist, Divorce, Ijtihad, Commission, Child Custody, Islamic Law (Fiqh, Shariah), Contemporary Laws.

Introduction

In recent years, there has been an ever-increasing fascination with human rights in the Muslim world, particularly the subordinate status of women in Islamic law and culture.² Westerners in general and feminists in particular have dreaded the possibility that the Islamic revival sweeping the Muslim world will turn back the clock on women’s legal and social rights. The West’s growing unease with violations of women’s rights in Muslim countries has made this issue a top priority for nations and advocates alike.⁴ The Islamic Republic of Pakistan, the second largest nation in the world with a Muslim majority, represents a promising case study due to its unique constitutional system enshrining Islamic law alongside Western guarantees of gender equality (Reading, n.d). The Muslim family law provisions that were enacted under the British administration were still in effect after the country got independence in 1947. Family law in Pakistan did not change at all between 1947 and 1954. The MFLO was adopted in 1961, to the vehement disapproval of religious authorities. The repugnancy clause was incorporated first into the 1956 Constitution. In later

Constitutions and amendments, the repugnancy provision has been kept and made stronger.

The article in hand describes the critical review of Muslim Family Laws Ordinance 1961 with reference to Pakistan. The main purpose behind this critique is to make a comparison between Muslim Family Laws and Pakistani Muslim Family Law Ordinance 1961 and to find out the similarities and the contrasts between them. Many of Muslim scholars are of the view that Pakistani MFLO (Muslim Family Laws Ordinance) is not in accordance with the Muslim Laws.

Succession

In the event of death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

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Islamic Concept of Succession

Direct succession out of grandfather's heritage is provided for inheritance to an orphan. This clause is repugnant to the injunctions of the Islam as direct inheritance is not provided. Federal Shariat court asked the then president Rafiq Tarar to amend the said clause. Prior to the Muslim family law ordinance grand children had no shares in the property left by the grandfather. But now the sec 4 of the ordinance creating an entitlement to succession in favour of the children of predeceased son or daughter.

Heirs referred to as primary heirs are always entitled to a share of the inheritance, they are never totally excluded. These primary heirs consist of the spouse relict, both parents, the son and the daughter. All remaining heirs can be totally excluded by the presence of other heirs. But under certain circumstances, other heirs can also inherit as residuary, namely the father, paternal grandfather, daughter, agnatic granddaughter, full sister, consanguine sister and mother (Hussain, 2010). Those who inherit are usually confined to three groups:

a. Quota-heirs (dhawu al-farā'd), usually include daughters, parents, grandparents, husband and wife/ wives, brothers and sisters, and others. This group usually takes a designated share or quota of the estates.

b. Members of the 'u'aba (residuaries), usually a combination of male (and sometimes female) relatives that inherit as residuaries after the shares of the Quota-heirs is distributed (Schacht, 1991).

c. In case a person leaves no direct relatives and there is no 'u'aba, his property escheats to the state treasury, Baytul Mal.

"And for his parents for each of them there is one-sixth of the inheritance if he has a child, but if he does not have a child and the parents are the heirs then for the mother one-third" (AnNisa:11).

The Arabic word "walad" has been variously translated as child, son, children and offspring by translators. However, there is universal agreement amongst the Sunni Muslim jurists that "walad" here refers to any child or agnatic grandchild (grandchild through son).

If there is a child or agnatic grandchild amongst the heirs then each of the parents inherits onesixth. In the absence of a child or agnatic grandchild the mother inherits one-third, the share of the father is not mentioned under these circumstances. The father in fact inherits as a residuary (a residuary heir gets whatever remains of the inheritance after the

Quranic sharers have been allocated their shares, residuary heirs are generally male agnates) under these circumstances.

To these two Quranic heirs, the mother and the father, the maternal grandmother and paternal grandfather have been added by analogy. The maternal grandmother substitutes the mother in the latter's absence (Butt, 2007).

Registration of Marriage

Every marriage solemnized under Muslim Law shall be registered. For the purpose of registration, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

Islamic Law and Registration of Marriage

Under classical Islamic law, the validity of a marriage contract does not in any way depend on the performance of any recorded ceremony or documentation: mutual consent, capacity to enter into the contract, and witnesses on the occasion being the only requisites necessary to make the contract valid and binding. Clearly when dealing with marriages celebrated abroad, and in the absence of any documentation, proof of marriage can be difficult, particularly when seeking to prove that there was such a marriage. It has been argued under Islamic law, in the absence of anything in writing to prove the marriage, or a Qazi's evidence of the marriage being celebrated or witnesses who can give relevant evidence of the marriage, a marriage can be proven by presumption. For instance, where the parties have lived together for a long time as husband and wife or where either party has acknowledged the marriage and that is not disputed by the other party, a valid marriage may be presumed unless there is a legal dispute against the alliance.

However, where there is no legal presumption of the existence of marriage, if it were challenged, it would have to be proven by satisfactory evidence in the normal way and any written documentation in these circumstances would prove invaluable. In Pakistan the Muslim Family Law Ordinance 1961, Art 5(l) states: 'every marriage solemnised under Muslim law shall be registered in accordance with the provisions of this Ordinance'. In India, however, no law or enactment requires compulsory registration of a Muslim marriage with any government official. Having said that, in the states of Assam, Bengal, Bihar, and Orissa local enactments provide facilities

for 'voluntary' registration of Muslim marriages, one must remember that, when all else fails, the Qazis maintain a register in which details of marriages they have attended are recorded. The record of each marriage so prepared is signed by the parties or their guardians or representatives, the witnesses, and the Qazi himself. Copies of this document commonly called 'Nikahnama' are issued by the Qazi to the parties (AL_Kholy, [n.d.](#)).

The Muslim Family Laws Ordinance (MFLO) 1961 introduced reforms regarding registration of marriages, and in default of such registration, penalties of fine and imprisonment have been prescribed. Nevertheless, Muslim marriages are still legal and valid if they are performed according to the requisites of Islam (Mutahhari, [1980](#)).

Polygamy

Every marriage solemnized under Muslim Law shall be registered and husband should seek permission from the wives before second marriage. On receipt of the application, Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council if satisfied that the proposed marriage is necessary and just, grant, the permission applied for marriage.

Islamic Concept of Polygamy

The Muslim scripture, the Quran, is the only known world scripture to explicitly limit polygamy and place strict restrictions upon its practice: "marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one." (Quran 4:3)

The Quran limited the maximum number of wives to four. In the early days of Islam, those who had more than four wives at the time of embracing Islam were required to divorce the extra wives. Islam further reformed the institution of polygamy by requiring equal treatment to all wives. The Muslim is not permitted to differentiate between his wives in regards to sustenance and expenditures, time, and other obligations of husbands. Islam does not allow a man to marry another woman if he will not be fair in his treatment. Prophet Muhammad forbade discrimination between the wives or between their children. Also, marriage and polygamy in Islam is a matter of mutual consent. No one can force a woman to marry a married man. Islam simply permits polygamy; it neither forces nor requires it. Besides, a woman may stipulate that her husband must not marry any other woman as a second wife in her prenuptial contract. The point

that is often misunderstood in the West is that women in other cultures - especially African and Islamic - do not necessarily look at polygamy as a sign of women's degradation. Consequently, to equate polygamy with degrading women is an ethnocentric judgment of other societies.

Even though we see the clear permissibility of polygamy in Islam, its actual practice is quite rare in many Muslim societies. Some researchers estimate no more than 2% of the married males practice polygamy (Chaudhry, [n.d.](#)). Most Muslim men feel they cannot afford the expense of maintaining more than one family. Even those who are financially capable of looking after additional families are often reluctant due to the psychological burdens of handling more than one wife. One can safely say that the number of polygamous marriages in the Muslim world is much less than the number of extramarital affairs in the West. In other words, contrary to prevalent notion, men in the Muslim world today are more strictly monogamous than men in the Western world.

Seeking Permission from the First Wife in Islam

Polygamy is within the injunctions of Islam. Seeking of permission by the husband from the arbitration council before marrying another woman is criticized. Allah says: "then marry (other) women of your choice, two or three, or four." (Quran 4:3)

It is well known that women are by nature jealous and reluctant to share their husband with other women. Women are not to be condemned for this jealousy, for it existed in the best of righteous women, the wives of the Companions, and even in the Mothers of the Believers. But women should not let jealousy make them object to that which Allah has permitted, and they should not try to prevent it; a wife should allow her husband to marry another woman for this is a kind of cooperating in righteousness and piety.

The first wife's consent is not a prerequisite for a man to take another wife. The Standing Committee for Issuing Fatwas was asked about this and replied as follows:

"It is not obligatory for the husband, if he wants to take a second wife, to have the consent of his first wife, but it is good manners and kindness to deal with her in such a manner that will minimize the hurt feelings such thing might produce. So it's incumbent on the husband to be kind to his wife, discuss the matter with her in a gentle and pleasant manner, and this should be coupled with spending

whatever money may be necessary in order to gain her acceptance of the situation.”

MFLO has also introduced some reforms in the law relating to polygamy. Now, a husband must submit an application and pay a prescribed fee to the local union council in order to obtain permission for contracting a polygamous marriage. Thereafter, the chairman of the union council forms an arbitration council with representatives of both husband and wife/wives in order to determine the necessity of the proposed marriage. The application must state whether the husband has obtained consent of the existing wife or wives. Contracting a polygamous marriage without prior consent is subject to penalties of fine and or imprisonment and the husband becomes bound to make immediate payment of dowry to the existing wife or wives. Nonetheless, if the husband has not obtained consent of the existing wife or wives the subsequent marriage remains valid.

Talaq

Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife. A person fail to do so shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both. If the Talaq, is not revoked expressly or otherwise, it shall not be effective until the expiration of ninety days from day on which notice is delivered to the Chairman. If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period of 90 days or the pregnancy, whichever later, ends.

Islamic Law of Talaq and its Effectiveness

Divorce is operative from the announcement. Hence pending it for 90 days is repugnant to Islamic teachings. Under MFLO limited reforms have also been introduced in relation to Talaq. Under MFLO a divorcing husband shall, as soon as possible after Talaq has been pronounced, in whatever form, give a notice in writing to the chairman of the Union Council. The chairman must then supply a copy of the notice of Talaq to the wife. Non-compliance is punishable by imprisonment and/or a fine. Within thirty days of receipt of the notice of Talaq, the chairman must constitute an Arbitration Council in order to take steps to bring about reconciliation between the husband and the wife. If and when such

attempts to negotiate reconciliation fail, a Talaq that is not revoked in the meantime, either expressly or implicitly takes effect after the expiry of ninety days from the day on which the notice of repudiation was first delivered to the chairman (Glenn, 2007). If, however, the wife is pregnant at the time of the pronouncement of Talaq, the Talaq does not take effect until ninety days have elapsed or the end of the pregnancy, whichever is later. Failure to notify, in the above stated manner, invalidated Talaq until the late 1970s and early 1980s, but introduction of the Zina Ordinance allowed scope for abuse as repudiated wives were left open to charges of Zina if their husbands had not followed the MFLO's notification procedure. Since early 1980s, the practice of the Courts in Pakistan is that they validate a Talaq despite a failure to notify as provided under the MFLO.

As far as the Islamic concept of effectiveness of the Talaq is concerned, Talaq is effective from the time of utterance of the word Talaq by the husband. Registration is only subjected to the country law and it has nothing to do with Islamic law of Talaq.

Dissolution of Marriage otherwise than by Talaq

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by Talaq the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply.

Islamic Concept of Dissolution of Marriage otherwise than by Talaq

We have so far dealt with the natural right of divorce which belongs exclusively to the husband. But he can confer the power of divorce on the wife. This delegation of power can either be general or limited to certain specified circumstances. To make it irrevocable it is included in the marriage contract as a binding clause, according to which the wife is empowered to dissolve the marriage in the specified circumstances already agreed upon.

It has been customary since the olden days that the women, who feel, in any way, apprehensive of the conduct of their husbands, insist on the inclusion of such a clause in the marriage contract and exercise the power delegated to them, if necessary. Thus, according to the Islamic law, though woman does not have the natural right of divorce, she can have the contractual right of the dissolution of marriage. Hence, it is not correct to say that the

right of divorce is unilateral and Islam has given it only to man (Marriage Commission Report, [1959](#)).

Maintenance

- a. If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.
- b. A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector concerned and his decision shall be final and shall not be called in question in any Court (Butt, [2007](#)).
- c. Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue. PUNJAB AMENDMENT In sub-section (2), the full-stop occurring at the end shall be replaced by a colon and thereafter the following proviso shall be added, namely: Provided that the Commissioner of a Division may, on an application made in this behalf and for reasons to be recorded, transfer an application for revision of the certificate from a Collector to any other Collector, or to a Director, Local Government, or to an Additional Commissioner in his Division.

Islamic Concept of Maintenance

Islamic concept of maintenance is given below:

Injunctions of the Qur'an

Injunctions of the Holy Qur'an regarding the rights of woman in respect of maintenance are contained in the following verses: -

- a. The mothers shall give suck to their offspring for two whole years, if the father desires, to complete the term. But he shall bear the cost of their food and clothing on equitable terms (Quran 2:233).
- b. There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his

means, and the poor according to his means,- a gift of a reasonable amount is due from those who wish to do the right things (Quran 2:236).

- c. For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous (Quran 2:241).
- d. Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means (Quran 4:34).
- e. O Prophet! When ire do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. Those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: Thou knowest not if perchance Allah will bring about thereafter some new situation (Quran 65:1).
- f. Let the women live (In 'Iddat,) in the same style as ye live, according to your means; annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense; and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf (Quran 65:6).
- g. Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him. After a difficulty, Allah will soon grant relief (Quran 65:7).

Ahadith of the Prophet (PBUH)

The Traditions of the Holy Prophet about the rights of woman for maintenance are:

- a. Jaber-b-Abdullah reported that the Messenger of Allah said: Fear Allah regarding women. Verily you have married them with trust of Allah and made their private parts lawful with the word of Allah... They have got rights over you in respect of

their food and clothing according to means (Bukhari and Muslim).

- b. Jaber-b-Abdullah reported: The Apostle of Allah addressed the people at Arafat during his farewell pilgrimage.... Fear Allah about women, because you have taken them with the trust of Allah and made their private parts lawful with the word of Allah. You have got rights over them that they shall not entertain anybody on your bed which you dislike. If they do that, scourge them without being oppressive. And they have got rights over you that you shall clothe them and feed them in a just manner (Muslim).
- c. Hakim- b-Muawiyah from his father reported: I asked: O Messenger of Allah! What right has the wife of one among us got over him? He said: It is that you shall give her food when you have taken your food, that you shall clothe her when you have clothed yourself ... (Ahmad, ibn e Maja).
- d. Abu Hurairah reported that the Messenger of Allah said:(As for) a dinar you have spent in the way of Allah, and a dinar you have spent in emancipating a slave and a dinar you have given to a poor man in charity, and a dinar you have spent for your family, the greatest of them in reward is that which you have spent for your family (Muslim).
- e. Ayesha reported that Hind, daughter of Utbah, asked: O Messenger of Allah! Abu Sufiyan is a miserly fellow. He does not give what may be sufficient for me and my children, unless I take it from him without his knowledge. He said: Take what suffice you and your children according to means (Bukhari and Muslim).

Rights In The Light of Qur'an and Hadith

Principles regarding woman's right of maintenance as enunciated by the Qur'an and Sunnah are:

- i. According to some well-known Traditions reported in authentic books of Hadith, the Prophet (may Allah's peace be upon him) required his followers to accord their wives the best possible treatment. He impressed upon the men the rights of women regarding the food, clothing and lodging. Even in his famous Farewell Address at Arafat, the Apostle of Allah did not forget to exhort the believers to fulfil their obligations regarding the proper maintenance of their women. The Qur'an says:

"Lodge them where ye dwell, according to your wealth, and harass' them not so as to straighten life for them" (Quran 65:6). The Qur'an makes the men Qawwam (caretaker) of women and places the responsibility of earning livelihood of the family primarily on the shoulders of men when it says: "... and because they support them from their means" (Quran 4:34).

- ii. Duty of providing maintenance to the women is so important that the Qur'an makes even the divorced women entitled to it during the period of *Iddah* when the husband would provide her food, clothing and lodging and cannot expel her from his house (Quran 65:16). If she is expecting, the husband is bound to maintain her till delivery and in case she suckles the child she would be entitled to receive the due payment for this service (Quran 65:6). Again the Qur'an says:

"The duty of feeding and clothing nursing mothers in seemly manner is upon the father of the child" (Quran 2:233).

In case the father of the child is dead, the obligation of providing maintenance to the nursing mother would be on the heir of the deceased, as the Qur'an says:

"And on the (father's) heir is incumbent the like of that (which was incumbent on the father)" (Quran 2:233).

- iii. The Qur'an makes it a duty for the pious and God-fearing persons to make some provision even for those women who have been divorced by them (Quran 2:241) Muhammad Asad explains this verse (Quran 2:233) of the Holy Qur'an in these words:

"This obviously relates to women who are divorced without any legal fault on their part. The amount of alimony –payable unless and until they remarry – has been left unspecified since it must depend on the husband's financial circumstances and on special conditions of the time."

- iv. No scale or standard has been fixed for maintenance by the Qur'an or by the Sunnah.

However a lot of guidance has been provided to determine it in the given circumstances. The Qur'an says: "No one should be charged beyond one's capacity" (Quran 2:233). At another place, the Qur'an directs: "Provide for them; the rich according to his means and the straitened according to his means, a fair provision" (Quran 2:236).

The same principle has been further elaborated when the Qur'an says:

" Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him" (Quran 65:7).

These are some of the verses which highlight the guiding principles regarding the determination of the quantum of maintenance. The rich according to his means and the poor according to his means and nobody to be charged beyond his capacity - this is the golden rule.

Islamic Law and Fiqh

Islamic law and Fiqh regarding maintenance of the women lay down the following principles: -

- a. The meaning of "Nafqah", which is the Arabic equivalent of "maintenance", is what a person spends on his family. Maintenance includes food, clothing and lodging.
- b. The husband is bound to maintain his wife. Her right to receive maintenance is absolute even if she is very rich and owns a lot of property.
- c. If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance. The Muslim Family Laws Ordinance, 1961 permits the wife to apply to the chairman who will constitute an Arbitration Council to determine the matter. She can also apply for an order of maintenance under section 488 of Code of Criminal Procedure, 1908.
- d. After divorce, the woman is entitled to maintenance from her husband during the period of Iddah. However, a widow is not entitled to maintenance during the period of Iddah. If the divorcee is pregnant she is entitled to maintenance till delivery and if she suckles the child, her entitlement would be up to the expiry of suckling period. In case the custody of the children is with her, the husband would be bound to provide maintenance for the children (Chaudhry, n.d).
- e. About the scale of maintenance, there has always been difference of opinion among the jurists. Hanafi Law prescribes that the maintenance should be determined with reference to the social position of both the spouses, husband and wife. But the Shafis say that the position of the husband alone should be considered. According to Hedaya, when one of them - the husband and the wife - is

rich and other poor, a proper mean should be adopted between the two. If both the parties are rich, maintenance should be provided at the high scale, but if both are poor, husband may provide accordingly. Scale of maintenance, according to the Shia Law, should be determined with reference to the requirements of the wife regarding condiments, food, clothing, residence, servants and articles for adornment subject to the custom of her equals among her own people living in the same town

Dower

Where no details about the mode of payment of dower are specified in the Nikahnama or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

Islamic Concept of Dower and Maintenance

The form of the dower described above in connection with the fifth stage is not an invention of the Qur'an. All that the Qur'an did was to restore it to its natural and pristine form. The Qur'an in its incomparably elegant style says:

"Give to the women a free gift of their marriage portions" (Quran 4:4).

This means that the dower belongs to women exclusively and it is a gift to be paid directly to them. It has nothing to do with their fathers or brothers.

In this short sentence the Holy Qur'an has referred to three basic points:

Firstly it has used for marriage portion or the dower the word, *saduqatehinna* meaning truthfulness and sincerity and not the word *mehr*. Thus, the dower is a symbol of the cordiality of the man paying it. This point has been expressly mentioned by a number of the commentators of the Holy Qur'an, such as *Zamakhshari*, the author of the well-known commentary, the *Kashshaf* similarly, the famous philologist, *Raghib Isfahani* says in his lexicon of the Qur'an that the dower has been called *saduqah* because it is a symbol of the sincerity of faith.

Secondly, it is clear from the above verse of the Qur'an that the dower is to be paid directly to the woman, and her parents have no claim to it. It is not a compensation for the efforts made by them to bring up their daughter.

Thirdly, it is clear that the dower is nothing except a present and a gift (*Mutahhari*, 1980).

The section 12 provides an effect only to the opinion of Shiaty faction. As I have studied the opinion of Abu Hanifa, he says that in such case, the prompt portion of the dower should be decided, while taking in consideration three things (1) custom (2) status of the husband (3) amount of the dower fixed.

So the provisions of section 12 don't have the merit of balance.

Power to Make Rules

- i. The Government may make rules to carry into effect the purposes of this Ordinance.
- ii. In making rules under this section, such Government may provide that a breach of any of the rules shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to two hundred rupees, or with both.
- iii. Rules made under this section shall be published in the official Gazette and shall thereupon have effect as if enacted in this Ordinance (Tanzilur, [1991](#)).

Islamic Concept of Making Rules

There are two sources of Sharia (understood as the divine law): the Qur'an and Sunnah. According to Muslims, the Qur'an is the unalterable word of God. Much of the Qur'an exhorts Muslims to general moral values; only 80 verses of the Qur'an contain legal prescriptions. The Sunnah is the life and example of the Islamic prophet Muhammad. The Sunnah's importance as a source of Sharia, is confirmed by several verses of the Qur'an (e.g. Quran 33:21). The Sunnah is primarily contained in the hadith or reports of Muhammad's sayings, his actions, his tacit approval of actions and his demeanor. While there is only one Qur'an, there are many compilations of hadith, with the most authentic ones forming during the sahih period (850 to 915 CE). The six acclaimed Sunni collections were compiled by (in order of decreasing importance) Muhammad al-Bukhari, Muslim ibn al-Hajjaj, Abu Dawood, Tirmidhi, Al-Nasa'i, Ibn Maja. The collections by al-Bukhari and Muslim, regarded the most authentic, contain about 7,000 and 12,000 hadiths respectively (although the majority of entries are repetitions). The hadiths have been evaluated on authenticity, usually by determining the reliability of the narrators that transmitted them. For Shias, the Sunnah may also include anecdotes The Twelve Imams.

The process of interpreting the two primary sources of Islamic law is called fiqh (literally meaning "intelligence") or Islamic jurisprudence. While the above two sources are regarded as infallible, the fiqh standards may change in different contexts. Fiqh covers all aspects of law, including religious, civil, political, constitutional and procedural law. Fiqh depends on 4 sources:

- i. Interpretations of the Qur'an
- ii. Interpretations of the Sunnah
- iii. Ijma, consensus amongst scholars ("collective reasoning")
- iv. Qiyas/Ijtihad analogical deduction ("individual reasoning")

As an Islamic rule if the rules that are in accordance with the Quran and Sunnah they will be welcomed and all the other will be rejected.

Amendment of Child Marriage Restraint Act, 1929

In the Child Marriage Restraint Act, 1929 –Minimum age for marriage both for boys and girls

- i. in section 2,--(a) in clause (a), for the word "fourteen" the word "sixteen" shall be substituted; ii. in Section 4, for the words "eighteen" the word "twenty-one" shall be substituted.

The Child Marriage Restraint Act 1929 has made under-age marriages a penal offence. Under the Act the minimum age of marriage for a male is 18 years whereas the minimum age of marriage for a female is 16 years. Despite the fact that under-age marriages are liable to punishment, such unions are not rendered invalid.

Child Marriage and Islam

Woman has the right to accept or reject marriage proposals. Her consent is a prerequisite to the validity of the marital contract, according to the Prophet's teaching. It follows that if an "arranged marriage" means the marrying of a female without her consent, then such a marriage may be annulled if the female so wishes:

Ibn Abbas reported that a girl came to the Messenger of Allah, and she reported that her father had forced her to marry without her consent. The Messenger of God gave her the choice... (Between accepting the marriage or invalidating it). (Musnad Ahmad) Another version of the report states that "the girl said: 'Actually, I accept this marriage, but I wanted to let women know that parents have no right to force a husband on them'" (Ibn e Maja).

Child Custody Laws in Pakistan

Council of Islamic Ideology assists the state in carrying out its mandate as stated in the constitution of Pakistan.

The constitution of Pakistan states that 'all existing laws shall be brought in conformity with the injunctions of Islam as laid down in Holy Quran and Sunnah. There are Sharia courts, including an apex body called the Federal Sharia Court, to adjudicate on Islamic matters and enforce the Sharia law (Balchin, 1994).

Eight years after the birth of Pakistan on August 4, 1956 the government of Pakistan announced the formation of a Commission on Marriage and Family Laws. The question of custody of the child was raised in the questioner drafted by the Marriage and Family Laws Commission.

The question was that,

'At present the mother is entitled to the custody of her minor child only up to certain age i.e. the male child up to seven years and female child till she attains puberty. These limits have no authority either in Quran or Hadith but have been fixed as a result of opinions of some Muslim Jurists. Do you consider it admissible to propose some modifications?' In answer to this question Commission stated in its report that; 'In the opinion of the Commission it is admissible to propose changes in matter of custody of minor children as the Quran and Sunnah have not fixed any age limit and some of great

Mujtahid Imams have expressed the view that the matters of age limit in this respect is an open question.' Maulana Amin Ahsan Islahi (1904-1997) commenting on the reply of the Commission said that, 'It is correct that there is no explicit implication of Quran and Sunnah which prescribe the age limit. But it does not mean that legists have fixed the limit just out of fancy and had no sound reasons for these deductions..... a careful study of the verdicts of Holy Prophet (pbuh) in the cases that were brought before him reveals that a very basic consideration has been the welfare and wellbeing, education and training, protection and interests of the minor. If they could be achieved well when the children are under the custody of the mother, this was done and when the case was otherwise they were given under the custody of the father.....'

Five years later in March 1961 many of the recommendations of the Commission on Marriage and Family Laws were embodied in Muslim Family Laws Ordinance of 1961 but it remained silent on the issue of custody of minors. All Pakistan Women's

Association (APWA) continued to agitate and finally proposed a reform on child custody as an amendment to the MFLO 1961. It proposed that,

'Family Laws Ordinance is silent on the issue of custody of minors. The law should provide that whilst deciding about the custody of the children of broken homes the court should keep in view not only the welfare of the minors but also wishes of such children.'

Maulana Maududi (1903-1979) an eminent Pakistani religious scholar states;

'The right thing in this regard is that the interest of the child should be kept above everything else. In every particular case preference should be given either to the father or mother after giving full consideration to the prospects of education and training in their respective custodies..... also under whom so ever's custody they might be no restrictions should be placed on children meeting the other party.'

Justice Tanzil ur Rehman states;

In granting the right of upbringing, the child's security and betterment should be kept in mind, and as long as there is no ma'ani (hindrance/hurdle) the mother's custody will be preferred. In certain situations, child has to be given the option to choose between the two. Sometimes such circumstances may arise in which it would be appropriate to give the child to maternal grandmother or maternal uncle even in the presence of the parents. If it is not appropriate to hand over the child to the mother due to her religion or profession then the court will decide by itself to whom the custody may be granted.' (MLD, 1994)

A general view which prevails in Pakistani society is that in cases of marital breakup, divorce or dissolution of marriage child custody is given to father when the child is seven years of age (as stated in Hanafi *fiqh*) and that this is supported by Islamic law as well as Pakistani law. In reality Muslim Family Laws Ordinance of 1961 of Pakistan is silent on the issue of child custody therefore there is a need to see the trend of courts in Pakistan while deciding child custody cases.

Trends of Courts in Pakistan

Cassandra Balchin after a careful study of the trends of courts in Pakistan with respect to family laws states that,

'Studies of Pakistani case law shows that courts have preferred a case by case consideration of the fact rather than rigidly applying the principles of

established Muslim Jurisprudence. In one of the cases a minor having attained age of 17 years had been living with his mother since his birth. Minor who was present in court stated that he was a student of a college and was being well looked after by his mother. Keeping in view age of the minor his desire could not be ignored. Order of the court below dismissing father's application of custody of minor and mother's custody being valid and proper was affirmed in these circumstances.

Welfare of the minors is the guiding factor in the matter of deciding the custody and personal law is subordinate to such consideration. Father although a natural guardian yet his right was also subordinate to the welfare of the minor. Overriding, fundamental and paramount consideration is always the welfare of minors, rather is the sole criteria which must prevail. Cassandra Balchin adds that an analysis of reported case law of Pakistan, in the area of custody and guardianship reveals that there are four basic influencing factors.

1. Firstly like all other individuals and institutions, the judiciary cannot remain above societal norms and political pressures.
2. Secondly a combination of Muslim personal law and a variety of statutory law is applied by courts in adjudicating such cases.
3. Third factor is the colonial impact in statutory laws as well as in molding the general trends of the courts in pre-partitioned India.
4. Fourthly the Roman concept of Justice, Equity and good conscience as it was introduced by the then Indian judiciary.

Cassandra Balchin has made no reference to the religious norms, Prophetic traditions and custody cases decided by the companions of the Prophet and those decided by the Muslim jurists of 4th and 5th centuries, nor has she made any reference to the impact of these precedents on the trends of Pakistani courts today. Influencing factors on the trends of Pakistani courts according to Balchin are the societal norms, political pressures, personal laws, colonial impact and Roman concept of justice, equity and good conscience. Cassandra Balchin further states that, 'Courts in Pakistan have succeeded in making inroads into established

Muslim Jurisprudence and have at times overridden express provisions of law.'(PLD 1994)

We have seen above that the broad principle of 'the welfare of the minor is of paramount consideration' was upheld by classical Muslim jurists and courts in Pakistan today have reverted towards this principle. Not only this, a careful study of the verdicts of Prophet Mohammad (pbuh) in cases brought before him reveal that the very basic consideration has been the welfare and wellbeing, education and training and protection and interest of the children.

Conclusion

To conclude it can be stated that there are many controversies surrounding the interpretations of various issues in Muslim Family Laws Ordinance 1961. Instability is another aspect of MLFO. It could be amended any time; it is not thought to be in accordance of injunction of Islam. The study shows that sections 4, 5, 6, 7, 9, and 10 of the ordinance are contradictory to Islam. The Muslim Family Law Ordinance of 1961, another compromise, only partially adopted the recommendations made in the Report of 1956. Nowadays, judicial application of the Ordinance to specific plaintiffs is a type of compromise since rigid adherence to the code frequently results in a more flexible case-by-case determination of how strictly to follow the code. Uniform law can be drafted for deciding custody cases for Muslim dominated regions which cater for the progressive laws of the modern world and spirit of Sharia. It is suggested that when custody of children is granted to the divorced women, she should also be vested with guardian ship rights with respect to travel, education and financial matters of the child. The primary objective while deciding custody should be preservation of religion and welfare of the minor. Visitation rights of both parents should be respected and child be allowed access to both parents. It should be a rebuttable presumption that mother should retain child custody till the child is in his growing years and is attending pre-school. This age is normally 6 years. Mother's remarriage and religion should be taken into consideration after this age and fathers should not contest custody in these delicate years of child's life.

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