



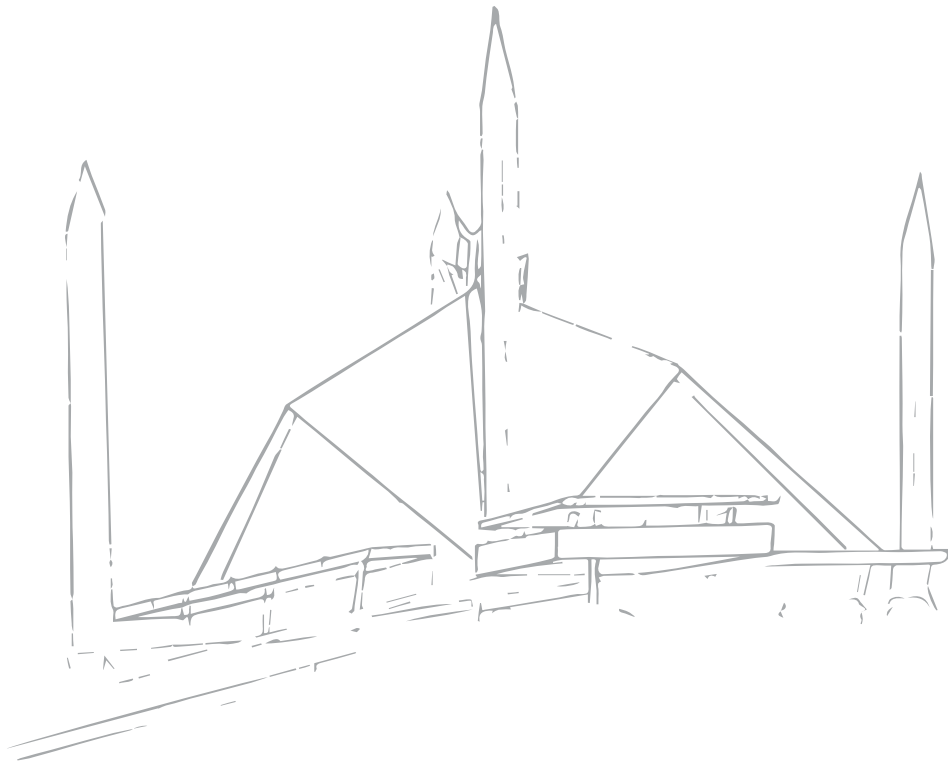
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## Islamization of Family Laws in Pakistan

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### Abstract

*Islam was not born on 14th of August 1947 in the Subcontinent. It was very much the part of Muslim life even during the colonial period of more than a century, though reduced to a private affair of a Muslim's life. The leadership believed that Islamization is an urgent need of the Muslims of Pakistani society. Communal life in Muslim society of Pakistan must be shaped through Islamic Laws and this Islamic system can only conserve the social life against evils. This country is born on the ideology of Islam that is explicitly stated in the objectives of resolution. The current research paper discusses the Islamization of family Laws in Pakistan. It provides a brief analysis of the Islamized laws. The study concludes with indication that supreme law, the Constitution of Islamic republic of Pakistan and family laws are Islamized by the legislative bodies of the Islamic Republic of Pakistan by questioning its implementation. On 23 March 1956, nearly 9 years after independence, Pakistan gave itself a new constitution proclaiming itself an "Islamic Republic".*

**Keywords:** *Islamic law, Pakistan, Kul', Federal Shariat Court, Talaq*

### 1. Objectives' Resolution Of 1949

An Important Milestone in Policy Formulation It would be pertinent to incorporate the views of Sharif al Mujahid, who is considered as a scholar, who is well conversant with the ideological debates in Pakistan. He says "over the decades, the Objectives' Resolution has continued to be relevant to Pakistan's

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body politics. It has been included, with minor adaptations, as Preamble to three constitutions<sup>1</sup>. It means, despite political upheavals and convulsions, despite periodic shifts in the political, social and economic orientation of those in power, the Resolution has continued to remain the primary source of inspiration on the ideological front to all shades of opinion on the political spectrum. Its importance has been affirmed and attested to by political theorists, jurists, and scholars. The constitution could be amended in conformity with the procedure laid down therein, without, however, tampering with the salient features of the Objectives' Resolution, and he listed federalism, parliamentary democracy blended with Islamic provisions, including independence of the judiciary' among its 'salient features'.<sup>2</sup>

## **2. The Constitution of Islamic Republic of Pakistan, 1973**

### **Article: 2**

This designates Islam as the state religion.

### **Article: 2-A**

It promulgated by General Zia on 2 March 1985, makes 'the principles and provisions set out in the Objectives' Resolution are substantive parts of the constitution which shall have effect accordingly. This makes, the Preamble an integral part of the constitution, enforceable in a court of law. It has been included as an annexure, so that if the constitution is abrogated, the Objectives Resolution is not automatically suspended, diluted, or abrogated.

### **Article-6, 9, and 12**

These Articles also have a bearing on Islam.

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<sup>1</sup> Constitution of Islamic Republic of Pakistan (1956, 1962 and 1973).

<sup>2</sup> Manzoor Ahmed Abbasi, *The Problem of Islamization in Pakistan: A Policy Perspective*, available at < [http:// ssrn.com/ abstract/ 2218436](http://ssrn.com/abstract/2218436)> (last accessed: 27 November 2018), 56.

### Article: 3

Article 3 which concerns the Islamic way of life is a constitutional command. It reads as follows: "Steps shall be taken to enable the Muslims of Pakistan, individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam and provide facilities whereby they may be enabled to understand the meanings of life according to the Holy Quran and Sunnah."

"The State shall endeavor, as respects the Muslims of Pakistan: (a) to make the teachings of the Holy Quran and Islamite compulsory, to encourage and facilitate the learning of Arabic language and secure correct and exact printing and publishing of the Holy Quran; (b) to promote unity and the observance of the Islamic moral standards; and (c) to secure the proper organization of Zakat, (usher), auqaf and mosques.<sup>3</sup>"

### 3. Muslim Family Laws in Pakistan Since 1947

The Pakistan's legal system is based on English common law and Islamic *shari'ah* law. Most of Pakistani law is still Anglo- Indian, although Islamic law (Qur'ān and *sunnah*) has also become a source of law. The first constitution was applicable in 1956, and included a provision known as the "repugnancy clause", affirming that no law repugnant to injunctions of Islam would be enacted and that all existing laws would be considered and amended with the injunctions of Islam. The Constitution of Islamic Republic of Pakistan came into force on 12 April 1973, and was suspended in 1977, and reinstituted in 1985. It has undergone several amendments over time. It was again suspended in 1999.

Nevertheless, the repugnancy clause has been retained and strengthened in these subsequent constitutions and amendments. Article (1) of 1973 constitution of Pakistan declares that Pakistan's official name shall be Islamic republic of Pakistan, and article (2) clearly mentioned that Islam is the state religion. The objectives resolution of the preamble of the constitution was made a part of

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<sup>3</sup> Article 3, The Constitution of Islamic Republic of Pakistan, 1973.

its substantive provisions by the insertion of article 2(A) in 1985,<sup>4</sup> there by requiring all laws to be brought into consonance with the Qur'ān and *sunnah*.<sup>5</sup> All Muslims shall be enabled to order their lives in collective and individual spheres in accordance with the teachings and requirements of Islam set out in the Qur'ān and *Sunnah*.

After Independence, Pakistan continued to apply The Child Marriage Restraint Act, 1929, Muslim Personal Law (Shariat) Application Act 1937, and The Dissolution of Muslim Marriage Act 1939. This was followed by codification of family laws through the Muslim Family Laws Ordinance in 1961. Zia al-Haq's Islamization did not touch the issues related to the family law, but it extended Islamic laws to criminal and, in some cases, revenue matters.

Muslim family laws were codified on the basis of recommendations made by the Commission on the status of Women in Pakistan (the Rashid Commission) in 1956. The All Pakistan Women's Association (APWA), a body which claimed to represent the women point of view was in the forefront in claiming legislation to protect their rights and had in fact started agitation. To alleviate the situation, then Government constituted a Commission to consider the various aspects of the demands and make recommendations in relation to the family system.<sup>6</sup>

The commission expressed an incontrovertible fact about Islamic provisions in the Qur'an and *Sunnah*, i.e. that these provisions are open to interpretation. Since the death of Prophet (peace be upon him), Islamic scholars have filled this interpretative space with the Islamic concept of *ijma* and *ijtihad*.<sup>7</sup>

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<sup>4</sup> Article 2A was inserted by P.O. No. 14 of 1985, art.2 and sch. Item 2 (w.e.f. March 2, 1985).

<sup>5</sup>Ihsan Yilmaz, *Good Governance in Action: Pakistani Muslim Law on Human Rights and Gender- Equality*, available at < [http:// ssrn.com/abstract/ 281568](http://ssrn.com/abstract/281568)> (last accessed: 27 November 2018), 156.

<sup>6</sup>Muhammad Abdul Basit, *Muslim Family Laws* (Lahore: federal law house, 2013), 5.

<sup>7</sup> Elisa Giunchi, *Adjudicating Family Law in Muslim Courts* (London and New York: Rout ledge, 2014), 71.

The Commission relied on the Hanafi School of interpretation, which was widely used in the sub-continent because it had been the basis of Islamic law administered by the colonial courts. This report was criticized by religious scholars and was not implemented until 1961, when a military government adopted certain sections of the report and enacted the Muslim Family Laws Ordinance, 1961.<sup>8</sup>

#### 4. The Punjab Family Courts Act, 1964

Section 10 (4) of The Family Courts Act, 1964 deals with the suit for dissolution of marriage: if no compromise or reconciliation is possible the court shall frame the issues in the case and fix a date for (the recording of the) evidence. (Provided that notwithstanding any decision or the judgment of any court or tribunal, the family court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the *Mahr* received by the wife in consideration of marriage at the time of marriage).<sup>9</sup>

The proviso in question was inserted by ordinance LV of 2002, it provides that in a suit for dissolution of marriage instituted by the wife on any ground available to her under the law, if reconciliation fails the family court shall pass decree of dissolution of marriage forthwith, on return of benefits attained by her under the marriage, so as release the wife of the matrimonial obligations ensuring from the marriage under challenging pending issues. A family court will have to frame issues in respect of other controversies as alleged in the pleading of the parties and disputes of the same accordance with the law<sup>10</sup>. According to the injunction of Islam, a sound mind, which has attained puberty, without assigning any cause, may even

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<sup>8</sup> Ibid.

<sup>9</sup> This proviso was added to section 10(4) of The Family Courts Act, 1964 by an amendment made through The Family Courts(Amendment) Ordinance, 2002 (No.LV of 2002) dated 1 October 2002.

<sup>10</sup> Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women Of South Asia* (Karachi: Oxford University Press, 2011), 13-15.

arbitrarily divorce his wife whenever he desires.<sup>11</sup> Such absolute right in Islam has not been so conferred upon the wife. In order to secure her right as well, to move about of unhappy union, a wife can seek dissolution of marriage on the basis of *khul'*, but she has to pay to the husband in form of return of benefits attained by her under the marriage. Return of such benefit may include the return of dower or any other amount which is already received by her.<sup>12</sup>

Section 10(5) of The Family Courts Act, 1964 deals with the suits for dissolution of marriage: in a suit for dissolution of marriage, if reconciliation fails, the family court shall immediately pass a decree for dissolution of marriage and, in case of dissolution of marriage through *khul'*, may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.<sup>13</sup>

## 5. Validity of *Khul'* In Qur'ān

The Holy Qur'ān provides basis and legality of *khul'*. In Holy Qur'ān, Allah Almighty iterates:

Divorce may be (pronounced) twice, then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within the limits of Allah, there is no blame on either of them if she gives something for her freedom.<sup>14</sup>

Under this verse the following conditions must be fulfilled:

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<sup>11</sup> Mahmood, *the Code of Muslim Family Laws*, 298.

<sup>12</sup> Ibid, 299.

<sup>13</sup> This proviso was added to section 10 (5) of The Family Courts Act, 1964 by an amendment made through The Punjab Family Courts (Amendment) Bill 2015 (Bill No. 14 of 2015)

<sup>14</sup> Abdullah Yusuf Ali, *the Holy Qur'ān: Text, Translation and Commentary* (Al-Rajhi Company, 1983).

- i. They (husband and wife) cannot live within the limits of Allah.
- ii. Woman (wife) who seeks separation from the husband.
- iii. It must be she who pays the compensation.

The verse means, the basic purpose of the marriage is love and mutual understanding, if there is no love and mutual understanding between the husband and wife that it becomes difficult to lead their life in mutual happiness and mutual understanding, the woman (wife) pay consideration to the husband and obtain *khul'* from the husband.<sup>15</sup>

This verse addresses the couple. The above-stated verse of The Holy Qur'ān means that the ground of effecting *khul'* is that the spouses (husband & wife) shall not be able to maintain the limits of Allah. The both of spouses search their hearts, if wife cannot maintain the limits ordained by Allah, and not able to fulfill her obligations to husband, then wife has right to pay consideration to her husband and husband has right to accept the consideration for *khul'* from wife.<sup>16</sup> All the afore mentioned orders, rules of divorce, revocation and *khul'* are limited by Allah. Regulations and obedience of these rules are obligatory on Muslims.<sup>17</sup> The following points can be inferred from this verse:

*khul'* is useful in a situation where there is well-founded fear that the limits set by Allah may get violated. Meaning thereby that *khul'* is undesirable like a divorce is, yet when there is fear that the limits of Allah might get violated, there is no harm for a Muslim wife to obtain *khul'*.

When a woman wants to repudiate the marriage contract, she should be willing and ready to lift the financial burden just as a man has to forgo the dower when he chooses to divorce the wife. The rule is that in case of divorce by the husband he has to give up all he gave the wife. The process of *khul'* gets completed

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<sup>15</sup>Tanzil Ur Rahman, *A Code of Muslim personal Law*, 525.

<sup>16</sup> Imam Abū Abdullah Muhammad Bin Ahmed Bin Abu Bakar Qurtubī, *TafseerQurtubī Al- Jami' li- Ahkām Al- Qur'ān* (Lahore: Zia Al-Qur'ān Publications, 2012), vol.2, 178-179.

<sup>17</sup>Allama Shabbir Ahmed Usmani, *TafseerUsmani "The NobleQur'ān"* (Lahore: Alameen Publications) vol.1, 128.



when the wife demands separation and expresses willingness to do the payment, and husband accepts the payment and divorces her. In case the wife offers to buy freedom from the marriage tie, and the husbands turn down the offer, she has the right to ask *Qadi* for help.

It has been held by various scholars, and the case laws in Pakistan including in *Khurshid Bibi*,<sup>18</sup> *Naseem Akhtar*,<sup>19</sup> *Syedda Khanam*,<sup>20</sup> *Bilqis Fatima*<sup>21</sup> cases that the words of the verse “then if you fear that the spouses cannot keep within the limits of Allah” clearly indicate that the pronoun “you” refers to the men of authority among Muslims. It is their foremost duty to keep attentive watch on the limits set by Allah. Another verse of The Holy Qur’ān regarding the *Mahr* is stated that, “But if you decide to take one wife in place of another even if you had given the latter a whole treasure for dower, take not the least bit of it back.”<sup>22</sup> The Holy Qur’ān indicated the significance of Dower as a token of a proper marriage relationship.

## 6. Precedents For *Khul’* In The Era Of The Prophet (Peace Be Upon Him) And Companions

There are two<sup>23</sup> well-known traditions in *Sunnah*. The first relates to the case of Jamilah, wife of Thābit Ibn Qais. It is narrated by Ibn ‘Abbās that wife of Thābit Ibn Qais came to the Holy Prophet (peace be upon him) and said: “O Muhammad (peace be upon him) I don’t find any fault in *Thābit Ibn Qais* regarding his moral or faith but I can’t bear him”. The Holy Prophet (peace be upon him) said: “will you return him his orchard which he had given you as

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<sup>18</sup> (PLD 1967 Supreme Court 67)

<sup>19</sup> (PLJ 2005 SC 293)

<sup>20</sup> (PLD 1952 Lahore 113)

<sup>21</sup> (PLD 1959 Lahore 566)

<sup>22</sup> *Al- Qur’ān* 4:20.

<sup>23</sup> Thābit’s second wife was Habibah, one morning the prophet (peace be upon him) stepped out of his house, he found Habibah standing by the door. He asked what she wanted. She burst out “messenger of Allah! Thābit and I can’t pull on together”. Thābit was summoned. Habibah was repeated her petition. “Messenger of Allah, I have with me all that Thābit gave me. The prophet (PBUH) told Thābit to take back what he was given and divorce her”. (Malik, Abu Dawood).

a dower?" yes she said, and The Holy Prophet (peace be upon him) ordered Thābit Ibn Qais to take back his orchard and give her a single divorce.<sup>24</sup> This event is recorded in these words, by various collections of *sunnah* including *Bukhari*, *Abu Dawud*, and *Al-Nasai* and have declared this to be a sound and reliable account of the event. The majority of jurists said that it is not permitted to the husband to take anything from his wife, but it is permitted with her consent.<sup>25</sup>

During the era of the second caliph 'Umar (Allah be pleased with him), a woman were brought before him and prayed for *khul'*. 'Umar (Allah be pleased with him) put her in a small room for one night, on the morning she appeared before 'Umar (Allah be pleased with him), he 'Umar (Allah be pleased with him) asked her how she felt? She said that she had real peace of mind in only that night. There upon 'Umar ordered the husband to leave (divorce) his wife.<sup>26</sup> Amongst the companion of prophet (peace be upon him), Abū Bakr (Allah be pleased with him) considers that it is not lawful for the husband to take more than what he has given to his wife.<sup>27</sup> The daughter of Mu'awwidh Bin 'Afrā obtained *khul'* from her husband in return of all her property. When the matter was appearing before caliph 'Uthmān Ibn 'Affān (Allah be pleased with him), he held the same to be lawful.<sup>28</sup> The following rules for *khul'a* can be inferred from the above-quoted precedents:

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<sup>24</sup>Imām M. Bin Yazeed Ibn Majah Al- Qazwinī, *Sunan Ibn Mājah*, Hadith no. 2056 (Lahore: Dar Us Salam, 2007), vol.3, 174.

<sup>25</sup> Ibn Rushd, *Bidāyah al- Mujtahid waNihāyah al- Muqtaṣid*, translated by Imran Ahsan Khan Nyazee (United Kingdom: Garent Publishing Limited, 1996), 79-80.

<sup>26</sup> C.M Shafqat, *The Muslim Marriage, Dower and Divorce* (Lahore: Law Publishing Company, 1979), 134.

<sup>27</sup>Tanzilur Rahman, *A Code of Muslim personal Law*, 518.

<sup>28</sup> Translated by Professor Muhammad Rahimuddin, *Muwatta' ImāmMālik*, hadith No.1153 (Lahore: Ashraf printing press), 252.

## 7. Muslim Family Law Ordinance 1961

### Section.4 Succession

“In the event of death of any son or daughter of the porosities 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 would have received if alive<sup>29</sup>”.

### 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 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 Section 4 of the Ordinance creates an entitlement to succession in favor 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<sup>30</sup>. These primary heirs consist of the spouse relict, parents, the son and the daughter. All remaining heirs can be totally excluded by the presence of other heirs<sup>31</sup>. 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<sup>32</sup>. Those who inherit are usually confined to three groups:

1. Sharers (dhawu-al-farā'ḍ), usually include daughters, parents, grandparents, husband and wife/ wives, brothers and sisters, and others. This group usually takes a designated share<sup>33</sup>.

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<sup>29</sup> Section 4 of Muslim Family Law Ordinance, 1961.

<sup>30</sup> Altaf Hussain Langrial, *A Critical Review of Pakistani Muslim Family Laws Ordinance 1961 In the Light of Islamic Family Laws*, Available On < [http:// Ssrn.Com/ 2218455](http://Ssrn.Com/2218455)> (Last Accessed: 20 November, 2018), 98.

<sup>31</sup> A.W.M Abdul Huq, Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic,< [http:// Jstore.com/ 1108945](http://Jstore.com/1108945)> (Last Accessed: 20 November 2018), 9.

<sup>32</sup> Ibid, 99.

<sup>33</sup> Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Lahore: Federal Law House 2012), 89.

2. Members of the *‘aṣaba* (residuary), usually a combination of male (and sometimes female) relatives that inherit as residuary after the shares of the Quota-heirs is distributed<sup>34</sup>.
3. In case a person leaves no direct relatives and there is no *‘usaba*, his property transfers to the state treasury, Bait ul 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<sup>35</sup>".

## Section 5: Registration of Marriage

Every marriage solemnized under Muslim Law shall be registered. For 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<sup>36</sup>.

## 8. Islamic Law and Registration of Marriage

Under 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 *Qadi*'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

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<sup>34</sup> Ibid, 91.

<sup>35</sup> Al-Qur'ān 4:11.

<sup>36</sup> Section 5 of Muslim Family Law Ordinance, 1961.

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(1) states: 'every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this Ordinance'.

The Muslim Family Law Ordinance, 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.

## Section 6: 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<sup>37</sup>.

## 9. 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.”<sup>38</sup>

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<sup>39</sup>. The Muslim is not

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<sup>37</sup> Section 6 of Muslim Family Law Ordinance, 1961.

<sup>38</sup> Al-Qur'ān 4:3.

<sup>39</sup> Whabab al Zuḥaylī, *Al-Fiqh al -Islāmī Wa Adillatuhū* (Beirut: Dār al-Fikr, 1989), vol.5, 341.

permitted to differentiate between his wives regarding sustenance and expenditures, time, and other obligations of husbands<sup>40</sup>. Islam does not allow a man to marry another woman if he will not be fair in his treatment. 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<sup>41</sup>; 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. 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. 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.

## 10. 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.”<sup>42</sup>

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

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<sup>40</sup>Dr.Muhammad Tahir Mansoori, *Family Law in Islam* (Islamabad: Shari'ah Academy, 2006), 133.

<sup>41</sup> Maulana Muhammad Ahsan Siddiqi Nanatvi, *Al- Durr al mukhtār*(Lahore: law publishing company), vol.2, 179.

<sup>42</sup>Al-Qur'ān 4:3.

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."

Muslim Family Law Ordinance, 1961 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 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.

### **Section 7: Divorce (*Ṭalāq*)**

Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *Ṭalāq* 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 fails 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 *Ṭalāq*, 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 *Ṭalāq* is pronounced, *Ṭalāq* shall not be effective until the period of 90 days or the pregnancy, whichever later, ends<sup>43</sup>.

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<sup>43</sup> Section 7 of Muslim Family Law Ordinance, 1961.

## 11. Islamic Law of Divorce (*Ṭalāq*) and Its Effectiveness

Divorce is operative from the announcement. Hence pending it for 90 days is repugnant to Islamic teachings. Under Muslim Family Law Ordinance, 1961 limited reforms have also been introduced in relation to *Ṭalāq*. Under Muslim Family Law Ordinance, 1961 a divorcing husband shall, as soon as possible after *Ṭalāq* 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 *Ṭalāq* to the wife. Non-compliance is punishable by imprisonment and/or a fine. Within thirty days of receipt of the notice of *Ṭalāq*, the chairman must constitute an Arbitration Council to take steps to bring about reconciliation between the husband and the wife. When such attempts to negotiate reconciliation fail, a *Ṭalāq* that are 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. If, however, the wife is pregnant at the time of the pronouncement of *Ṭalāq*, the *Ṭalāq* 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 *Ṭalāq* 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 *Ṭalāq* despite a failure to notify as provided under the Muslim Family Law Ordinance. As far as the Islamic concept of effectiveness of the *Ṭalāq* is concerned, *Ṭalāq* is effective from the time of utterance of the word *Ṭalāq* by the husband. Registration is only subjected to the country law and it has nothing to do with Islamic law of *Ṭalāq*.

### Section 8: Dissolution of Marriage Otherwise Than By *Ṭalāq*

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



*Talāq* the provisions of section 7 shall, mutatis mutandis and so far, as applicable, apply<sup>44</sup>.

## 12. Islamic Concept of Dissolution of Marriage Otherwise Than By *Talāq*

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.

### Section 9: Maintenance

(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(2) 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.

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<sup>44</sup> Section 8 of Muslim Family Law Ordinance, 1961.

(3) Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue<sup>45</sup>.

### **Punjab Amendment in Section 9:**

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.<sup>46</sup>

## **13. 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: -

1. "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"<sup>47</sup>.
2. "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."<sup>48</sup>
3. "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous"<sup>49</sup>
4. "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"<sup>50</sup>.

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<sup>45</sup> Section. 9 of Muslim Family Law Ordinance, 1961.

<sup>46</sup> [Ord. II of 1975, Section 2].

<sup>47</sup> Al-Qur'ān 2: 233.

<sup>48</sup> Al-Qur'ān 2: 236.

<sup>49</sup> Al-Qur'ān 2: 241.

<sup>50</sup> Al-Qur'ān 4: 34.

## Islamic Law and *Fiqh*

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

1. 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.
2. 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.
3. 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.
4. 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.

## Conclusion

To conclude the whole discussion, 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 issue of Islamization in Pakistan needs to be seen dispassionately.