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Legal Efforts of Council of Islamic Ideology & Muslim Family Law Ordinance 1961: Application & Outcomes in Pakistan

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ABSTRACT

Family law refers to legal matters relating to marriage, divorce, legal separation, child custody and support, alimony (spousal support), adoption and related issues, and no doubt that Islam has provided a solid and effective family law. Every segment of this system strives for success, sustainability, and prosperity of mankind. Which not only the source of an effective and productive family but also for a prosperous and conducive society. Being an Islamic ideological state a constitution of the Islamic Republic of Pakistan had drafted in the light of sharīᶜah (Islamic law). Furthermore, to bring all existing laws in conformity with the Injunctions of Islam the council of Islamic ideology had also formulated. In sum, the study aims to analyze the role of the Council of Islamic Ideology for the Islamization of Muslim family law 1961. The study would also highlight the impact of these efforts on providing the legal rights to the female fabric of society and conversely its outcomes in Pakistan. The research methodology has employed in this paper is the critical approach. Furthermore, the paper would be concluded that there is a dire need for the actual implementation of these laws in society, therefore the real purpose for the provision of women's rights would be achieved, which is the real epitome of sharīᶜ principles.

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***Key words**: Council of Islamic Ideology, Islamization of Law, Muslim family law 1961.*

Introduction

The laws that derive their origin from divine sources recognize marriage as an established form of human relationship based on human instincts which require satisfaction with added characteristics of sanctity and durability, responsibilities and obligations towards self-offspring of such relationship. All religious societies share these values and the responsibilities of the couple are so deeply respected that some sects declare that marriages are made in heaven and cannot be ever broken. It is, however, accepted on all hands that marriage and divorce law of Islam is unique in the sense that it accepts certain instincts in man as demanding satisfaction but at the same time creative of responsibilities. The divine sanction is granted to the marriage relationship and due provision is made to control and regulate the conduct of the spouses and society in general in respect of the marriage relationship so that the responsibilities and obligations it creates are duly discharged. But again this control is exercised in a simple framework, for it is obvious that human nature and human actions cannot be very tightly controlled by words. The marriage and divorce laws of Islam and so of will and inheritance were respected and implemented by the colonial rulers and very little interfered with.

It was in 1961, during the administration of filed martial Muhammad Ayub Khan that the present Muslim Family Laws Ordinance was hammered out and promulgated and since has been receiving legal protection in every regime. The Advisory Council of Islamic Ideology, as it then was, took up the matter of consideration of Muslim Family Laws Ordinance, 1961 as long before as 19th of October, 1964. It was resolved that in connection with the Islamization of Laws recommendations may be first made on the ordinance in question for suitable amendments. Consideration and discussions in the council went on till March 1967. The said council was, however, able to present to the government its final recommendations in December 1967. In this paper, the author has the intention to discuss only the scope of this note. Therefore, the discussion is confined only to the subjects of Polygamy in certain indicative jurisdictions.

Council of Islamic Ideology (CII): Purpose & Prospects

This study provides the lucid and precise history of the Council of Islamic Ideology and its predecessors from 1956 to 1988 by performing the content analysis of the annual and the special reports of the Council by contrasting them with the debates in the legislature, daily newspapers, and legislations which were promulgated on the name of Islam in the country. Its findings provide an

explanation of its existence and its role in the polity of the country. The most important sources that have been consulted to conclude this study are the annual reports and the special reports of the Council. These reports were confidential till 2005 as per its working procedures and were sent to the Legislature or Ministry or President or Martial Law Administrators depending on the respective government. To amend its working procedures, Council required the assent of the President, to make these reports public for which it has requested repeatedly during the Zia era so that the population comes to know about the work done by the Council, but this did not materialize until 2005. It was because of the efforts of its Chairman Dr. Khalid Masood, that President General Pervez Musharraf allowed declassifying its previous Annual reports. These are now available at the Council office that can be obtained by getting the written permission from the Secretary who is administrative in charge of the Council. This study will contrast the recommendations given in these reports with the Assembly debates and the subsequently promulgated legislation promulgated by the respective governments during these years. The reports that are now available for the proceedings of the Council from 1962 onward, for collecting these reports I visited the Council office several times during the first fieldwork for data collections from January 2017 to July 2017.

However, the first constitution of Pakistan had drafted in 1956, It had been decided that for the promulgation of said Constitute within one year of the Constitution Day, the President of Pakistan shall appoint a commission.

1. *"To make recommendations*
2. *As to measure for bringing existing laws into conformity with the injunctions of Islam*
3. *as to the stages by which such measures should be brought into effect*
4. *To compile in a suitable form, for the guidance of the National Provincial Assemblies, such Injunctions of Islam as can be given legislative effect."*[1]

Unfortunately, they constitute of 1956 had survived no longer and after its cancelation, a new constitution had introduced in 1962, but similar to the previous constitution a decision had taken about the establishment of the Advisory Council of Islamic Ideology. The chapter of duties of the council of Islamic ideology as laid down in article 230 of the constitution of Pakistan, 1973, is as under the article 230-(1) the functions of the Islamic council shall be-

1. *"To make recommendations to parliament and the provincial assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects following the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah."*

2. *"To advise a house, a provincial assembly, the president, or a Governor, on a question referred to the council as to whether a proposed law is or not repugnant to the injunctions of Islam."*
3. *"To make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by which such measures should be brought into effect."*
4. *"To compile in a suitable form for the guidance of parliament and the provincial assemblies such injunctions of Islam as can be given legislative effect."*[2]

Muslim Family Law Ordinance 1961: An Overview

"Laws are like metals in the crucible of time and circumstances; they melt, they solidify into different shapes, they remelt and assume diverse forms. This process of evolution is coterminous with human society."[3] The Muslim Family Law Ordinance was the first legal effort in Pakistan to codify Muslim personal law.[4] Mumtaz Ahmad has stated "The Shariah Act of 1937 had earlier laid the foundations for such an effort but, having been promulgated by the British colonial administration, it could not claim any Islamic legitimacy. The 1961 law was also the first step toward the protection of women in matters of marriage, divorce, custody, and inheritance."[5] But religious scholars and leaders bombarded upon it with strong criticism. "The first Constitution was promulgated in 1956 and included a provision known as the repugnancy clause, affirming that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered and amended in light of this provision. The repugnancy provision has been retained and strengthened in subsequent Constitutions and amendments." [6] in the view of the ulama, "the ordinance had violated the sanctity of the traditional Islamic laws of marriage, divorce, and inheritance by introducing changes of a fundamental nature."[7] The religious scholars and leaders claimed that this law had transferred their power to state regarding the conduct of marriages, pronounce judgments on the validity of divorce, and give authoritative views on inheritance and maintenance, which was now to be turned over to the secular authorities of the state.[8] Ministry of Religious Affair has informed the council of Islamic ideology from the following views of Ministry of Law through their letter No 17 (1)/ ADJ/79 dated 27-01-1980:

"The Muslim Family Laws Ordinance 1961, is utterly un-Islamic. It is against the Holy Qur'an and Sunnah. It has dared to amend the Qur'anic law to the extent of Irtidad and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such legislation or

even its name need not be protected. Let us clean the blot altogether by its total repeal." [9]

The ulama of all schools of thought joined hands to oppose the MFLO. Fourteen prominent ulama from Lahore issued a joint statement describing the ordinance as "against Islam" and asked the government to withdraw it forthwith. The fact that the ulama were much more concerned about the loss of their influence rather than about the changes in the traditional formulation of Muslim family laws is evident from a statement by a group of prominent ulama of Karachi, in which they proposed that, if the government-appointed competent ulama as qazis (judges) and registrars of marriages, "the problems and difficulties of jurisprudence and religion...[could] be overcome through mutual discussions.[10] Therefore, a meeting of the advisory council of Islamic ideology was held at Rawalpindi on the 19th of October, 1964 under the chairmanship of Allama Alauddin Siddiqui as chairman council. It was resolved by the council as under:

"In connection with the Islamization of laws, the recommendation may be made first on the Muslim family laws ordinance, 1961 for suitable amendments in the light of the Holy Quran and Sunnah".

The 1956 Constitution, however, did not last long. It was abrogated on October 7, 1958, and replaced by another Constitution in 1962. However, before the promulgation of the new Constitution, the government issued the Muslim Family Laws Ordinance (MFLO) in March 1961, which was designed to give effect to certain recommendations of the Commission on Marriage and Family Laws. The ordinance covered questions of succession, registration of marriages, polygyny, divorce, maintenance, dower, and dissolution of marriages. The Muslim Family Law Ordinance was the first legal effort in Pakistan to codify Muslim personal law. The Shariah Act of 1937 had earlier laid the foundations for such an effort but, having been promulgated by the British colonial administration, it could not claim any Islamic legitimacy. The 1961 law was also the first step toward the protection of women in matters of marriage, divorce, custody, and inheritance.

Concept of Polygamy in Islam

Marriage has been ordained by Allah as the right and legitimate approach to produce children and revive the earth. The family is the fundamental unit of Islamic society and the nation. Allah has made the longing for mates and posterity instinctual for humanity and creatures. Life on earth proceeds through children, and offspring are the results of marriage. All things considered, marriage in Islam can't be seen only as means joining the male and female body and delivering offspring, nor was marriage initiated only for the motivation behind fulfilling human needs or

extinguishing desires. Its objectives are a lot further in significance than those conspicuous physical real factors. Which has illustrated in Qur'an:

"And of His signs is that He created for you from yourselves mates that you may find tranquility in them, and He placed between you affection and mercy. Indeed in that are signs for a people who give thought." (Quran, 30:21)

This Tranquility did not rely only just on the satisfaction of sexual impulses what one may feel in the wake of fulfilling sexual driving forces however it is the serenity that follows a mental need that has been satisfied. Each individual knows about having felt a need or feeling of loneliness and deprivation inside himself/herself which required finish, a shortcoming which required reinforcing or depression which must be expelled by somebody dedicated to him/her. The quiet or passionate rest which one feels because of having satisfied these necessities can be term Tranquility. Subsequently, marriage in Islam is something beyond obtaining a legitimate relationship with a spouse but in fact, it's an imperative foundation of Muslims that protects the right and honor of man, woman, and their offspring along with the innate satisfaction of physical, emotional and intellectual faculties and needs.[11] The Haneef, S. also makes it clear that "this union is not a temporary relationship between two individuals of opposite sexes: It is a permanent and enduring relationship in the sense that both the parties should put in their earnest endeavors to lead their lives in perfect harmony and acquitting themselves creditably of the responsibilities saddled upon them by entering into this sacred contract."[12] The Prophet has stated that:

"When a servant of Allah marries, he has completed half of his religious obligations and he must fear Allah in order to complete the second half."[13]

Legality of Polygamy

Abdullahi Ahmen An-Na'im stated that "Allah has already instructed Muslims in no uncertain term not to make unlawful that which He has made lawful. Thus, it is not fitting that those who choose to follow the Prophet's Sunnah be condemned for availing themselves of an option given to them by Allah. Polygyny is not a decadent or indecent relationship but a valid part of the marriage system of Islam."[14] Allah the Almighty has said:

"…Marry of the women that please you: two, thress or four. But if you feel that you shall not be able to deal justly, then only one or what your right hand posesses. That would be more suitable to presvent you from doing injustice." (Quran 4:3)

Abu Ameenah Bilaal has stated that: "One must note that man is first told to mary two, three or four women, then he is advised to marry only one if he can not deal justly with more than one. This does not mean that Islam encourages all the men to marry at least two women, but that such an option is undoubtedly permission able for those who can fulfill its conditions. The verse also sets the upper limits of four in the society in which an unlimited amount of simultaneous marriages were allowed. Thus a man must be able and willing to divide his time and wealth equitably before he is allowed to having more than one wife. Conversely, if he is unable to feed, clothe and house all his wives justly, then, according to this Quranic command, he should not marry more then one. The point is that the permissibility of polygyny has been exemplified in the Sunnah of Prophet Muhammad (SAW) who was allowed by Allah to marry nine women during the same period. It's true that many of the marriages were for sociopolitical purposes like encouraging the marriage of widows, breaking certain taboos, and linking clans; however, the Prophet (SAW) still married those who pleased him and turned down those who did not." Allah tells us in the Quran:

> **"*Men are the protectors and maintainers of women, because Allah has given the one more than the other nd because they support them from their means. Therefore, the righteous women are devoutly obedient and guard in the absence (of their man) what Allah would have them guard (of their chastity).*" *(Quran 4:34)***

The manifestation of Kindness and maintenance of Equity among wives has been instructed to the man in Islam in these words:

"…Live with them [women] is kindness and equity (Quran 4:19) and further instructed that***: "…Do not turn away altogether and leave her hanging." (Quran 4: 129)…*** also advised: *"*....***if you fear that you will not be able to deal justly with them then only one…" (Quran 4:3)***

The Quran, while permitting to have a plurality of wives at the same time, laid down certain conditions that have to be satisfied before polygamy can be practiced. The two verses of the Quran about the subject of polygamy can be reconciled, if one takes into consideration the then existing conditions in Arabia which made necessary, in some cases, multiple marriages. Due to holy wars, many women became widows and children orphans. In order to protect them, the Quran permitted to marry more than one wife in the interest of the widows and orphan. The most important aspect of the Muslim Family Laws Ordinance was its section on polygyny. The modernists further argued that, since the Quran itself warns that

"you shall never be able to do justice among wives"[15] and that, "if you fear you cannot do justice [among wives], then [marry] only one"[16] it is putting a virtual ban on polygamy.

The Muslim Family Laws Ordinance did not go so far as banning polygyny, as had earlier been done in some other Muslim societies, such as Turkey and Tunisia. The permission to contract a second marriage has been made dependent on satisfying certain conditions.[17] If these conditions are not satisfied then polygamy is not permitted[18] and one who contracts a second marriage in contravention of the provisions of the code will be liable to punishment as well as fine.[19] The Syrian Code of Personal Status, 1953, has similar provisions. In this code,[20] powers are given to the qadi to withhold permission to marry a second wife if the husband is not able to support a plurality of wives. But the boldest step taken in this regard is by the Tunisian Code of Personal Status, 1957. It unequivocally declared that "polygamy is prohibited."[21] While the Iraqi, the Syrian, the Moroccan, and the Jordanian legislation take into consideration the financial aspect and the fulfillment of equal treatment between co-wives, the Tunisian law with one stroke enacts directly that polygamy is not permitted.[22] The juristic justification for enacting such direct legislation rests perhaps on the impossibility of fulfilling the Quranic injunction that there must be just treatment of the co-wives.[23]

The ordinance, however, stipulated that "a man who wants to have more than one wife is legally obligated to obtain the consent of his wife. He was also required to present his request, giving reasons for the second marriage, to an arbitration council, consisting of representatives of each party and headed by the chairman of the local council." The final decision whether permission for a second marriage should be granted or not rests with the arbitration council. The ordinance provided, however, that a review petition may be filed with the district officer whose "decision shall be final and shall not be called into question in any court.[24]

The Pakistan Ordinance enacts that a second marriage during the subsistence of an existing marriage is prohibited without the written permission of an Arbitration Council and such permission may only be given where the council ist' 'satisfied that the proposed marriage is necessary and just." An application for permission for the second marriage must include the consent of the existing wife or wives to the new marriage.[25] Lastly, the reforms are based on the reinterpretation of the Quranic text to suit contemporary thoughts.

Council's Recommendations for bringing the judicial Structure in line with Islam

In Islam man has well-defined as the provider and protector; whereas, and the female as compassionate supportive and dependent, which gives the impression to

the complete contrast from the western society. Because women in the west have considered much progressive after achieving the privilege of educational opportunities, suffrage rights, and property rights but the family system in the west is alarmingly degenerated. The fact that western culture and society is dying has been proclaimed on the covers of *Newsweek* and *times* magazines. During the last few years, the birth of the illegal child has scarily raised in the west and the culture of teenage pregnancies has developed. The incidents of wife swapping, child abuse, and prevalence of various sexual diseases like AIDS, raise the question in the mind of a sane person toward the deteriorating western society and the problems of imposed monogamy.[26]

Although according to the statistical report of the Pakistan Bureau of Statistics, "the number of men in the country stands at 106,449,322 while the number of women are 101,314,780. The total population of Pakistan stands at 207,774,520. Meanwhile, there are 10,418 transgenders in Pakistan." But unfortunately, Pakistan is also facing a crucial situation regarding the imbalance situation of the increasing number of unmarried women which is constantly on the rise and the percentage of unmarried women is high than unmarried men. The divorced population, listed as 0.34 percent in 1998, which has now increased to five or six percent. Furthermore, most women are getting old without marrying, along with this the larger number of divorced and widows is also a serious issue for the society, so by considering the multiple issues which are the result of this current situation, the Council of Islamic Ideology has declared that there is no need for a husband to seek permission from his first wife for his second marriage. The Council of Islamic Ideology on Tuesday submitted its report from 2013-14 to the Law and Justice Committee of the Senate. The Council of Islamic Ideology said that registration of marriage should continue as per the current system. The Council of Islamic Ideology says in the report it's legal to have four wives at a time and a husband doesn't need to seek permission from his first wife for his second marriage. Also, the husband does not need to seek permission from the reconciliation council or the civil judge, the Council of Islamic Ideology added.[27]

Conclusion

This study provides the lucid and precise history of the Council of Islamic Ideology and its predecessors from 1956 to 1988 by performing the content analysis of the annual and the special reports of the Council by contrasting them with the debates in the legislature, daily newspapers, and legislations which were promulgated on the name of Islam in the country. The Muslim Family Law Ordinance was the first legal effort in Pakistan to codify Muslim personal law. This Ordinance enacts that a second marriage during the subsistence of an existing marriage is prohibited without the written permission of an Arbitration Council and

such permission may only be given where the council ist' 'satisfied that the proposed marriage is necessary and just. An application for permission for the second marriage must include the consent of the existing wife or wives to the new marriage. Most women are getting old without marrying and a large number of the female are staying single because they could not find the suitable match, along with this the larger number of divorced and widows are also a serious issue for the society, so by considering the multiple issues which are the result of this current deteriorating situation, the Council of Islamic Ideology has declared that there is no need for a husband to seek permission from his first wife for his second marriage. Therefore, there is a dire need for the actual implementation of these laws in society, therefore the real purpose for the provision of women's rights would be achieved, which is the real epitome of *sharīʿ* principles.

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[15] *Al-Quran,* 4:129

[16] *Al-Quran,* 4:3

[17] The conditions are: (i) that the husband is financially competent to support more than one wife; and (ii) that there is some lawful benefit involved.

[18] Section 5: "If any failure of equal treatment between co-wives is feared, then polygamy is not permitted; and the determination of this matter is left to the discretion of qadi."

[19] Section 6: "Anyone who concludes a contract of marriage with more than one wife in contravention of sections (4) and (5) will be punished by imprisonment for not more than one year, or by a fine of not more than 100 dinars, or by both these penalties."

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