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Muslim Family Law Ordinance 1961: Modernists And Traditionalists' Perspectives

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Abstract

The Muslim Family Law Ordinance (MFLO) of 1961, which was developed in response to the Marriage Commission Report of 1956, made the most substantial changes to Pakistan's family law in the preceding 61 years. Considering the impact of this law, which has been in effect for 61 years, would seem to be essential to nearly any study of Pakistani society. Some of its provisions, though, have caused some traditionalist ulama to express serious reservations.

This article addresses the conflict between Modernists and Traditionalists in the framework of Pakistani family law in general and Pakistani divorce law in particular. First, this paper asserts that the Muslim Family Law Ordinance's specific historical record shows that the conflict between modernists and traditionalists regarding the extent of ljtihad continued even after 1947. Second, and probably more significantly, this conflict made sure that the MFLO would be the compromise-based document. It would find a middle ground between the objections of those who supported a traditional interpretation of family laws and others who campaigned for genuine, substantial reforms for Pakistani women. Third, a careful analysis of the MFLO's divorce provisions serves as evidence of this balance.

Keywords: MFLO, Traditionalist, Modernist, Divorce, Ijtihad, Commission

1. The MFLO's Origin: The Marriage and Family Law Commission's Report of 1956

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. (Vardag,2013)

The most important yet divisive reform law in Pakistan is the MFLO 1961. The MFLO's history is quite fascinating. The then-prime minister of Pakistan, Muhammad Ali Bogra, wed his secretary in 1955 while he was still formally wed to his first wife. After it, a nationwide movement was launched by the elitist All Pakistan Women's Association. On August 4, 1955, the Pakistani government announced the creation of a seven-member Commission on Marriage and Family Laws. The commission was made up of six Modernists and a traditionalist religious scholar. On October 27, 1955, a former Pakistani Chief Justice named Mian Abdur Rasheed was chosen to succeed the deceased president. "The commission was tasked with producing a report on several issues, including the proper documentation of both marriages and divorces, the right to divorce exercisable by

either spouse through a court or other judicial means, maintenance, and the creation of special courts to deal with cases involving women's rights quickly." (Haider,2000) The commission released its report on June 20, 1956, while Maulana Thanvi's opposing statement was released separately on August 30, 1956. The report drew a fierce reaction from the ulama.

To make its recommendations in line with the general people's preferences, the Commission created a questionnaire, distributed thousands of copies to the public, and urged respondents. It may be significant to highlight that individuals who were literate and therefore able to answer were likely to be more liberal on social and political issues than the typical Pakistani, as well as being more sympathetic to modernism. The questionnaires' responses may have given the Commission the authority to pursue its Modernist agenda as a result. The Commission's findings and a dissenting comment from Maulana Haq, who offered a traditional perspective on family issues, were both submitted together. The Report and the Dissent brought attention to the opposing perspectives that characterized the politics of family law. Regardless, as lawmakers attempted to find a middle ground between Modernist and Traditionalist interests, many of the Commission's proposals were not even included in the MFLO.

The Traditionalist's perspective on Commission

The commission was charged with endeavouring to refine and broaden the application of ijtihad by traditionalists. Their main points of contention were with the Commission's interpretation of Ijtihad. Accepting the Commission's definition would include acknowledging that the Commission had the right to conduct Ijtihad, which, if accurate, would entail that its Report and any subsequent legislation would be Islamic. Maulana Haq, the Commission's lone religious member, wrote the first criticism of the Report's Introduction rather than approving it. His dissenting opinion was frequently cited by later Traditionalist articles. He spoke particularly to the Report's Introduction.:

"This [Report] starts with a long Introduction, which not only unsuccessfully attempts to undermine the accepted tenets of Islam and the fundamentals of Islamic Shariat but is also irregular and unconstitutional, for not a word of this Introduction was ever brought before the Commission for discussion. It is most arbitrary to make the un-Islamic views and personal caprices of a layman as the Introduction to and the basis for the Report of the Commission without the knowledge or consultation of its members. Of all the irregularities that have so far been committed in the transaction of the Commission's business, this is by far the worst and most unpardonable... It is obvious, therefore, that to take personal and individual whims as the basis for the derivation of laws and principles is neither "Fiqh" nor "Ijtihad" but amounts to distorting the religion. ..." (Haider,2000)

For two fundamental reasons, Maulana Maududi disagreed with the definition of ijtihad.

1. A broad definition of Ijtihad would provide the Commission with potential legal authority to practice it, validating their legislation. What distinguishes ijtihad from the legal opinions and judgments of contemporary lawmakers, if ijtihad in the context of Islamic law refers to the formation of an independent judgment on a legal issue? If so, would this not imply that there is no real distinction between Ijtihad and independent legislation and that Muslims have merely given it a new name?
2. A broad definition of Ijtihad would imply that judges may assume the responsibilities once performed by the Mujtahids. This was intolerable to traditionalists, especially if it required them to publicly oppose the modernist ambition for social justice, which they

had deftly referred to as the spirit of democracy.

In addition to this, Maududi further penned:

The Commission members do not believe that a Mujtahid needs to possess any qualifications. They believe that everyone can engage in Ijtihad and should do so to uphold the purported spirit of democracy. They have created two arguments to back up this perspective. They first assert that since Islam does not have a priesthood, both Ulama and non-Ulama are on an equal footing. Second, by interpreting Alim and Ulama as "Muslim scholars" or "those with knowledge," they have skillfully attempted to mislead the reader. With the aid of this technique, they have attempted to convey to the general public that even the Hadith assigns this duty to all educated individuals and not just those who are familiar with the Qur'an and the Sunnah.

Maulana Islahi, a well-known Traditionalist leader, and other Traditionalists were extremely concerned about maintaining the Mujtahid's position. The Commission's inability to define or even conduct Ijtihad was the central point of many of the Traditionalists' critiques.

1. The Muslim Family Law Ordinance of 1961

In the 1950s, society had moved toward a more secular outlook. Modern forces, such as women's organizations like the United Front for Women's Rights and the All-Pakistan Women's Association, had supported the Commission's formation in 1955 and had an impact on its membership and structure. For instance, the head of the Commission had female relatives who were WAF members.

Some academics say that the MFLO of 1961 was Pakistan's most significant move toward granting women and men "equal rights," but the MFLO was unsuccessful because its reforms were weak and watered-down the Marriage Commission Report's recommendations. "Specifically, its reforms were prescriptions for procedural safeguards rather than clear prohibitions of certain acts. This shortcoming was a result of the two viewpoints that existed in Pakistan concerning family law: Modernist and Traditionalist. In sum, [t]he MFLO reflect[ed] [a] compromise between Traditionalists and Modernists. This compromise weakened the effect of the reforms." (Esposito,1977)

The MFLO brought changes to marriage registration, maintenance, and inheritance in addition to its two core objectives of discouraging polygamy and regulating divorce. The Ordinance continuously struck a balance between Traditionalist forces and the Report's recommendations for legislative reform (which were themselves compromises). Each of the divorce clauses in the Ordinance, which are described in detail below, is an example of a compromise between Traditionalist resistance and the Report's Modernist authors. There are two parts to the analysis of divorce.

A. As evidence of the interests affecting each issue, three viewpoints on the matter are first provided. The Commission's, Traditionalist Maulana Maududi's, and Traditionalist Maulana Islahi's perspectives are included.

B. The MFLO is taken into consideration when examining each aspect. What needs to be understood is that "(1) even among the Traditionalists, opinion was fragmented (Maududi seems to take a calmer middle road while Islahi is more vehemently anti-Westem), and that (2) the MFLO offered at most procedural safeguards that might protect women or provide them with some rights, but it never actually prohibited any practices that might hurt them. In other words, the MFLO's writers yielded to Traditionalist pressures and struck a middle ground." (Esposito,1977)

The debate over Divorce

It will be helpful to compare the Commission's responses, Maulana Maududi's viewpoint, and Maulana Islahi's viewpoint on divorce to get a sense of how the MFLO compromised on this matter.

Questionnaires and Their Responses

Five questions were posed to the Commission, but this paper will deal with the most important two questions:

1. "If a husband pronounces talaq three times at a single sitting, should it be recognized as a valid and final divorce or should three pronouncements during three Tuhrs as enjoined by the Holy Qur'an, be made obligatory?
2. Should there be compulsory registration of divorces?" (Maududi,1959)

The Commission responses

In answer to question no. 1, the Commission provided the following response:

The Commission has recommended that three pronouncements of divorce in one sitting should be deemed as one pronouncement only and it should be legally provided that only those divorces should be admissible in law which are pronounced in three tuhr. In support of this view the Commission has quoted a well-known Hadith related by Hazrat Ibn-e-Abbas that during the period of the Holy Prophet the first Caliph Abu Bakr, and for some years in the reign of Hazrat Umar, three pronouncements of Talaq at one sitting were regarded as only one pronouncement. But Hazrat Umar made three pronouncements in one sitting as irrevocable Talaq as a punitive measure to punish those who had made a vain sport of the injunction of the Holy Quran and Sunnah.

According to the commission, "It is essential that this divorce should be followed by two further pronouncements in two subsequent Tuhrs. This is an important reform, and if enacted will bring into force the law as laid down by the Holy Qur'an and the Sunnah and followed by the first Caliph. It is authentically reported by Ibn-i-Qayyum that Caliph Umar was allowed it even as an emergency measure." (Rashid,1959)

Dealing with Q.2 commission wrote:

While dealing with 2nd question, the Commission has suggested the registration of divorces in the same way as it has suggested the registration of marriages. The Commission has made two suggestions. One is that of a standard Talaq-Nama to be made in triplicate, giving specific details as to how the Talaq had been affected. One copy of the deed of divorce should be sent to the Tehsildar for registration If the deed of divorce is the official register of divorces. If not completed, then the husband would be liable to a fine not exceeding Rs 500. But some members of the Commission are not sure whether this would fully safeguard the rights of women. Therefore, the Commission suggests another method of divorce: "It should be enacted that no one can divorce his wife without recourse to a matrimonial and family laws court. When a court is approached, it should not permit the person to pronounce divorce until he has paid the entire dower and made suitable provision for the maintenance of his first wife and children." (Rashid,1959)

Traditionalist's responses to the questionnaires

i. Maulana Maududi's Response

Maulana Maududi wrote regarding 1st question:

The four Imams and most of the jurists are of the opinion that if three divorces are pronounced at one and the same time they will be reckoned as three. Maududi considered it a more correct view. he further stated that "As such, I cannot suggest any Alteration on this point. But it is an admitted fact that, although legally valid, it is still a sin as it goes contrary to the method of divorce taught by God and His Prophet (peace be on him). Hence there must need to be a check on this wrong practice." (Maududi,1959) According to him, the following tools are suitable:

(1) Muslims should generally be familiar with the correct divorce procedure. Additionally, this should be incorporated into the course curriculum, pounded home to the public via the press and radio, and mentioned in the directives attached to the Nikah-Namas (marriage forms).
(2) It should be illegal for stamp writers to create documents for three divorces at once, and defaulters should face consequences.

(3) It should likewise be illegal to announce three divorces at once. Caliph Omar is a precedence for this (May God bless him). When a case of divorce that had been finalized three times in one sitting was submitted to him, his approach was to enforce it while also punishing the offender. (Maududi,1959)

In response to the second query, Maulana Maududi penned the following:

It is necessary to make arrangements for divorce registration, although registration should be optional. It is quite tough to make it mandatory. Regardless of whether the divorce has been registered or not, the court should recognize every such divorce for which there is sufficient proof or which the divorcing party confesses as such. (Maududi,1959)

ii. Maulana Islahi's Responses

The following is how Maulana Islahi explained his findings on this topic:—

All four Imams, the majority of the Prophet's companions, the "tabaeen," and the fuqaha agree on the irrevocability of the divorce that was granted three times in one sitting. Hazrat Usman and Hazrat Ali, two members of the Khulafai-e-Rashideen, shared the same viewpoint. The most intriguing aspect of all of this is that Hazrat Ibn-e-Abbas, the companion whose Hadith the entire framework of the argument is based, held this opinion. With the exception of Ibne-e-Hazm, Ibn-e-Taimiya, and Ibne-Qayyim, practically all of the later legists support this viewpoint. He holds Imam Ibn-e-Taimiya in great esteem and veneration but as far as this point is concerned, after a thorough his pupil Abn-e-Qayyim, he has come to the conclusion that the view of the majority of legists as against that Imam Ibn-e-Taimiya is more in accord with Quran and Sunnah. (Islahi,1959)

He further argues that now, if the Commission's advice were to become law, it would not only violate Islamic Law but also make divorce a plaything. Anybody can declare thousands of divorces against the wife and then claim that they weren't their intentions. God's commands would make this an open sport, which is why Hazrat Umar shut the doors to this vile pastime that would strip the words "Nikah" and "Talaq" of all their meaning.

"He holds that the best possible course is that the view of an overwhelming majority of the legists should be respected and the folly of violating that should not be committed. Such Talaq should be regarded as irrevocable and along with that the person who divorces in such a way should be punished or fined so that this play with the Book of God must end forever." (Islahi,1959)

Regarding the second question, Maulana Islahi wrote:

"I have the same concerns about the first suggestion that I have about marriage registration. The Tehsildar's register would become a jumble of manufactured and fraudulent divorces if this method of registration were to be used, and the device's intended function would be utterly and hopelessly destroyed. Instead, the situation would worsen and there would be a significant increase in lawsuits. I consequently consider this suggestion to be both hazardous and superficial." (Islahi,1959). In regard to the second recommendation, He expresses the following points about it: The Commission has taken action based on the assumption that

A. Man is always and fundamentally the careless evildoer. Out of nowhere, he pronounces Talaq. He abandons his wife and kids like trash! leaves them completely defenseless and unattended to! But this is simply one perspective. If the Commission believes that all divorce cases result from such circumstances—or even that the majority of them do—then he is compelled to state that this conclusion is both unrealistic and untrue. Such statements, which have no bearing on the real facts of life, can only be made by armchair theorists. In current society, there are countless reasons why couples decide to divorce. The husband is frequently forced to file for divorce due to the wife's undesirable behaviour, her tendency to fight, or some other grave

transgression or immorality. This is the case, at least among the middle and lower classes. The Commission's evaluation may be accurate for the elite and wealthy, ultra-modern classes, but the typical citizen never acts that way. He has never been so eager to bring in a second wife. This luxury is out of his price range. He must consider a vast array of variables before he can even consider influencing the separation. Dower payment in divorce cases is a religious obligation. The issue of the kids' maintenance is both justifiable and appropriate. But how can the court order the man to support a lady who is no longer his wife? According to Shariah, the man is obligated to provide for the divorced wife's needs during her iddat, up until her delivery if she is pregnant, or up until the time of razaat if she also breastfeeds the child. However, beyond these defined times, the man cannot be held liable for the woman's maintenance. Such an irrational and reckless extension of accountability cannot be justified by Shariah or human reason. … And how would their financial troubles be resolved if the court forbid him from declaring the divorce? How would it get rid of what was causing their tension? How would it improve the tone of their relationship? And if the answer to these questions is no, wouldn't the court's decision make the unfortunate wife's life even worse? What purpose does such court interference serve? It would just complicate the situation. (Islahi,1959)

B. The right to divorce has also been granted to men by the sharia. What legal rule allows one to wrest this authority away from the man and give it to the court? Can it be defended by any idea of justice and the law? If it is claimed that the court can exercise this right more circumspectly and deliberately, the following issue arises: Is the court more accountable to the husband and wife or the man in question? With whom must the woman reside? What can the court do if the husband refuses to cohabitate with the woman? She can, at best, refuse to give him the go-ahead to declare the divorce. But where would that lead? What benefit can there be in forcing an unwilling couple together? Wouldn't that make the poor woman's situation much worse, if not intolerable? The court cannot make spouses fall in love. It is impossible to "enforce" a pleasant family life.

Only a very small percentage of Talaq proceedings will take the form of a dispute. Then, even if there is nothing wrong with it, how logical would it be to take it to court? And if disagreements do occur, they can be quickly resolved through the marriage and family law courts without any concern for the woman being treated unfairly.

C. The circumstances that force a man to divorce his wife are frequently such that he is unable to define them; he can only feel them. In this situation, if the court decides to consider the acceptability of the reasons, the man would be compelled to make a complaint against the woman that would appear "forceful" to the court. As evidenced by the example of the contemporary west, most of these claims would be of a moral nature. The majority of the time, false accusations are made in place of the real causes of the situation, which may be acceptable in court. Our ladies would be subject to the worst kinds of abuse and torture as a result. However, in our society, a woman's entire career would be wrecked if she were to suffer such a tragedy. It may be feasible for a woman in the west to stay honourable and reputable even after the downpour of such moral allegations. Additionally, this would ruin the lives of the women involved and have a negative impact on society's moral atmosphere and moral health. The Report's proposals unleash the deadliest kind of danger in our society, and it is this. (Islahi,1959)

Maulana Ihtishamul Haq is credited with making the following statement: "The Commission's proposal will become permissible in Shariah if a condition to the effect that the husband gives up the right to pronounce Talaq except in a matrimonial and family laws court is inserted in the standard Nikah-Nama."[16] In the foregoing talks over the transfer of the right to divorce, Maulana Islahi

expressed his views in great detail and viewed this suggestion as outright violating Islamic Shariah. Here, He just poses one question: Would this requirement be mandatory for all men, or would it be optional? How many people would accept it if it were optional? And if it were required, that would be open duress, which the Shariah cannot ever acknowledge. No such requirement that is not the result of the couples' free decision may be imposed on the Nikah-Nama by force. Shariah prohibits any tafweez or tawkeel with even the slightest hint of coercion or pressure. The suggestion that the courts become involved in the Nikah and Talaq cases goes against the fundamental nature of such issues, it is a reality. The court can rule on disagreements, but how can she prove love and confidence? Matrimony depends on the spouses' shared love and confidence. When there is a disagreement or an injustice, let the courts get involved. The serenity, poise, and tranquility of life would be lost if everything were governed by the law and the legal system, and disagreements would start even in places where there is no justification for them. (Islahi,1959)

3. Divorce in MFLO

The MFLO's Section 7 addresses divorce:

"(1) 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 notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with a fine which may extend to five thousand rupees, or with both.

(3) Save as provided in subsection (5), a talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section [11][(3)] or the pregnancy, whichever be later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective." (MFLO,1961)

Discussion

Section 7 is clearly only relevant in situations when the husband has declared talaq to his wife, according to the text of the section. The husband in this situation must notify the Chairman in writing of the pronouncement. "The spouse is deemed to have committed a crime for failing to provide the notice, which is punishable by either a fine or jail or both. The third paragraph is crucial to this interpretation. Talaq is not considered to be effective under this sub-section until 90 days have passed since the Chairman received notice of it. Since the Ordinance's adoption, ulema has expressed their worries about this provision and sub-section (5) and have claimed that they are against the prohibitions of the Holy Quran and the Prophet Muhammad's Sunnah. These provisions have drawn criticism from a variety of social groups (may peace be upon him). The Superior Courts have also expressed varying opinions on the matter, and there are numerous judgments on this subject." (Section7 of MFLO,1961)

The suggestion that the courts get involved in the Nikah and Talaq issue is against the law. The Family Laws Ordinance has stipulated that the divorce must take place in three installments and cannot be valid until the Arbitration Council has considered it, refusing the

customary procedure whereby an emphatic three-time declaration of divorce by the husband takes instant effect. The law states: “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 notice in writing of his having done so and shall supply a copy thereof to the wife. Whoever contravenes this provision shall be punishable with simple imprisonment for a term which may extend to one year or with a fine which may extend to 5,000 rupees or with both.” (Section7 of MFLO,1961). The legislation further stipulates that the divorce thus declared must not take effect for ninety days following the day on which notification is sent to the chairman. The chairman must form an arbitration council with the aim of mediating a settlement between the parties within thirty days of receiving the notice, and the arbitration council must take all necessary action to achieve this. The chairman, a wife's representative, and a husband's representation make up the Arbitration Council.

Similar arrangements have been in place and are well recognized across the majority of Middle Eastern nations. Strong opposition has been raised in Pakistan, however, primarily on the grounds that an “emphatic divorce,” which occurs when a man declares to his wife, “I divorce thee,” three times, takes effect immediately and that the husband can only rescind his divorce in the case of a non-emphatic divorce. The Islamic law scholars of the Middle Ages disagreed on this issue as well. Graduate divorce was the norm during the Prophet's times, according to historical data. However, it is reported that this custom was abused under the second caliph Umar, who ordered that if a man gave his wife an emphatic divorce, she would be promptly divorced and released from the marriage contract. It is informed that the abuse of the graduated divorce resulted from the large number of foreign women who were present in Mecca and Medina following the quick conquests during Umar’s period. Many men started tormenting their wives by announcing a divorce, keeping them in suspense for about a year, then canceling the divorce—only to repeat the entire process multiple times.

Although Umar's proclamation was intended as a corrective action to address this issue, the Hanafi school of law specifically adopted it and eventually replaced the earlier custom of the Prophet's time. A closer look reveals that the Hanafi law of divorce in general has some internal coherence and strongly suggests that it was created to maintain the strongest possible moral relationship. It was believed that the implementation of Umar's decision would prevent careless declarations of divorce. Its intention was unfortunately undone in practice because a guy who is angry does not carefully contemplate the effects of severing the marital bond. The conservative claim that man is generally more sensible and considerate and will utilize his right with moderation is gravely refuted by this fact. one of the main social evils of Muslim society has been the husband's unilateral, hurried divorce.

The filing of divorce proceedings with a tribunal has also offended the conservatives. They contend that taking such private matters before a public tribunal rather than resolving disagreements privately is a naïve imitation of western traditions that will have a demoralizing impact on family life. It must be acknowledged that no one has yet discovered a cure-all for the problems that afflict this delicate and vulnerable aspect of interpersonal relationships. Undoubtedly, the publicity surrounding such incidents is not helpful. If one could avoid it, they would avoid the shame as well as some of the sensationalism and demoralization that undoubtedly takes place.(Smith,1969)

The only individual who does not come from either of the two families is the chairman, so the tribunal as envisioned isn't precisely a public body. It could also be claimed that the couple's fear of appearing before a judge or jury serves as a strong dissuader from acting recklessly. The conservative may also be questioned on whether the exposure that such cases inevitably bring about is indeed worse than the tyranny that women have experienced in traditional Muslim society. And last, is it not preferable to bring serious injustices to light when they are committed?(Smith,1969)

CONCLUSION

This study described the conflict between modernists and traditionalists about the principle of the inviolability of the law, which the British helped develop. The series of ideological compromises that individuals interested in the modernization endeavour have made and are still making is largely influenced by this conflict. One of such compromise was the Marriage Commission's Report 1956, which gave women new rights through procedural safeguards but did not go as far as to make certain behaviours illegal.

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.

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