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Islamic Legal Diversity and the Reform Methodologies- An Analysis of the Legislative System of Pakistan

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Abstract

The Islamic law being rich in the juristic opinions has made Islamic legal diversity an important issue to be addressed for legislative purposes in Pakistan. This diversity has been incorporated in Pakistani law by way of various Islamic law "codes", in the wake of Islamization of laws. Pakistani courts have time and again declared that they are not bound by the juristic differences or the Islamic legal diversity (*fiqhi* opinions) and that they will directly resort to reasoning from the Holy Qur'ān and *Sunnah*, in case of any ambiguity or uncertainty. A deep analysis reveals that Pakistan adopted different reform methodologies to bring law into conformity with the Islamic injunctions. It was, however, observed that the laws in which *ijtihād* was undertaken were more controversial than those in which the opinion of selecting different opinions from different schools *(takhayyur)* was availed. The research after evaluating the material on the classical *fiqh* literature, various Pakistani laws and the court practices concludes that the parliamentarians and the judges need to be equipped with analytical and critical skills

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in order to appraise earlier juristic rulings, if they want to select from different opinions from different schools of thought, or in order to directly reason from the Divine Texts, in case of setting aside the Islamic legal diversity. This will make Pakistan an Islamic country in its true spirit.

Keywords: Islamic legal diversity, reform methodologies, *takhayyur*, *ijtihād*, legislation, *fiqh*, *Sharī'ah*, Injunctions of Islam

1. Introduction

Pakistan following the parliamentary system of government was composed of three main organs of the government: Legislature, Executive and the Judiciary. The task of the legislature was to make laws; the executive to implement the law and the judiciary to interpret the law. The focus of the present research is on the legislative part of the state of Pakistan; therefore, the other two organs will not be touched here. The legislature, under the parliamentary system of government, is the source of all sovereignty in a nation-state. However, in case of Pakistan, the sovereignty was declared to be the sole ownership of Allāh Almighty, through the incorporation of the Objectives Resolution 1949 in the preamble of the Constitution of Pakistan, 1973. The present research follows the analytical research model wherein the narrative of Pakistan about its Islamic status, as per the Constitution of Pakistan, 1973, in the legislative domain is discussed and analyzed. This analysis is done in light of different reform methodologies such as *ijtihād*, *takhayyur*, *talfīq* and others adopted by the parliamentarians in Pakistan to make law conform to the Islamic injunctions. .

In the following paragraphs, different stances adopted by Pakistan, defining its status and operation as an Islamic state, will be discussed. The stances regarding defining the meaning of "Injunctions of Islam" and the status of the diversity of legal

opinions in Islam will also be discussed in the context of Muslim World, in general, and Pakistan, in particular.

2. Status of Objectives Resolution in the Constitution of Pakistan, 1973

The Objectives Resolution 1949 is the most vital document in the constitutional history of Pakistan, as far as the status of Islam in Pakistan is concerned. This document has however been debated at a great length as regard its status within the Constitution. The document was included as a preamble in all the three constitutions of Pakistan and it had no other significance. However in 1985, it was made an operative and integral part of the constitution, by the incorporation of the article 2-A in the Constitution of Pakistan, 1973. This was done through a constitutional order.[2] The status of this Objectives Resolution, as declaring the laws contradictory to the injunctions of Qur'ān and *Sunnah*, has been decided under various court cases in the constitutional history of Pakistan. There have been a number of cases deciding its significance and its status within the constitution. Some of the cases are discussed here briefly.

In *Asma Jilani v. Government of Pakistan*[3] the Chief Justice declared Islam as the *grundnorm* for Pakistan.[4]The chief Justice's statement in this regard is very important to mention here. The statement is reproduced as under:

> In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in

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[2] Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985); Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

[3] PLD 1972 SC 139

[4] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

> our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by him a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "corner stone of Pakistan's legal edifice" … it is one of the fundamental principles enshrined in the Qur'an.[5]

Thus, under this case, the Objectives Resolution was regarded as the *grundnorm* for Pakistan; the *grundnorm* being prescribed by Kelson under his pure theory of law.[6] Kelson described *grundnorm* as something which the constitution prescribes and needs to be followed as enunciated in the constitution.[7] Thus, for Pakistan it was the Objectives Resolution and was to be followed as incorporated in the constitution. In another constitutional case, *Ziaur Rehman v. The State*[8] the Hon'ble Justice declared Objectives Resolution as a document which is "Supra-constitutional" and opined that it "is so fundamental and contains such mandates that it cannot at all be repealed or abrogated and is permanent for all times to come." This was the decision of the Lahore High Court. However, the Supreme Court, while giving judgment on the case *Ziaur Rehman v. The State*[9], rejected the notion that the Objectives Resolution was supra-constitutional, on the argument that it was "not incorporated in the

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[5] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

[6] Hans Kelsen, *The Pure Theory of Law*, Trans. M. Knight (Berkeley: University of California Press, 1967), 201; Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 453.

[7] Ibid.

[8] PLD 1972 Lahore 382 at 390.

[9] PLD 1973 SC 49.

Constitution". The *Hussain Naqi v. D. M. Lahore case*[10] declared the Objectives Resolution as a mere guideline in order to frame the constitution and rejected the notion of it being regarded as the *grundnorm* for Pakistan.

The status of Objectives Resolution within the Pakistani's constitution has thus been discussed with variant views in these cases. In *Hakim Khan v. Government of Pakistan*[11], the Supreme Court practically demonstrated the status of Objectives Resolution by declaring that the commutation of death sentences by the President under article 45 of the Constitution was not repugnant to the injunctions of Islam. [12] This, thereby reduced it to a position that was not supra-constitution; and the acts of the president were declared to be valid as he commuted the death sentences on the pretext that they had been awarded by way of *ta'zīr* and not as *ḥadd.*

This was the first step towards defining the Islamic basis in Pakistan. It curtailed the status of the Objectives Resolution and upheld the action of the President to be valid.

2.1. Definition of *Sharī'ah* and the Status of the Diversity of the Juristic Opinions in the Muslim World

It is pertinent to note that there is a sharp distinction between *sharī'ah* and *fiqh. Sharī'ah* is a broad term encompassing the overall Islamic tenets, but it is not descriptive and specific. The jurists deliberated on the texts of the *sharī'ah* to find the purpose and purport of the Divine Law. They used different canons of interpretation to get to the true intent of the Law-giver. This was termed as *fiqh* meaning "understanding". The *sharī'ah* and *fiqh* , thereby complement each other; the former providing the latter with

[10] PLD 1973 Lahore 164.
[11] PLD 1992 SC 595.
[12] PLD 1992 SC 595; Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 456.

the proofs and texts from the sources and the latter providing the former with the possibility of various interpretations, all equally valid. The process of interpreting the law by directly deliberating on and expounding the texts of the Divine Law was not an abrupt and easy task. It required a lot of qualifications and exposure, in the field of Islamic law. The Islamic law was not the outcome of the arbitrary articulations of the jurists; rather it was a whole process of mental and physical engagement. It was for this purpose that this intellectual activity was itself considered a means for reward in the first place, even if the deliberation turned out to be erroneous.

However, the debate regarding the enforcement of *sharīʻah* continues within the Muslim World. The debate is centered on the idea that whether the enforcement of the *sharīʻah* means the general law that is dictated within the sources of Qur'ān and *Sunnah* (the primary sources) or the deliberations and interpretations of the jurists regarding these texts of the Qur'ān and the *Sunnah*, leading to diversity of opinions also forms part of the *sharīʻah*; in other words, whether the *fiqh* has any binding effect on the state in order to accomplish its task of enforcing the *sharīʻah.* Different countries have adopted different stances regarding this. Different Islamic countries have also mentioned different strategies that they have adopted to give effect to their constitutional provisions. As has been mentioned earlier, there are few states only which have declared Islam to be their state religion and consequently they have incorporated provisions in their constitutions to enforce the principles of *sharīʻah*. Sudan and Syria are Muslim states but they have not declared any state religion.[13] However, they provide for the Islamic law to be a basis of legislation in their system.[14]

[13] Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[14] Article 65 of the Sudan constitution provides for the Islamic law to be a basis of legislation. It states, "Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no

In contrast to this, there are other Muslim countries which have declared Islam to be the state-religion, but they have curtailed the enforcement of Islamic provisions and law in the country. They have limited the application of the Islamic law. For example, Jordan has declared Islam to be the state religion but it has limited the application of Islamic law to matters relating to personal status and *waqfs* only.[15] Malaysia, likewise, has restricted the application of Islamic law to certain enumerated matters only. [16]

There are also countries that have declared Islam to be the state religion but they have given no practical importance and enforceability to the Islamic law. In other words, Islamic law and jurisprudence has no role in the furtherance of the Islamic status of these countries. These are Brunei, Bangladesh, Morocco and Tunisia.[17]

Pakistan on the other hand, has not only declared Islam as its state religion but also has incorporated the article 2A, comprising the Objectives Resolution, giving effect to the injunctions of Qur'ān and *Sunnah.* It is pertinent to see, therefore, the practical connotations adopted by the Constitution and the courts in defining the *sharī'ah* and the injunctions of Qur'ān and *Sunnah* in Pakistan. The following paragraphs will be a discussion regarding the status of the diversity of juristic opinions in Pakistan and the meaning of the injunctions of Qur'ān and *Sunnah.*

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legislation in contravention with these fundamentals shall be made.......”; Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[15] Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 10.

[16] Ibid.

[17] Ibid.

2.2. Definition of "Injunctions of Qur'ān and *Sunnah*" According to the Constitution of Pakistan, 1973

The article 227(1) of the Constitution of Pakistan, 1973, provides the meaning of "Injunctions of Islam" as those injunctions which are laid down in the Qur'ān and *Sunnah.* Article 227(1) provides that "All existing laws shall be brought in conformity with the Injunctions of Islam as laid in the Holy Qur'ān and *Sunnah,* in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions."

These words of the Constitution make it clear that the courts are only bound to interpret the law according to the texts of Qur'ān and *Sunnah,* and not according to the opinions of the jurists. Only Qur'ān and *Sunnah* are considered to be the "Injunctions of Islam" according to the Article 203-D of the Constitution of Pakistan, 1973.[18]

2.3. Definition of *sharīʻah* and the Status of the Diversity of the Juristic Opinions in Pakistan

The Section 2 of the Enforcement of the *Sharīʻah* Act, 1991 defines "*sharīʻah*" as meaning the injunctions of the Qur'ān and *Sunnah* as a whole and it does not restrict itself to the deliberations and articulations of the jurists. Rather, the opinions of the jurists "may" be used as a source of reference and consultation but the decisions of the judges need not abide by any particular school of thought.[19] The section 2 states that "While interpreting and explaining the *sharīʻah* the recognized principles of interpretation and explanation of the Holy Qur'ān and *Sunnah* shall be followed and the expositions and opinions of recognized jurists of Islam belonging to

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[18] Muhammad Munir, Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991, *Hamdard Islamicus,* Vol.XXXVII, No.4, 63-4.

[19] Muhammad Munir, Precedent in Islamic Law with Special Reference to the Federal *Shariat* Court and the Legal System in Pakistan, *Islamic Studies* 47:4 (2008), 458.

prevalent Islamic schools of jurisprudence may be taken into consideration."[20]

Similarly, the section 4 of the Enforcement of Sharī'ah Act, 1991, states:

> Laws to be interpreted in the light of Sharī'ah: For the purpose of this Act, (a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and *jurisprudence* shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution *shall* be adopted by the Court.[21]

According to this section, while interpreting any law having ambiguity in the form of more than one interpretations or more than one equally possible interpretations, the courts are directed mandatorily to refer to that interpretation "that best suits" the Principles of Public Policy and the Islamic provisions in the Constitution. This makes it appear that it is for the courts to decide as to which of the various interpretations, evaluating the laws through the Islamic principles and jurisprudence (*sharī'ah* as defined in section 2 of the *Sharī'ah* Enforcement Act, 1991), is to be adopted. Nyazee calls it the "constitutional form of the *sharī'ah*"[22] to be adopted by the courts and not the *sharī'ah* of a particular sect.

This makes the courts at liberty to use the jurisprudential debates of the Islamic jurists for adjudication; however, they are not bound to follow any particular opinion. They are free to see as to which of the

[20] See, Section 2 of the Enforcement of Sharī'ah Act, 1991 (Act X of 1991).
[21] See, Section 4 ibid.
[22] Imran Ahsan Khan Nyazee, *It is the Sharī'ah of the Courts, Your Honour*, 2014, 4, https://dx.doi.org/10.2139/ssrn.2409105.

various interpretations best fit to the need of the situation at hand. This is an *ijtihādī* action and not an easy task to do.[23] If the judges are free to adopt any of the various interpretations, then they are bound to produce evidence and reason for preferring one opinion over the other. This requires a lot of expertise in the Islamic law. The question arises whether the present judges of our honorable judiciary are competent to exercise *ijtihād* independently? For instance, in *Mst. Hakimzadi v. Nawaz Ali* [24]case, the wife had contested the case for divorce against her husband's ill-treatment and false accusation of committing adultery with her father-in-law. The case had fallen under the Dissolution of Muslim Marriages Act, 1939 (DMMA) grounds for dissolution of marriage. She had pleaded for the dissolution of her marriage; and for *khul'* in the alternative. The court had refused to grant dissolution of marriage on the basis of DMMA and granted her *khul'*. The court resorted to *Ijtihād* instead of following the Islamic law as adopted in the DMMA for dissolution of marriage.

Similarly, in the case *Mrs. Seema Chaudhry v. Ahsan Ahsraf Sheikh*[25] case, the divorced wife suing for the custody of her male child of eight years was refused by the court on the rationale of "welfare of the minor" as the wife had contracted another marriage and had a child from her new husband as well. The ex-husband did not marry another woman admittedly. On account of these facts, the court refused to give custody of the child to the mother in the house of his step-father while the real father had not contracted a second marriage. The court did this for the welfare of the minor while in

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[23] As has been mentioned elsewhere, according to the opinion of Shah Waliullah, exerting one's utmost effort in order to understand and apply the rulings of the jurists previously extended and then approving, conforming or even the rejection of those rulings, is also *ijtihād* and according to him this kind *ijtihād* is the need for all ages, See, Muhammad Athar Ali, *Shah Wali Ullah's Concept of Ijtihād and Taqlīd: With Special Reference to 'Iqd al-Jīd fī Aḥkām al-Ijtihād wa'l Taqlīd*, (Bangladesh: Bangladesh Institute of Islamic thought, 2001), 33.

[24] PLD 1972 Karachi 540.

[25] P L D 2003 SC 877.

fact it had exercised independent *ijtihād* leaving aside the traditional Islamic law.

2.3.1. Stance of the Federal Shariat Court on Diversity of Juristic Opinions

Under the Constitution of Pakistan, 1973, the Federal Shariat Court is empowered to examine and decide the question as to whether any provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'ān and *Sunnah*.[26] In case, any provision of law is held repugnant to the spirit of the Qur'ān and *Sunnah,* the Court will also give its reasons for declaring that law as such.[27]

In a leading case, *Muhammad Fayyaz and another v. Federation of Pakistan and others*[28], the petitioner while filing a petition in the Federal Shariat Court sought the declaration of the age limit by the Majority Act (IX of 1875) to be 18 years for puberty, to be repugnant to the injunctions of Qur'ān and *Sunnah*. The petitioners, for the sake of their arguments, relied on the juristic views of the *fuqahā.* One of the petitioners contented that it was troublesome for him to maintain his son till 18 years while he might have developed the symptoms of puberty and thereby attained the age of majority as per Islamic injunctions, even before attaining the age of 18 years.

The court held that the Federal Shariat Court had great respect and regard for the juristic opinions, however, as per constitutional requirements, the article 203 (b) of the Constitution of Pakistan, 1973 empowers the Court to examine laws only as per the injunctions of the Qur'ān and *Sunnah.* The Court had investigated and studied the case in detail and also examined the Islamic view point regarding the age-limit, but did not find any clear verse or any

[26] See, Article 203-D of the Constitution of Pakistan, 1973.
[27] Ibid.
[28] Shariat Petition No. 6/I of 2004 and 27/I of 1992. https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%20No.%206%20-%20I%20-%20of%202004.pdf.

sound *ḥadīth* fixing the age of puberty. Even the Muslim scholars were not in agreement regarding one age-limit for the same reason. The Court further held that mere appearance of symptoms of puberty might not be a manifestation of the attainment of the age of majority. The fixing of age limit by the legislature is important for the purposes of avoiding conflict and confusion, by defining the law for the parties. Thereby, the petition was dismissed.

Thus, from this case as well it is clear that the Federal Shariat Court, as empowered under article 203(b) of the Constitution of Pakistan, 1973 is bound by clear injunctions of the Qur'ān and *Sunnah*, in order to examine the "un-Islamic" element in the laws, and not by the diversity of juristic opinions.

2.3.2. Stance of Supreme Court on Diversity of Juristic Opinions

The Supreme Court held a similar decision in *Khurshid Bibi*[29] case, which is reproduced as under:

> The opinions of jurists and commentators stand on no higher footing than that of reasoning of men falling in the category of secondary sources of Muslim law, and cannot, therefore, compare in weight or authority with, nor alter the Qur'ānic law or the *Aḥādīth.* If the opinions of the jurists conflict with the Qur'ān and the *Sunnah*, they are not binding on the courts, and it is our duty, as true Muslims, to obey the word of Allāh and the Holy Prophet (peace be upon him).[30]

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[29] PLD 1967 SC 97.

[30] PLD 1967 SC 97; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol. XXXVII, No.4, 58.

2.3.3. Stance of Lahore High Court on Diversity of Juristic Opinions

In *Bilqis Fatima v. Najm ul Ikram Qureshi* case, the Lahore High Court held, regarding the diversity of juristic opinions, as under:

> We are dealing with the interpretations of the Holy Qur'ān and on a question of interpretations we are not bound by the opinions of the jurists. If we be clear as to the what the meaning of a verse in the Qur'ān is, it will be our duty to give effect to that interpretation irrespective of what has been stated by the jurists……Similar considerations apply to the interpretations of the traditions of the Prophet (peace be upon him).[31]

Similarly, in *Khurshid Jan v. Fazal Daad* case, the Lahore High Court opined as under:

> The views of early jurists must be treated with utmost respect but the right to differ from them cannot be denied to the present-day courts, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligations of the courts to interpret the law they are asked to administer and apply in cases coming before them.[32]

These cases clarify that the diversity of juristic opinions, developed through extraneous juristic debates by the early jurists, are of recommendatory nature and not of binding nature. It also becomes clear that the judges are free to exploit and deliberate on the texts.

[31] PLD 1959 Lahore, p.566; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol.XXXVII, No.4, 58.

[32] PLD 1964 (W.P.) Lahore 558.

This is evident from the opinion of the Lahore High Court in *Bilqis Fatima v. Najm ul Ikram Qureshi*[33]case.

The judges have, however, also adopted different juristic opinions, while deciding different cases. This selection of opinions, the rationale behind selection of particular opinions in preference to others and the juristic appraisal of this selection will be the main focus of the following topic of this work.

The methodologies adopted by Pakistan to bring its laws into conformity with the Islamic injunctions and to amend its British-imported codes will be discussed in the following paragraphs to give an insight into the legislative efforts of Pakistan, followed by an Islamic appraisal of these efforts.

2.4. Legislative Methodologies for the Introduction of Reform Adopted by Different Muslim Countries

Throughout the Muslim world, in countries that have undergone colonial past adopting western codes, there have been different legislative methodologies adopted in order to amend these western codes and to bring them in line with the Islamic injunctions. These methodologies have been termed as "reform methodologies" by these countries, as they bring novelty and reform in the country under the name and umbrella of Islam.

Different countries adopted different methodologies and garbs in order to give the legislative efforts an Islamic backing. The nature of *uṣūl ul fiqh* (Islamic jurisprudence) was to provide with the means and methods of developing the law over time. These methodologies were however, not taken as per their intent. The later scholars restricted the use of *ijtihād* and independent reasoning and there was an emergence of *taqlīd*. This occurred in the later part of the Abbasid

[33] PLD 1959 Lahore, p.566; Muhammad Munir, "Islamization of Laws in Pakistan with Special Reference to the Punjab Pre-Emption Act, 1991", *Hamdard Islamicus,* Vol. XXXVII, No.4, 58.

period.[34] The methodology of *uṣūl ul fiqh* was however, in essence, meant to encourage the activity of intellectual engagement in the field of Islamic law. Due to the restriction of *ijtihād* and a halt in the activity of the intellectual engagement, there emerged a "Crisis of the Muslim Mind" as termed by Abū Sulaymān.[35] It is this slogan that the modern writers and scholars now raise for the renaissance and revival of the Islamic law. They yearn for the revival of the Islamic spirit.

The world with its changing circumstances and the nature and purport of the Islamic law to remain alive till eternity is what has prompted the Muslim countries around the Muslim World now to give a renewal to their legislative systems by adopting the Islamic support for such renewal. They have called such renewal and activism in their systems as "reform". However, these reform strategies adopted by the modernists around the Muslim world now are derived not just by external motives of modernity but also by internal motives of giving the reformers' desires an "Islamic backing."[36] The reform strategies adopted by different countries around the Muslim world will expound and support this fact in the later paragraphs of this topic in general and the reform strategies adopted by Pakistan, in particular.

2.4.1. Legislative Methodologies Adopted in Different Muslim Countries for the Introduction of Reform

To state briefly and objectively, different reform strategies were adopted by the Muslim countries around the Muslim World. Some are stated as under:

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[34]Kemal A. Faruki, *The Evolution of Islamic Constitutional Theory and Practice*, (Karachi: National Publishing House Ltd., 1971), 39.
[35]Muhammad Hashim Kamali, "Methodological Issues in Islamic Jurisprudence", *Arab Law Quarterly,* Vol.11, No.1 (1996) pp. 3-31 at p 5.
[36]Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 2.

1. Takhayyur (Eclecticism)

Takhayyur was one of the reform methodologies adopted by the Muslim countries to bring reform in their legislative systems and in order to adapt their legal systems to the changing circumstances. This methodology involves the analysis and appraisal of all the opinions of different schools of thought comprising minority and majority views and then preferring that opinion which best suited to the situation at hand.[37] However, it was limited and restricted to the opinions expounded and articulated by the jurists alone and did not allow the direct interpretation of the Qur'ān and *Sunnah.* According to this approach, the diversity within the Islamic legal schools, representing the deliberations and toil of the jurists, was a wealth and could be used for the introduction of reform.[38] According to this approach, free adherence to schools was permitted without following any school strictly and that opinion was adopted which best suited the needs of the situation. This selection was at times reformatory and dependent on preponderance (*tarjīḥ*) of one opinion over the other and at times provoked by pragmatic derives; as these are the two main motivations behind switching between one opinion and the other.[39]

A clear manifestation of this eclectic approach regarding diversity of opinions is what was observed as a problem in the family law. According to the traditional Islamic law, the husband was entitled to the right of divorce. However, the right of the wife to claim divorce under traditional Islamic law was attached with some necessary conditions. These conditions varied from school to school. The *Ḥanafī* School listed very few grounds for claiming such a divorce

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[37] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 9.
[38] Mudasra Sabreen, "Takhayyur: A Reform Methodology for Pakistan", *Hamdard Islamicus,* 2.
[39] Ahmed Fekry Ibrahim, "Al-Shaʿrānī's Response to Legal Purism: A Theory of Legal Pluralism", *Islamic Law and Society* 20-1-2 (2013), 112.

by the wife such as long-term abandonment (Ghībah), whereas the *Mālikī* School allowed the divorce claim by the wife on the ground of non-maintenance or harm. Consequently, this school was followed in Law 25 of 1920 and in the Law 25 of 1929 in Egypt's family law codes. [40]

2. *Talfīq (Combining or Patching Together)*

Another strategy of reform adopted by Muslim countries was *talfīq* meaning patch-work or "the merging of the opinions of several schools of thought into one conclusive issue which is often dissimilar to all."[41] Thus, this was a unique strategy adopted, a kind of independent reasoning (*ijtihād*)[42], by the Muslim countries in order to render their decisions and laws in an "Islamic" garb. An example of this is the Moroccan family law of 1958. In this code, the husband's right to unilaterally divorce his wife and its legal effect is discussed. According to the traditional Islamic law, the pronouncement of divorce made through speech of the husband is given legal effect. However, the reformers wanted to enlist and codify the circumstances under which the divorce pronounced by the husband would be ineffective. The circumstances were thus enlisted in the article 49 of the Moroccan Family Law Code of 1958. According to this article, if the husband pronounces divorce in the state of compulsion, anger or intoxication then the pronouncement is ineffective. This bit of exception from the effectiveness of verbal pronouncement in the state of compulsion was taken from the *Mālikī* School; the exception regarding anger was taken from the *Ḥanafī* School and individual opinions from the individual views from the *Ḥanbalī* and *Mālikī* Schools; and the provision regarding

[40]Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 11.
[41]Ghazala Ghalib Khan, Application of *Talfīq* in Modern Islamic Commercial Contracts, *Policy Perspectives*, (2013), Vol. 10(2), 141.
[42] Ibid.

drunkenness was adopted from the minority views in the *Mālikī, ḥanafī* and *Shāfi'ī* views.[43] This thus was a merging of different opinions on different matters (anger, compulsion and drunkenness) resulting in a new ruling (they all making the verbal pronouncement ineffective), not recognized by any of the jurists.

3. Delegation of Power of Adjudication to the Judges or Other Authority

In this case, the authority of adjudicating certain matters is limited and conditioned to court litigation for the purposes of reform. In this case particularly, the reformers' intent is to secure the public interest by referring the matters to the decision of the courts rather than individual vigilantism. However, practically it has been done in order to reduce the enforceability of individual authority accorded by Islam to the individuals as their right. The most significant example of this is the case of polygamy. Different countries have adopted different laws in order to curtail the right of the husband to marry up to four wives at a time, by referring the polygamous marriages to the court conditions and requirements. Iraq for instance, under its law 188 of 1959, article 8 provides that a polygamous marriage will not be allowed without the permission of the courts. It further adds two stipulations for polygamous marriage: the husband must be financially capable to support the wives and the taking of another wife will secure a lawful benefit to the family.[44] This legislation regarding polygamy has been done by way of *ijtihād,* as there has been no evidence from the deliberations of the earlier jurists regarding such an innovative idea. The proponents of the idea of restricting the polygamous marriages derive their Islamic support by way of *ijtihād* from the verses of the Qur'an regarding polygamy. They quote the verse 3 of Sūrah Al-Nisā' which says: "If

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[43] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 9-10.
[44] Ibid, 16; J. N. D. Anderson, "Reforms in Family Law in Morocco", *Journal of African Law* 2: 3 (1958), 157.

you fear that you might not treat the orphans justly then marry the women that seem good to you: two, or three, or four. If you fear that you will not be able to treat them justly, then marry (only) one, or marry from among those whom your right hand possess. This will make it more likely that you will avoid injustice."[45] Similarly, the verse 129 of Sūrah Al-Nisā': "You will not be able to treat your wives with (absolute) justice not even if you keenly desire to do so."[46] Thus, these verses they take in support of restricting the practice of polygamy as Allāh Almighty says that you will not be able to treat your wives justly even if you so keenly desire to do. Similarly, Morocco has adopted a similar stance regarding the regulation of polygamous marriages. It allows polygamy only under extreme stringent and compelling circumstances and has also provided for a cause of action claim to be filed by the first wife if there be an occurrence of "harm" to her. It also provides for the "consent of the first wife" to be taken before contracting a second marriage.[47] Tunisia is the only Muslim country which has even abolished polygamy altogether.[48]

4. Legislation Taking Support from a Remote or Less- Known Textual Evidence

According to this approach the reformer does not evaluate and employ all the relevant texts and evidences regarding a particular ruling; nor does he make use of the different articulations and extraneous debates of the jurists regarding a particular issue but simply relies on a less-known text from Qur'ān or *Sunnah* and

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[45] Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Sūrah Al-Nisā': 4/3.

[46] Ibid, Sūrah Al-Nisā': 4/129.

[47] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 16.

[48] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 162.

legislates according to that text without any deep inductive or deductive interpretation. This is done merely to give the legislation, according to the desires of the reformer, an Islamic support. [49]

An example of this approach can be found in the clause 6 of the preamble of the Moroccan Law.[50] In this law, the husband's right of unilaterally divorcing his wife has been restrained and subjected to certain conditions. These conditions include the authorization by the judge and the subjection of the divorce proceedings to arbitration by the courts for reconciliation. If the reconciliation between the spouses is not secured, then a compensation comprising all the necessary expenses for the wife and her children is obligated on the husband to be paid in order to repudiate the marriage. [51] In this way, the husband's unconditional right to divorce the wife has been curtailed.

Thus, these are different methodologies adopted by the Muslim countries in order to incorporate Islamic law in their constitutions or in order to give their laws an Islamic backing.

The following paragraphs will elaborate the Islamic basis and the status of the underlying concepts of Islamic law under the Constitution of Pakistan and its different laws as implemented and interpreted in the country, and consequently the reform or the "Islamization" methodologies adopted by Pakistan to amend its laws applying the Islamic law.

2.4.2. Legislative Methodologies Adopted in Pakistan for the Purpose of Reform

Different legislative efforts were undertaken in Pakistan's legislative history for the reformation of laws in Pakistan. As has

[49] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers, 11*, (2011), 18.
[50] Ibid, 20.
[51] Ibid.

been mentioned earlier, Pakistan emerged out of British colonialism and thereafter this colonialism had long term effects on its constitutional and political history. The British codes were adopted by Pakistan as its laws in the country; these include the Criminal Procedure Code of 1898, Code of Civil Procedure of 1908, Pakistan Penal Code of 1860 and other codes. These were British codes which were adopted by Pakistan. However, there were certain amendments proposed in the British codes, adopted in Pakistan, through the channel of reformation of laws in Pakistan.

Most notable among all the amendments in the Pakistani law were the Hudood Laws and Family laws. These laws along with their history, essential provisions, and reform methodologies adopted in those laws and their Islamic appraisal will be discussed at length in the following topic.

2.5. Muslim Family Law Ordinance: History and Provisions

The pre-partition British colonialism had long-term effects on the Pakistan's constitutional and political history. The British had included under its colonial administration different "reforms" by changing the Islamic legal theory as it was in the traditional period through various means: by giving the juristic writings the status of immutable and fixed law by incorporating those in the "codes of law"[52], the British translated the Arabic writings into English and then employed those in the courts and the British disregarded the regional customs, as it would give rise to diversity in the practice and would make the implementation of the uniform codes difficult.[53] It is also important to mention that the Muslim family law was the least touched subject under the British colonial system.[54]

[52] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 295.
[53] Ibid.
[54] Ibid.

In the field of family law, the Muslim Family Laws Ordinance is the most controversial and important document in the legislative history of Pakistan. The background efforts and debates regarding this document were encountered mainly between four actors: the Secularists, the Modernists, the Traditionalists and the Ulamā.[55] The main agenda of the Secularists was the separation between the state and the religion, termed as the separation of church and state. The Ulamā on the other hand were staunch about the fusion of religion and state. The reform methodology adopted in the promulgation of this Ordinance was individual *Ijtihād*.[56] The Modernists in their approach were centered upon the idea that the Islamic law was adaptable to change and could be molded and interpreted according to the situations at hand; moreover, *any one* could engage in this "interpretive process" (traditionally termed as *"ijtihād"*). The Traditionalists held the agenda that the right to interpret the law and to apply it to situations at hand was entitled to those qualified to exercise *ijtihād* and not just to anyone. The legal reform could take place only within the confines of the fixed domains of the *sharī'ah* and those declared as interpretable or non-definitive. Thus, the underlying difference between the Modernist and Traditionalist approach was the qualification of the one exercising *ijtihād* and the texts that were the subject of *ijtihād*; in other words, what could be interpreted with different meaning and what could not be interpreted as such. These four actors basically had the mainstream debate underlying the designing of the Muslim Family Laws Ordinance.

2.5.1. The Marriage Commission Report 1956

As has been mentioned earlier, in the years after partition from 1947 to 1954, there were no reforms in the family law.[57] in 1956 the Government set up a commission on marriage and family laws in order to study and examine its laws and to put forward

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[55] Ibid.
[56] Ibid, 302.
[57] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 157. https://doi.org/10.4324/9780203381298.

recommendations for the purpose of reform. The commission comprised of six members belonging to the Modernists group and only one Traditionalist scholar, Maulana Ehteshamul Haq.[58] The commission carried out its examination of the laws in the form of preparing questionnaires and then these questionnaires were circulated among the public to take their opinion. It was intended to gain support from the masses on the issues pertaining to religion.[59] The crux of the commission report led in its definition of *ijtihād* and those competent to exercise it. The astonishing part of the report was that it laid its reliance on the definition of *ijtihād* given by revivalist Muhammad Iqbal, instead of the definitions given by early emmient jurists of the Islamic law. The definition of *ijtihād* as given by Iqbal and relied upon by the commission is reproduced as under:

> The word (*Ijtihād*) literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgment on a legal question. The idea, I believe, has its origin in a well-known verse of the Qur'ān- "And to those who exert; We show Our path." We find it more definitely outlined in a tradition of the Holy Prophet. When Mu'ādh was appointed ruler of Yemen, the Prophet is reported to have asked him as to how he would decide matters coming up before him. 'I will judge matters according to the book of God,' said Mu'ādh. 'But if the Book of God contains nothing to guide you?' 'Then I will act on the precedents of the Prophet of God.' 'But if the precedents fail?' 'Then I will exert to form my own judgment.' The student of the history of Islam, however, is well aware that with the political expansion of Islam systematic legal thought

[58] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 301.
[59] Ibid.

> became an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognized schools of law. These schools of law recognize three degrees of *Ijtihād*: (1) complete authority in legislation which practically confined to the founders of schools, (2) relative authority which is to be exercised within the limits of a particular school, and (3) special authority which relates to the determining of the law applicable to a particular case left undetermined by the founders.[60]

The commission thus cited Iqbal and relied on his idea that the *ijtihād* was to be carried out freely as there were many matters not contemplated by the early jurists. Iqbal also did not talk about the qualifications of the one exerting to extract a ruling from the texts. According to his conception it was not a monopoly of the jurists. A very strong statement given by Iqbal elsewhere proposes the same idea, and it is reproduced as under:

> The claim of the present generation of Muslim Liberals to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is, in my opinion, perfectly justified. The teaching of the Qur'ān that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.[61]

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[60] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 303.

[61] Syed Abdul Rahman, "Iqbal's Concept of Sovereignty and Legislation in Islam", *Islamic Studies*, Vol. 25, No. 1 (Spring 1986), 53.

The commission was thus opposed by the Traditionalists on the ground that it relied on a very liberal definition of *ijtihād* and assigned no qualifications to the one exercising *ijtihād.* Maulana Ehteshamul Haq gave a note of dissent, opposing the commission's recommendations.[62] Muslim Family Laws Ordinance, 1961 (MFLO) was promulgated at a time when women were very educated and were derived by secularist ideas, which prompted them to raise their voices for "equal rights" with men.[63] MFLO thus resulted as a compromise between the ideas of the Modernists and the Traditionalists, and in the following paragraphs, different provisions of the MFLO will show how it proved as a compromise and what the impact of its reform provisions was.

2.5.2. Provisions of the MFLO: Study and Islamic Legal Appraisal

Some of the provisions of MFLO will be discussed here along with their Islamic legal appraisal. The provisions are stated as under:

1. Polygamy

Polygamy has been a very controversial subject and different Muslim countries have adopted different stances in order to incorporate it in their constitutions. As has been mentioned elsewhere that some countries like Morocco have put several restrictions on the practice of polygamy, whereas, Tunisia is the only Muslim country prohibiting polygamy altogether. Under the MFLO, polygamy is dealt under its section 6. According to the section 6(1) of this Ordinance, it has been mandated that the person desirous of contracting a polygamous marriage must refer the case to the Arbitration Council and the husband must take consent from his

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[62] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 308; Mumtaz Ahmad, "The Muslim Family Laws Ordinance of Pakistan", *International Journal on World Peace*, Vol. 10, No. 3 (1993), 39.

[63] Ibid.

existing wife or wives.[64] It further adds restrictions to the polygamous marriage by stating that the Arbitration Council must be satisfied as to the fact that the polygamous marriage is "necessary and just".[65] The question of "necessary and just" shall be considered by the Arbitration Council, looking into various grounds such as physical unfitness, willful avoidance of conjugal relations by the existing wife, infertility etc.[66] The Muslim Family Laws Ordinance provides that if the person contracts a polygamous marriage without referring the matter to the Arbitration Council, then he will be punished with the repayment of the entire dower to his existing wives, or he could be also punished with imprisonment for up to one year or fine of up to five thousand rupees. Moreover, the existing wife would be entitled to a claim for dissolution of marriage, if the husband contracts the marriage without her consent.[67] In all these cases however, the polygamous marriage has not been declared null and void, and such a marriage will be valid.

2.5.2.1. Islamic legal Appraisal

Under Islamic Law, a man is permitted to marry up to four wives at a time and there has been no restriction on this right of the husband and adding restrictions to it is subjecting the Divine Law to arbitrary opinions. Secondly, the addition of restrictions and the awarding of penalties have made the already permissible thing by *Sharīʻah*, as condemnable in the eyes of law. Thirdly, if the restrictions have an effect only to "regulate" the polygamous marriages, the adding of all these restrictions is a mere accumulation of provisions with no strong impact. As Rashida Patel quotes, "…if restrictions on polygamy are to be effective, the law should go further and lay down, that if another marriage is contracted during the subsistence of a marriage, without the prior permission from the relevant judicial

[64] See, Muslim Family Law Ordinance, 1961, Section 6(1) and 6(2).
[65] See, Muslim Family Law Ordinance, 1961, Section 6(3).
[66] See, Muslim Family Law Ordinance, 1961, Section 14.
[67] See, Muslim Family Law Ordinance, 1961, Section 13(9).

authority, such polygamous marriage shall be illegal and void *ab initio*."[68]

2. Marriage Registration

According to the section 5 of the MFLO, the registration of marriages was made compulsory and the Union Councils were empowered to grant licenses to the persons registering for the marriage. Any person not complying with the section's requirements was made liable to imprisonment which may extend up to three months or fine which may extend up to one thousand rupees or both.[69] However, the marriage which was not registered before the Union Council, as per the requirements of the MFLO, was not declared as void and it was still valid and effective.

2.5.2.2. Islamic Legal Appraisal

Under Islamic Law, a marriage contract is valid if it is executed by an offer and acceptance in the presence of two witnesses. Registration is not required to make the marriage contract valid. However, committing important things to writing has been encouraged in Islam[70], but not obligated or penalized for non-registration. The addition of this provision was no doubt important with regards to avoiding the false claims of *zinā* and claims of multiple husbands over one woman, but it was a merely addition of provisions in the law, as a marriage without registration was not declared void, and only the persons guilty of non-registration were

[68] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 164-5. https://doi.org/10.4324/9780203381298.
[69] See, Muslim Family Laws Ordinance, 1961, Section 5.
[70] "Believers! Whenever you contract a debt from one another for a known term, commit it to writing,…..Do not show slackness in writing down the transaction, whether small or large, along with the term of its payment.", Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Surāh Al-Baqarah: 2/282.

penalized by this enactment. Therefore, these provisions proved ineffective and unnecessary.

3. Divorce

The MFLO deals with the subject of divorce under its section 7. The section provides that when the husband pronounced *ṭalāq*, it will not be effective unless and until he gives notice in writing to the Chairman of the Union Council and upon the receipt of the notice by the chairman, an Arbitration Council will be set up in order to bring reconciliation between the parties. The *ṭalāq* will be only effective, if ninety days have been passed since the receipt of the notice by the chairman.[71] Before the expiration of the ninety days, the *ṭalāq* will not be effective in the eyes of law nor will it be effective if no notice has been served to the chairman of the Union Council. This provision in the MFLO has been quite troublesome in many cases, as it has been the underlying factor in deciding the consequential matters pertaining to the question of effectiveness and ineffectiveness of the divorce. For instance, in *Javed Ali v. Abdul Kadir* case, [72] the Supreme Court held that if the husband does not give notice to the chairman or avoids giving notice to the chairman after verbal pronouncement of the divorce, the divorce does not become effective in the eyes of law and the abstinence from giving notice will be considered as a revocation of the pronouncement by the husband. This case provides clearly that the divorce which is not given notice of to the chairman will not be effective whatsoever in the eyes of law.

[71] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 318; See, MFLO, Section 7.

[72] 1987 SCMR 518 (Pak.); Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism*: Vol. 12:2, (2000), 319.

2.5.2.3. Islamic Legal Appraisal

According to Islamic law, the divorce is effective by the mere pronouncement of the divorce by the husband and it does not require any of such conditions for its validity. The MFLO adding the condition that the divorce would be ineffective altogether on the non-service of notice to the chairman of the Union Council is making the divinely ordained law as ineffective and unimplemented.

2.6. Dissolution of Muslim Marriages Act, 1939: History and Provisions

The History of Dissolution of Muslim Marriages Act, 1939 is very important with regard to the methodology of reform adopted in the legislative efforts in Pakistan. It has been mentioned in the previous sections that different methodologies have been adopted by different Muslim countries in order to bring reform in their laws and in order to adapt their laws according to the contemporary situations, while keeping in view the Islamic provisions, for whatever motive. Pakistan, too adopted different methodologies in order to bring reform in its British-imported laws. The MFLO of 1961 was an example of *ijtihād* done by the legislators in Pakistan, whereas, the methodology used in the DMMA was *Takhayyur.* In order to understand how this was done, the history of DMMA is important.

The majority of the Muslims living in the Sub-continent belonged to the *Ḥanafī* school of thought. According to this school, there are very few grounds for the dissolution of marriages, or in other words, for a wife to seek divorce from her husband. However, Islamic law, rich in its diversity of juristic opinions, provided various other opinions from other schools which are way relaxing in providing for the grounds of dissolution of unwanted marriages. The other schools of thought like the *Shāfi'ī, Mālikī* and *Ḥanbalī* schools provided

other grounds for dissolution as well. Using this diversity of juristic opinions, the British had promulgated the DMMA in 1939.[73]

The main person behind this great legislation, based on *takhayyur*, was Maulana Ashraf Ali Thanwi.[74] In the passing of this Act, most of the fundamentals of the *Mālikī* school of thought were adopted[75], departing from the tradition *Ḥanafī* school of thought followed by majority of the Muslims in the British Sub-continent. Maulana Ashraf Ali Thanwi had issued a *fatwā* in 1913 that the conversion of Muslims to other faith would automatically dissolve the marriage, according to the *Ḥanafī* school of thought. On knowing this, there occurred a wave of conversions from Islam to Christianity by those women who desperately wanted to dissolve their marriage and get rid of their husbands; as there were no other expedient modes of separation under the *Ḥanafī* doctrine. Maulana thereafter reconsidered his earlier opinion and discussed the matter with four groups of *muftīs*- three groups were from India and one group was from Madina. Maulana subsequently retracted from his earlier opinion and issued another *fatwā* in 1933[76] declaring that the marriage would not automatically be dissolved on the conversion of a person from Islam to another faith.[77] He proposed certain instances as well whereupon the wife could seek divorce from her husband and he stated that the *Malīkī* school of thought be adopted. Maulana asked Qadi Muhammad Ahmad Kazmi to present the Bill in the central legislature for introducing this reform, as he was a member

[73] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 174. https://doi.org/10.4324/9780203381298.
[74] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 272.
[75] Ibid.
[76] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 272.
[77] As provided under Section 4 of the Dissolution of Muslim Marriages Act, 1939.

of the Indian Parliament and a lawyer from Meerut, UP. The Statement of Objects and Purposes of the bill was as under:

> There is no provision in the *Ḥanafī* Code of Muslim Law enabling a married Muslim (woman) to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, or makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for or under certain other circumstances. The absence of such a provision has entailed an unspeakable misery to innumerable Muslim women in British India. The *Ḥanafī* Jurists however have clearly laid down that in cases in which the application of the *Ḥanafī* law causes hardship, it is permissible to apply the provisions of "*Mālikī*, *Shāfi'ī* or *Ḥanbalī* Law". Acting on this principle the Ulamā have issued fatwās to the effect that in cases enumerated in clause 3, Part A of this Bill, a married Muslim woman may obtain a decree dissolving her marriage….As the Courts are sure to hesitate to apply the *Mālikī* Law to the case of a Muslim woman, legislation recognizing and enforcing the above mentioned principle is called for to relieve the sufferings of countless Muslim women.[78]

The Bill was thus passed as the Dissolution of Muslim Marriages Act, 1939, following the *Mālikī* school of thought.

2.6.1. Provisions of the DMMA, 1939

Under the section 2 of the DMMA, 1939, the Muslim women have been provided with the following grounds in order to obtain

[78] Muhammad Munir, "Rights of Women and the Role of Superior Judiciary with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research,* Vol.3, (2009), 273.

dissolution of marriage from their husbands. These grounds are listed as under: [79]

1. The whereabouts of the husband have not been known for a period of four years;
2. The husband has neglected or has failed to provide for her maintenance for a period of two years;
3. The husband has been sentenced to imprisonment for a period of seven years or upwards;
4. The husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
5. The husband was impotent at the time of the marriage and continues to be so;
6. The husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
7. She, having been given in marriage by her father or guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated;
8. The husband treats her with cruelty, that is to say:
9. Habitually assaults her or makes her life miserable by cruelty of conduct, even if such conduct does not amount to physical ill-treatment, or
10. Associates with women of evil repute or leads an infamous life, or
11. Attempts to force her to lead an immoral life, or
12. Disposes of her property or prevents her from exercising her legal rights over it, or
13. Obstructs her in the observance of her religious profession or practice, or
14. If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'ān.

[79] See, Section 2 of Dissolution of Muslim Marriages Act, 1939.

An important perspective of DMMA was that if a wife invoked dissolution of marriage through these grounds, she would still be entitled to her financial claims against her husband.[80] This is stated under section 5 of DMMA which is reproduced as under:

"Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage." This was an important aspect in granting women empowerment in a male-dominant society like Pakistan. Another important feature of this Act was that it did not require the consent of husband for the claim of dissolution of marriage by the wife.[81]

2.6.1.1. Islamic Legal Appraisal

Under the traditional Islamic law, when a wife seeks divorce from her husband it is called as *khulāʻ*. Under the Islamic law, the *khulāʻ* is effective only with the approval and consent of the husband and without the consent of the husband; the dissolution of marriage cannot take place. The evidence that is cited in support of this fact of mutual consent of the spouses in order to make the divorce effective is derived for instance from a *ḥadīth* in which a woman Habībah approaches the Prophet (peace be upon him) and states that she needs separation from her husband Thābit bin Qays although he had done nothing wrong, but the wife claimed that she could not live within the limits prescribed by Allāh. On hearing this, the Prophet asked Habībah if she agreed to pay in return the garden which she had got as a gift from her husband and she agreed to pay that. Whereupon the Prophet (peace be upon him) executed separation between the spouses and asked the husband to take the garden in

[80] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 175. https://doi.org/10.4324/9780203381298; See Section 5 of the Dissolution of Muslim Marriages Act, 1939.
[81] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 176. https://doi.org/10.4324/9780203381298.

return for this separation and he did that.[82] According to the apparent meaning of this *ḥadīth*, there is nothing that suggests such consent from the husband to make the separation effective; however, jurists interpret it to mean a mutual consent divorce, which means if the husband had refused to accept the garden in return for separation the divorce would not have taken place.[83] This view was also supported by the Qur'ānic verse regarding it which states that "(While dissolving the marriage tie) it is unlawful for you to take back anything of what you have given to your wives unless both fear that they may not be able to keep within the bounds set by Allāh. Then, if they fear that they might not be able to keep within the bounds set by Allāh, there is no blame upon them for what the wife might give away of her property to become released from the marriage tie."[84] The jurists interpreted from this verse and the *ḥadīth* that it meant that the divorce was a mutual agreement between the spouses for the wife to free herself from the marriage tie and the *ḥadīth* was speaking of the same process that was mentioned in this verse for separation. [85]

Under the DMMA, this act of separation has been made unilateral and has been delegated to the judge to execute the act of separation between the spouses. This approach of the reformers in Pakistan by delegating the divorce to the judges is based on the re-interpretation of the *ḥadīth* who take it to mean the role of the Prophet (peace be

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[82] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23; Sahih al-Bukhari, Vol. 7, Ahadith 5273-5277.

[83] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23.

[84] Sayyid Abu'l A'lā Mawdūdī, *Towards Understanding Qur'an, Abridged Version of Tafhīm Al-Qur'ān*, Translated and Edited By Zafar Isḥāq Anṣārī, (Great Britain: Islamic Foundation, 2007), Sūrah Al-Baqarah: 2/229.

[85] Kristen Stilt and Swathi Gandhavad, "Strategies of Muslim Family Law Reform", *Northwestern University School of Law Northwestern University School of Law Scholarly Commons Faculty Working Papers,* 11, (2011), 23.

upon him) as an arbitrator between the spouses which in the present day would be a task of the judges. [86]

Moreover, under the DMMA this separation would not affect the financial claims of the wife against her husband, which is opposing to the traditional Islamic law, according to which when a woman offers herself to be separated from her husband in exchange for her dower, then this compensation must be paid to the husband; in other words, the wife must give away her financial claim against her husband.[87]

2.7. Conclusion

To conclude, it has been exhaustingly discussed how Islamic legal diversity was incorporated in Pakistani laws in the wake of reformation. The different challenges of incorporating the Islamic law through legislation were thus discussed through the different stances adopted to define its Islamic basis. The legislative efforts done by Pakistan in order to give its laws an "Islamic" backing was also discussed along with an Islamic legal analysis. It is pertinent to note that Pakistan's legislative history has given an idea of variety in the approaches it had adopted to reform its laws. In these circumstances, however, it has been evidently seen that the matters where *ijtihād* was resorted to were more controversial than those in which *takhayyur* was adopted. In either case, the parliamentarians and the judges need to be equipped with high analytical and critical skills in order to appraise the Islamic legal literature (in case of adopting *Takhayyur* methodology) or to reason directly from the *Qur'ān* and *Sunnah.* Pakistani courts while interpreting the law, in order to entail complete reliance on the ultimate sovereignty of Allah Almighty, must resort to a cautious, deliberate and conscious approach while reasoning from the texts of the *Qur'ān* and *Sunnah.*

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[86] Ibid.

[87] Mehdi, R. (1994). The Islamization of the Law in Pakistan (RLE Politics of Islam) (1st ed.). Routledge, 175. https://doi.org/10.4324/9780203381298.