

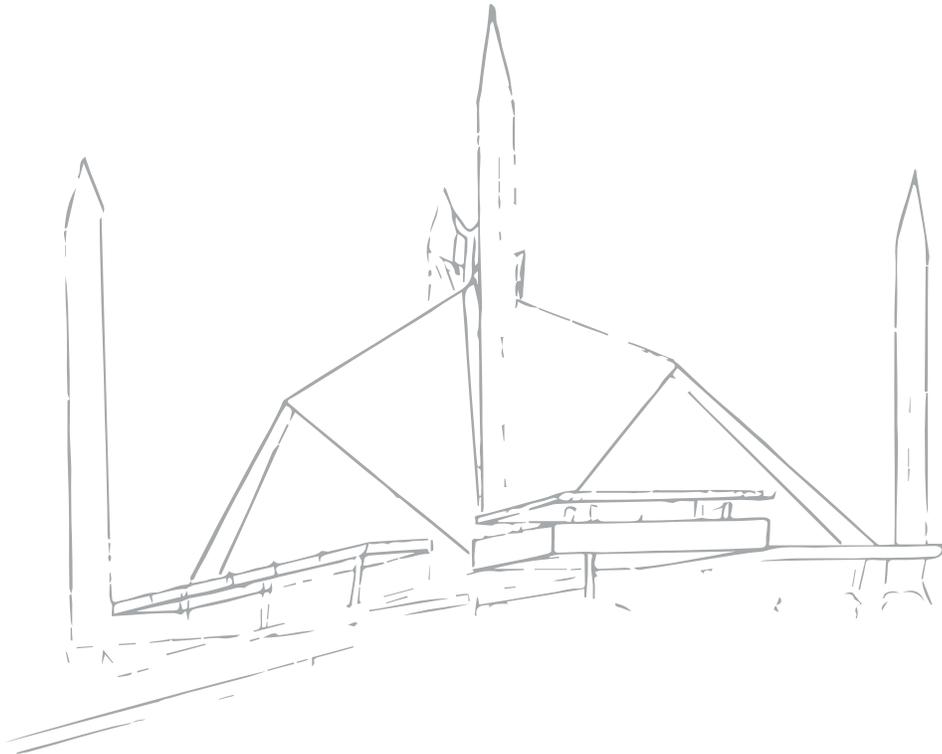


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Prolific Contribution of Council of Islamic Ideology for Islamization of Muslim Family Law Ordinance 1961: An Overview

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Abstract

Family law refers to legal matters relating to marriage, divorce, legal separation, child custody and support, alimony (spousal support), adoption and related issues and no doubt that Islam has provided a solid and effective family law. Every segment of this system strives for success, sustainability and prosperity of mankind which not only the source of an effective and productive family but also for prosperous and conducive society. Pakistan is an Islamic ideological state which is established on the foundations of two-nation theory, and main purpose of its establishment is to exercise the Islamic laws in an independent state. After the establishment of Pakistan for inculcation of these objectives a constitution of Islamic Republic of Pakistan had drafted in the light of shari'ah (Islamic law). Beside this, council of Islamic ideology had also formulated and the basic objectives of this counsel are particularly that, all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah. Therefore, the study will highlight that Council of Islamic Ideology had prolific contribution for Islamization of Muslim family law 1961. This Council had critically analyzed the every article of Muslim family law 1961 in the light of Quran and sunnah. Furthermore, during this procedure many sessions had held. The Muslim family law Ordinance was taken up for the first time for consideration of the counsel in its session held on the 17 Feb, 1965 under chairmanship of Allaudin Siddiqi as counsel's chairman. In connection with the Islamization of law, recommendations were given on the Muslim family law Ordinance 1961 for the suitable amendments in the light of Quran and sunnah. The counsel completed its three readings up to march 1967 and final recommendations were formulated in council's session held in Lahore on 28 March 1967.

Key Words: Council of Islamic Ideology, Islamization of Law, Muslim family law

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1. Introduction

Of all the relationships extant in human affairs the most important and intimate is that between a husband and wife. Obviously casual and informal sexual relations between any man and woman are possible. But all humanity regards such a relationship as height of aberration like any other sexual aberration. Whatever experience has been gone through by humanity through the ages in this respect no better form in this relationship has been evolved than a formal more or less permanent arrangement i.e. marriage, even have come to respect marriage as the most civilized and rewarding social association with responsibilities and obligations.

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

It was in 1961, during the administration of filed martial Muhammad Ayub Khan that the present Muslim Family Laws Ordinance was hammered out and promulgated and since has been receiving legal protection in every regime. The Advisory Council of Islamic Ideology, as it then was, took up the matter of

consideration of Muslim Family Laws Ordinance, 1961 as long before as 19th of October, 1964. It was resolved that in connection with the Islamization of Laws recommendations may be first made on the ordinance in question for suitable amendments. Consideration and discussions in the council went on till March 1967. The said council was, however, able to present to the government its final recommendations in December, 1967.

2. Establishment of Council of Islamic Ideology (CII)

Although the constitution of Pakistan was drafted much late after its establishment which has considered dark chapter in the history of Pakistan, however, the first constitution had drafted in 1956, and in its article 198(1) it has decided that

1. *whereas sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him is a sacred trust;*
2. *And whereas it is the will of the people of Pakistan to establish an order;*
3. *Wherein the state shall exercise its power and the authority through the chosen representatives of the people;*
4. *Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;*
5. *Wherein the Muslim shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.*
6. *Now, therefore, we, the people of Pakistan.... Faithful to the declaration made by the founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah, that Pakistan would be democratic state based on Islamic principles of social justice.”¹*

It had been decided under the article that:

“No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah, and

¹Annual Report By Council of Islamic Ideology : 2013-2014, p.3

existing law should be brought into conformity with such injunctions.²

It also had suggested that for promulgation of said Constitution within one year of the Constitution Day, the President of Pakistan shall appoint a commission.

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

Unfortunately the constitution of 1956 had survived no longer and after its cancellation new constitution had introduced in 1962, but similar to previous constitution a decision had taken about the establishment of Advisory Council of Islamic Ideology in article 199. In article 204(1) of this constitution the following duties had assigned to the Council:

"To make recommendations to the Central Government and the Provincial Government as to means of enabling and encouraging the Muslims of Pakistan to order their lives in all respects in accordance with the principles and concepts of Islam, and to examine all laws in force immediately before the commencement of the constitution (First Amendment) Act, 1963, with a view to bringing them into conformity with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah."⁴

The chapter of duties of the council of Islamic ideology as laid down in article 230 of the constitution of Pakistan, 1973, is as under the article 230- (1) the functions of the Islamic council shall be-

² Ibid, p.4

³ Ibid, p.4

⁴ Ibid, p.5

- (a) *To make recommendations to parliament and the provincial assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah.*
- (b) *To advise a house, a provincial assembly, the president or a Governor, on a question referred to the council as to whether a proposed law is or not repugnant to the injunctions of Islam.*
- (c) *To make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by which such measures should be brought into effect; and*
- (d) *To compile in a suitable form for the guidance of parliament and the provincial assemblies such injunctions of Islam as can be given legislative effect.”⁵*

Under the law of 1962 and from the notification by the ministry of law and parliamentary affairs the first advisory council of Islamic Ideology had been established. The first chairman of this council was Mr. Justice Abu Salih Muhammad Akram, Justice Muhammad Sharif, Maulana Akram Khan, Maulana Abdul Hamid Badayuni, Maulana Hafiz Kafiyat Hussain, Dr. Qureshi and Maulana Abdul Hashim were also the members of this council. It has declared that:

“All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as the injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions.”⁶

It also has declared during the interpretation of article 228 that:

“There shall be, constituted within the period of ninety days from the commencing day a council of Islamic Ideology, in this part referred to as the Islamic Council.”⁷

⁵ Annual Report By Council of Islamic Ideology : 2013-2014, p.5

⁶ Ibid, p.6

⁷ Ibid

In the same article the components, structure and rules and regulations had highlighted in brief and a comprehensive methodology.

“The Islamic Council shall consist of such members, being not less than eight and not more than twenty as the president may appoint from amongst person having knowledge of principles and philosophy of Islam as enunciated in the Holy Qur’an and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan.”⁸

According to the clause (3) of the article 228 it was mandatory that, Minimum two members of the council should be retired or on service judge of Supreme Court or High court. Similarly it was also mandatory to have at least one female member in the council. According the article 229, if the president of Pakistan or Governor would face any question that the current existing law is either according the *shari’ah* ruling or have any contradiction with *shari’ah* injunction? Then the higher authority will refer these questions towards the council. The similar condition had suggested for senate, Provisional Assembly and National Assembly as well. In article 230 the following responsibilities and duties had been discussed:

- (a) *“to make recommendation to Majlis-e-Shoora(Parliament] and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslim of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concept of Islam as enunciated in the Holy Quran and Sunnah;*
- (b) *To advise a house, a Provincial Assembly, the president or a governor on any question referred to the council has to whether a proposed law is or is not repugnant to the Injunctions of Islam;*
- (c) *To make recommendations has to measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and*

⁸Annual Report By Council of Islamic Ideology : 2013-2014, p.6

(d) *To compile in a suitable form for the guidance of Majlis-e-Shoora(Parliament] and the Provincial Assemblies, such injunctions of Islam as can be given legislative effect”⁹*

3. Muslim Family Law Ordinance 1961

After partition in 1947, the legislation relating to Muslim family laws introduced under British rule continued to govern personal status.¹⁰ In 1961 the Muslim Family Laws Ordinance was passed, drawing much criticism from religious leaders. The first Constitution was promulgated in 1956, and included a provision known as the repugnancy clause, affirming that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered and amended in light of this provision. The repugnancy provision has been retained and strengthened in subsequent Constitutions and amendments.¹¹ Ministry of Religious Affairs has informed the council of Islamic ideology from the following views of Ministry of Law through their letter No 17 (1)/ ADJ/79 dated 27-01-1980:

“The Muslim Family Laws Ordinance 1961, is utterly un-Islamic. It is against the Holy Qur’an and Sunnah. It has dared to amend the Qur’anic law to the extent of Irtidad and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such legislation or even its name need not be protected. Let us clean the blot altogether by its total repeal.”¹²

Therefore, a meeting of the advisory council of Islamic ideology was held at Rawalpindi on the 19th October, 1964 under

⁹Ibid.

¹⁰Perveen, D. R. (2008). Alternative perspective on “Child and Early Marriages” in Pakistan. *Understanding Adolescent and Youth RH issues in Pakistani Context; perspectives from the advocates, activists, academicians, scholars and practitioners* (p. 26). Islamabad: AGEHI Resource Centre Society for the Advancement of community Health Education and Training (SACHET Pakistan).

¹¹Vardag, Z. K. (2013). *A Full Service Pakistani Law Firm*. Retrieved April 04, 2014, from Pakistan Law Firm: www.pakistanilaw.wordpress.com

¹²Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.35

the chairmanship of Alaudin Siddiquias chairman council. It was resolved by the council as under:

“ In connection with the islamization of laws, recommendation may be made first on the Muslim family laws ordinance, 1961 for suitable amendments in the light of the holy Quran and Sunnah”.

Here we discuss only those sections of Muslim Family Laws Ordinance 1961 which are contradictory to Islamic Family Laws:

4. Section 4: Succession

The provisions of this section may be usefully reported below for facility references:

“In the event of the death of any son and daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as in the case may be, would have received if alive”¹³

Sharī'ah Injunctions about Succession

The moving spirit behind this section appears to be the intense desire for making some provision for the orphan grandchildren of the propositus who often find themselves without any financial support after the death of their grandfather. The problem has been solved by giving them permanent place in the list of inheritors. The intention is no doubt consonance with the solitude of the Holy Quran and *Sunnah* of the Holy Prophet (PBUH) for the welfare of the orphans but the solution offered to nevertheless clearly against their injunctions. The basic principle of the Muslim law of inheritance has been laid down in verse 7 of *sura Al-Nisa*¹⁴ and the appointed shares have been elaborated in verses 11, 12 and 177 of the same Surah, which are being

¹³ Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.6

¹⁴ al-Quran 4: 7

reproduced for the fuller grasp of their Quranic distribution among various relatives of the propositus.¹⁵ For further elucidation a reference may be made with the advantages to the following two reports from Hadiths:

- (i) *Zaid(R.A) said: the children of son take the place of the son, when there is no son besides them; their males are like their males and their females are like females; they inherit and they preclude(other relatives) as they preclude; and the son of a son does not inherit with the son*¹⁶
- (ii) *Ibn Abbas (R.A) reported, The Prophet (PBUH) said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased".*¹⁷

4.1. Prophetic Traditions and Verdicts of the Companions

It is established from this tradition that man who is entitled to inherit personally or through a male related to the deceased is "Asbah". His share is not fixed and settled by the Quran. Son, grandson, brother, uncle and their male issues are "Asbat" whose shares are not fixed thus from amongst them whoever is closer to the deceased becomes the heir. The son compared to the grandson and the brother compared to the nephew is closer; hence the son and the brother shall exclude the grandson and the nephew.

Ibn Hajar al-ʿAsqalānī writes¹⁸, "there is unanimity of *Ummah* on the point that whatever remains after the distribution of shares of the sharers, the same shall belong to the closest Asbah. The closest Asbah shall get precedence. There after precedence shall be given to the next the closest Asbah. A remote Asbah shall not be an heir in the presence of a close Asbah. an Asbah is that

¹⁵ Al-Quran 4:14; Al-Quran 4:177; Al-Quran 4:12; al-Quran 4:11

¹⁶Abū ʿAbd Allāh Muḥammad b. Ismāʿīl al-Bukhārī *Ṣaḥīḥ, al-Bukhārī*, Laws of Inheritance (Al-Faraa'id), Chapter: The inheritance of one's grandchild, Hadith: 6735

¹⁷ Ibid, Chapter: Inheritance of the offspring from dead fathers and mothers,

¹⁸Ibn Hajar al-ʿAsqalānī, *Fatīh Al-Barī*, Chapter: Inheritance of the offspring from dead fathers and mothers, vol.12 p. 11.

male who is so related to the deceased that there is no family intervening between him and the deceased if he is alone he shall get the entire property which is left over by the sharers. "If there is no sharer the closest Asbah gets the whole." The commentator of *Ṣaḥīḥ Al-Muslim*, Imam Nawawi also writes, there is unanimity of all Muslims on the point that whatever is left after giving of (their share to) the fixed sharers belongs to the Asbah. The closest of them shall get precedence and the close next shall succeed thereafter hence the remoter Asbah shall not be the heir in presence of the closer Asbah.¹⁹ It is also clearly reported by "Zaid bin Thabit(R.A) says the grandson shall not be an heir(along) with the son".²⁰ Another well-known commentator of *Ṣaḥīḥ al-Bukhārī* Badr al-Din al-'Ayni says in whatever Zaid(R.A) has said there is no consequences on it.²¹

Rabih has reported from Atah that Abu-Bakr (R.A) says that "if the father of the deceased is not present the grandfather of the deceased shall take the place of the father of the deceased, in the same way as the grandson of the deceased, in the event of the deceased not been present is what deemed to the son of that deceased".²² It is also reported from Kharjah b. Zaid ibn Thabit(R.A) that "only those principles and meanings in respect of the science of inheritance are reliable that have been received from Zaid Bin Thabit(R.A) and only those commentaries (on such principle and meanings) are reliable that are based on the interpretations of Zaid(R.A) from Abu- Al-Zinad."²³

This last report continues to say that Zaid bin Thabit(R.A) said: "the status of the issues of the sons of the deceased son, in the absence of a son of the deceased, (himself) shall be that of the issue of the deceased. Of them the males shall be like his real male issues and female shall have the status of *Sulbi* issues. As were they (the issues of the deceased the heirs, so shall the issues of the

¹⁹ Abu Zakaria Yahya Ibn Sharaf al-Nawawī, *Sharah Ṣaḥīḥ Al-Mulim*, Book: Laws of Inheritance (Al-Faraa'id), Hadith: 1615, vol.11 p. 53.

²⁰ *Ṣaḥīḥ al-Bukhārī*, Laws of Inheritance (Al-Faraa'id), Chapter: The inheritance of one's grandchild, Hadith:6735.

²¹ Badr al-Din al-'Ayni, *Umdat al-Qari*, vol.1 p. 97.

²² Abū Bakr Aḥmad ibn Ḥusayn Ibn 'Alī al-Bayhaqī, *Al-Sunah, Al-Kubraa*, Laws of Inheritance (Al-Faraa'id), Hadith: 12281, vol.6 p. 370.

²³ Ibid. Hadith:12291, vol. 6 p. 371

deceased issue) be the heirs and as they prevented or got prevented in the matter of the inheritance so shall these (the latter) either prevent or be preventing from the inheritance. (Where the son and the grandson of the deceased, if found together, the grandson in the presence of the grandson shall not get the inheritance. If the deceased has to more daughters the granddaughter shall get nothing except where along with the granddaughters the grandson of the deceased as well be present". Mughirah (R.A) has, on his own authority reported the statements of Zaid bin Thabit (R.A) Ali (R.A) and Hadrat Abdullah bin Masood(R.A) to the effect that the issues of the issues of the deceased in case of their not being a son of the deceased shall be considered to be the issues of the deceased if someone, therefore, leaves after his death a son and a grandson, the grandson shall get no inheritance. Similarly if the deceased leaves behind him a grandson and a great grandson and so on to the lowest degrees the lower one in presence of the higher one shall get nothing as the grandson (in presence of the son gets nothing) ²⁴

Therefore, the verdicts of Abu Bakar(R.A), Zaid Bin Thabit(R.A), Ali (R.A)and Abdullah bin Masood (R.A)are clear proof of the fact the during the days of the companions of the holy Prophet (PBUH) there was a consensus that in the presence of the closer one the remoter one shall not be the heir. Not a single assertion of any of the companion can be sited gains this position.

4.2. Recommendations of Council of Islamic Ideology (CII)

Some broad principles are clearly discernable, which are following:

- (i) *Here is a clear indication of the emphases that Islam lays on the importance of the family and the protection of the interests of its members. The father, the mother, the son, the daughter, the husband or the wife, constitute the real family. They are never excluded from the scheme of inheritance via-a-vis the property of the propositus. His other relations have been relegated to the secondary position.*

²⁴Ibid

- (ii) *The brothers and sisters get their prescribed Quranic shares when the property of Kalala is to be distributed and no otherwise.*
- (iii) *The share of the male will be equal to that of two females.*
- (iv) *The nearest living male relation of the propositus excludes the more remote.*
- (v) *The children of a dead son take the place of that son only when there is no other son.*²⁵

Any discussion on all the details of the law of inheritance will not be relevant to issue under consideration and it is sufficient to indicate that during the last fourteen centuries or so the view of all the recognized Muslim sects has been against the principle included in section 4 of the ordinance. The unanimity of view is not without significance and cannot be brushed aside lightly. Any departure will upset the structure of this law and will also run counter to the expressed provisions of the Holy Quran and *Sunnah*. A few examples will bring the problem in bold relief:

- (1) The propositus leaves behind two daughters and a son's son. Section 4 interferes with the share prescribed by the Holy Quran by allowing less than $\frac{2}{3}$ share to two daughters, i.e one half, as the other half will go to the son's son.
- (2) The propositus is succeeded by 2 daughters, a son's son and a daughter from another son. Here again the daughters prescribed share is reduced by the section 4 to $\frac{1}{3}$. Further relying on the Quranic principle of for the male is the equal of the portion of females the *hanfi* law allows $\frac{1}{9}$ share to the son's daughter and $\frac{2}{9}$ to the son's son. But the section violates this principle by proportioning equal shares to both, i.e. $\frac{1}{3}$ each.
- (3) If there had been one daughter in the above case her Quranic share would be reduced by the section to $\frac{1}{5}$.
- (4) When the only surviving heirs of the propositus are a son's son and a daughter from another son, the section distributes the property between them in equal shares in

²⁵Ibid

clear violation of the injunction according to which, the share should have been $\frac{2}{3}$ and $\frac{1}{3}$ respectively.²⁶

- (5) The estate of the deceased is to be divided between daughter and daughter from another son. The operation of section 4 distributes the property by allowing the granddaughter double the share of the daughter, i.e. $\frac{2}{3}$ and $\frac{1}{3}$ respectively. The Quranic share of the daughter has been reduced here also.
- (6) If the property is to be distributed a son and a daughter of another son, both will get $\frac{1}{2}$ share each according to the provisions of section 4, the female getting a share equivalent to that of the male. The Sharia gives the whole property to the son.
- (7) On the death of a propositus his property is to be distributed between his son and the son of another son. The hadith reported by Ibn Abbas (R.A) allows the son to inherit the whole property as he is the nearest male relation but section 4 cuts in here by giving $\frac{1}{2}$ share to the son's son.²⁷

Therefore, successors of a propositus claim their shares in his estate as a matter of right and not on account of their own needs. Their financial position cannot alter the course of operation of the inheritance laws. Such being the position, the provisions of section 4 can also be instrumental in allowing a rich orphaned grandchild to deprive his poor newly-orphaned minor uncle of a large share in the property of the grandfather. The intention behind the section will thus be defeated. Further, the new enactment has introduced the principle of representation which Islamic law of succession does not recognize. If once this principle is accepted even though restricting it, for the present to a limited sphere, there will, later on, appear no justification for refusing to extend it to other orphans e.g., children of a deceased brother or sister, etc. and if it is stretched to its logical conclusion it will undo the *shari*^c laws, built so cautiously and painstakingly since the advent of Islam.

²⁶Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.8,9

²⁷Ibid

Again, Islam does not recognize any category of presumptive heirs because succession opens on the death of the propositus and his property by birth and, therefore, he transmits no interest to his children on his death. This theory, therefore, unsupported as it is by injunction of the Holy Quran or *Sunnah*, evidently appears unsustainable. There is no compulsion in Islam with regard to making wills; nobody can be forced to make a will in favor of his grand-children. Further, the Holy Qur'an gives every person the right to make a will for benevolent purposes up to the extent of 1/3rd of his property. Another solution lies in making some provision for the maintenance of needy orphaned grandchildren through some other legally enforceable channel. Islam places this responsibility on the shoulders of the parental uncles who inherit their share in the property to the exclusion of such needy orphans and it is, therefore, their duty to maintain them. The majority view of the council favors the solution of making them. The majority view of the council favors the solution of making the successors of the propositus responsible for the maintenance of such orphans according to the dictates of sharia and feels that provisions of section 4 are not in accordance with the teachings and requirements of the Holy Quran and Sunnah (two members have dissented by maintaining that such orphans are heirs).²⁸

5. Section 5: Registration of Marriages

This section deals with the procedure for the registration of marriages, appointed of *nikah* registrars, and punishments for contravention of the prescribed provisions. It is reproduced as under:

- (1) *“Every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this ordinance.*
- (2) *For the purpose of registration of marriages under this ordinance, the union council shall grant licenses to one or more persons, to be called Nikah registrars, but in no case*

²⁸Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.8,9

- shall more than one Nikah registrars be licensed for one ward.*
- (3) *Every marriage not solemnized by the Nikah registrar shall, for the purpose of registration under this ordinance, be reported to him by the person who has solemnized such marriage.*
- (4) *Whoever contravenes the provisions of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.*
- (5) *The form of Nikahnama, the registrars to be maintained by Nikah registrars, the records to be preserved by the union councils, the manner in which marriages shall be registered and copies of Nikahnama shall be supplied to the parties, and the fees to be charged therefore, shall be such as may be prescribed.*
- (6) *Any person may, on the payment of the prescribed fee, if any, inspect at the office of the union council the record preserved under section (5), or obtain a copy of any entry therein.”²⁹*

5.1. Recommendations of Council of Islamic Ideology (CII)

The council considers that the matters incorporated in this section are of an administrative nature and do not clash with the Sharia. As regards the compulsory registration of *Nikah* it has some very definite advantages. With regard to the appointment of *Nikah* registrars some members were of the view that it would be advisable to give power of their appointment to the government, instead of the union councils, who could appoint them after careful scrutiny. But the point has not been expressed as it lies purely within the administrative discretion of the government. Moreover, it is not obligatory on the *Nikah* registrar to solemnize each and every marriage. Anybody can do so and the only obligation involved is to get such marriage registered. Maulana Vilayat Hussain while abstaining from giving his final opinion desires that the following words may be recorded.

²⁹Ibid, P.11

As regards punishments prescribed in the sub-section 4 the council is not expressing any opinion implying thereby that it has no objection. However, it desires to draw the attention of the government to the punishment in this section to every person who solemnizes a marriage in contravention of the provisions of section 5(3). It is more severe than that provided for the registrar (who is expected to know the relevant rules and regulations) in rule 7(4), enacted under section 11, for contravention of any of the provisions of the ordinance.³⁰

There has been no voice of dissent about these conclusions.

6. Section 6: Polygamy

This section is reproduced below:

- (1) *“No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the ordinance.*
- (2) *An application for the permission under the sub-section(1) shall be submitted to the chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.*
- (3) *On the receipt of the application under sub-section (2) the chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the arbitration council so constituted may, if satisfied that to proposed marriage is necessary and just, grant, subject to such conditions,, if any, as may be deemed fit, the permission applied for.*
- (4) *In deciding the application the arbitration council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of west Pakistan, to the collector and,*

³⁰ Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.11

in the case of east Pakistan, to the sub-divisional officer concerned and his decision shall be final and shall not be called in question in any court.

- (5) *Any man who contracts another marriage without the permission of the arbitration council shall-*
- (a) *Pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and*
- (b) *On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.*³¹

The relevant verses of the Holy Quran which explain the purpose of marriage and the circumstances under which one or more than one wife is to be taken in wedlock are self-revealing.³² A cursory glance at verses 4:3 and 4:129 above may lead to an erroneous impression that they are contradictory. A brief explanation is, therefore necessary at this stage. Verse 4:3 permits a polygamous marriage on the condition that justice is intended to be done and verse 4:129 merely explains that although the husband is not expected to distribute his love and affection between all his wives with equal fervor and ardor, as this is impossible in performance, yet he is also not allowed to absolutely ignore the interest of any spouse. It follows that justice means equal treatment of wives on the moral, physical and material levels.

6.1. Recommendations of Council of Islamic Ideology (CII)

Keeping the above teachings in view and prevalent misuse, in this country of the Islamic permission of polygamy, the council is of the unanimous opinion that unrestricted freedom of taking more than one wife may be suitably curtailed. Differences arose as the authority which may be considered fit for the purpose of deciding the capacity of the intending husband to do justice. They have been considerably narrowed down after intensive and careful deliberations. Two views have crystalized. The first makes

³¹ Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.13

³² Al-Quran 24:33; Al-Quran 4:3; Al-Quran 4:129

the man the sole judge of his own ability of meeting the ends of justice, and allows him to act freely according to his own judgment, but nevertheless permits the state to prescribe punishments in case he ill-treats any of his wives after the polygamous marriage. The second upholds the right state to prescribe some other agency for the purpose, in order to ascertain, before the intended marriage, all facts, including the man's capability of doing justice. The mischief, if any, can thus be nipped in the bud.³³

The first view is supported by Maulana Vilayat Hussain, although the solutions offered by them are different. Mr. Akhtar Hussain, H. Pk., advisor is also in the favor of its amended form which can be expressed more or less as follows:

*"Section 6-If a man, during the subsistence of an existing marriage, desires to contract another marriage, he shall submit an application for permission for such marriage to the arbitration council in the prescribed manner together with the prescribed fee, and shall state the reasons for the proposed marriage. The application shall be accompanied by the declaration, that he is competent to do justice to all the wives and their children, if any."*³⁴

The Council is of the unanimous opinion that unrestricted freedom of tasking more than one wife may be suitably curtailed. The members of the Council, however, differ as to who should decide the capacity of the intending husband to do justice. One view is that the man is the sole judge in this regard, whereas the other upholds the rights of the State to prescribe some agency for the purpose. Nevertheless, the members who hold the second view have proposed the following changes in the original section:

- (1) *The negative form of the opening part of the section should be changed into positive form.*
- (2) *The provision of permission of the first wife has been deleted.*

³³Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983, p.14

³⁴Ibid

- (3) *The applicant for a second marriage should also submit a declaration to the effect that he is competent to do justice to all the wives and children.*
- (4) *Criminal proceedings should be initiated only on the complaint of any of the aggrieved wives.³⁵*

7. Section 7: Divorce

This section is reproduced as below:

- (1) *“Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of divorce in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to his wife.*
- (2) *Whoever contravenes the provisions of the sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.*
- (3) *Save as provided in sub-section(5), divorce unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of the 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 the 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 divorce is pronounced, divorce shall not be effective until the period mentioned in sub-section(3) or the pregnancy, whichever be later, ends.*
- (6) *Nothing shall debar a wife whose marriage has been terminated by divorce effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective”.*³⁶

³⁵Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983,p.19

³⁶Tenth Report By Council of Islamic Ideology on Islamization of Muslim Family Law, April 1983,p. 20

As will be noticed the section deals with the procedure for determining the time when the divorce is to become effective and prescribes a form for initiating reconciliation efforts between the estranged husband and wife. Every man is compelled to inform the Chairman, in writing of the fat that he has pronounced divorce, failing which he is liable to the punishments mentioned in sub-section(2). It recognizes only one form of divorce.

7.1. *Sharī'ah* Injunctions about Divorce

The multiple verses of the Holy Qur'an and the relevant *ahadith* relating to divorce, *Iddat* and reconciliation are being quoted before discussing the provisions of the section.³⁷ Along the Quranic verses the following relevant *Ahadith* have been discussed:

- (i) *Ibn Omar reported that the Apostle of Allah said: The most detestable of lawful thing near Allah is divorce.*³⁸
- (ii) *Rokanah b' Abu Y-azid(R.A) reported that he gave his wife Sohaimah and irrevocable divorce, and he conveyed it to the Messenger of Allah and said: By Allah, I have not intended but one (divorce). Then the Messenger of Allah asked: have you not intended but one (divorce)? Rokanah (R.A) said: By Allah, I did not intend but one (divorce). The Messenger of Allah the returned her back to him. Afterwards he divorced her for the second time at the time of Omar and the third time at time of Osman (R.A).*³⁹
- (iii) *Abdullah-b-Omar (R.A), reported that he divorced his wife while she was under menstruation Omar mentioned it to the Prophet (PBUH). The Prophet (PBUH) became enraged at it and said: Take her back and keep her, till she becomes pure, and then menstruates and then becomes pure. If it appears to him to divorce her*

³⁷Al-Qur'an 4: 35; Al-Qur'an 2:299;Al-Qur'an 2:231;Al-Qur'an 65:1;Al-Qur'an 65:2;Al-Qur'an 2:236;Al-Qur'an 33:49;Al -Qur'an 2:228;Al-Qur'an 2:226 and 227;Al-Qur'an 65:4;Al-Qur'an 65:4;Al-Qur'an 2:234; Al-Qur'an 2:230

³⁸Abū 'Abdillāh Muḥammad ibn Yazīd Ibn Mājāh al-Rab'ī al-Qazwīnī, *Sunan Ibn Mājāh*, The Chapters on Divorce, Hadith:2018

³⁹Ibid, Hadith:2051

*afterwards, let him divorce her while she is pure before he touches her. This is the period of waiting which Allah enjoins for the divorce of women.*⁴⁰

- (iv) *Mahmud b'Labeed(R.A)reported that the messenger of Allah (PBUH)was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said: are you playing with the Book of the Almighty and Glorious Allah while I am (still) amongst you? So much so that a man got up and said: Shall I not kill him?*⁴¹

The rules quoted above give the inevitable impression that current law needs drastic changes for bringing it in conformity with the Islamic provisions. Although it has been enacted with the intention of restraining the husband from pronouncing *divorce* in an arbitrary manner, and this intention accords with the injunctions of the Holy Qur'an and *Sunnah*, yet the solution offered militates against such injunctions.

7.2. Recommendations of Council of Islamic Ideology (CII)

The general view of the Council has, therefore, been to evolve a procedure by which the husband is not given a free and unfettered hand in this matter and the principles of *Sharia* are also not violated. Sub-section (1) read with subsection (4) envisages conciliatory proceedings after the pronouncement of divorce whereas verse 4:35, already cited above, declares that they should precede such a pronouncement. This, naturally, is the proper time for patching up differences between the parties because none of them has by then taken an unequivocal stand. The task becomes more difficult, if not impossible, when actual pronouncement of divorce has already hardened feelings of estrangement, and wounded pride has prepared the ground for a show-down. It has, in these circumstances, been decided to recommend that the man should give a notice to Chairman of his intention to pronounce divorce.

⁴⁰*Ṣaḥīḥ al-Bukhārī*, Book of Divorce, Chapter: "O Prophet! When you divorce women, divorce them at their 'Idda and count their 'Idda.", Hadith:5251

⁴¹*Abū `Abdar-Raḥmān Aḥmad ibn Shu`ayb al-Nasā'ī*, *Sunan al-Nasā'ī*, The Book of Divorce, Chapter: It Is Up To You, Hadith:3410

It has been further noticed that sub-section (4) provides for the setting up of an Arbitration Council for the purpose of bringing about a reconciliation between the husband and the wife and that according to the Rules made under the ordinance all decisions of the Arbitration council shall be taken by majority, and where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration council. The Advisory Council is of the view that proceedings under the section should be for reconciliation only, and not for Arbitration where some decision has to be taken. The words "Arbitration Council" may, therefore, be replaced by "Reconciliation Council" which will be competent to only declare whether reconciliation has succeeded or failed. In the case of a failure the husband will be at liberty to take whatever action he likes.

In the beginning free and frank discussions were inevitable in the context of the provisions of this section on such controversial subjects as **Talaq-e-Bida** (if someone gave three talaqs in single meeting against sunnah then also all the three talaqs shall take place, but the person who gave talaq shall be sinful due to his non-sunnah practice), i.e; *Ḥalāla* and the time when the period of Iddat [waiting period] starts and ends. But in view of the final proposals mentioned above, their recapitulation now will be merely of an academic interest. Sub-section (3), (5) and (6) have become automatically redundant. These subjects, in relation to different Muslims sects, may be allowed to be governed by their own interpretations of the *sharīc* principles.

The above decision necessitates a change in the punitive part of the section as well. The person intending to divorce his wife must not take any further step, in connection with divorce, after giving notice to the Chairman of his intention of pronouncing divorce, and before the conclusion of the reconciliation proceedings, if he does so he must be punished. The pronouncement of divorce before giving the required notice about his intention must also be made punishable. With these ends in view, the following decision has been taken unanimously.

8. Conclusion

To conclude, Islamization of laws in Pakistan has been severally explained as revival of Islam, as implementation of the vision of Pakistan formulated as Objective Resolution in 1949 passed by the Constituent Assembly soon after its independence in 1949. It is justified as requirement of Sovereignty of God and Supremacy of Sharia as principles of Islamic State. It is also described as Policy of the state in 1973 Constitution and along this, Council of Islamic Ideology had also formulated and the basic objectives of this council are particularly that, all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and *Sunnah*. Therefore, Muslim family laws ordinance was taken up for the first time for consideration of the council in its session held on the 17th February, 1965 at Rawalpindi under the chairmanship of Alaudin Siddiqi as council chairman. When Ministry of Religious Affairs has informed the council of Islamic ideology from the following views of Ministry of Law through their letter No 17 (1)/ ADJ/79 dated 27-01-1980, that Muslim Family Laws Ordinance 1961 is utterly un-Islamic and is against the Holy Qur'an and *Sunnah*. It has dared to amend the Qur'anic law to the extent of *Irtidād* and its existence is a slur, a blot, a bad blot on the glorious name of Islam and our Islamic country. Such legislation or even its name need not be protected. Let us clean the blot altogether by its total repeal." Then the council took up this ordinance for consideration in its various sessions held during the year 1965-66 under the chairmanship of Alaudin Siddiqi as council chairman. This Council had critically analyzed the every article of Muslim family law 1961 in the light of Quran and *Sunnah*. The council completed its three readings up to March, 1967 and final recommendations were formulated in council's session held. The above recommendations for amendments in the ordinance were finally approved by the Council in its session held at Dacca on 28th November, 1967 and were submitted to Government in the following month.