

## ‘Ulamā’ and the Muslim Family Laws in Pakistan

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### Abstract

Fatvā writing is an important discipline of Islamic sciences. The scope of fatvā writing, especially in modern times, is vast, which may have multi-dimensional impact on the state and society. Since the muftīs believe that they are performing religious duties through fatvā writing, their fatāvā are deemed, to some extent, establishing a parallel or rather alternate legal system in their respective societies. An overwhelming number of Pakistanis follow the ‘ulamā’ and muftīs of their respective schools of thought in their social, moral, and legal matters. Majority of the ‘ulamā’ and muftīs are of the view that many provisions of Pakistan’s penal code and family laws are not in line with the sharī‘ah. The Muslim Family Laws Ordinance, 1961 (MFLO) is still under debate among the ‘ulamā’ and muftīs. The same is the case with the Protection of Women (Criminal Laws Amendment) Bill, 2006. This paper starts with an overview of the historical development of the family laws in many Muslim countries, especially in Pakistan. Then it turns to the responses of the Pakistani ‘ulamā’ and muftīs to the MFLO. The paper also studies a publicized court case and discusses the practical defiance of the ordinance. It ends with the conclusion.

### Keywords

Muslim family laws, MFLO, Pakistan, Ayub Khan, fatāvā, ‘ulamā’.

### Introduction

The ‘ulamā’ and muftīs, on the authority of the Qur’ān,<sup>1</sup> believe that the preferable Muslim family structure is patriarchal in nature and that the family laws are central to the smooth functioning of the family and social living. For them, only Allah, being the Creator, *inter alia*, has the authority to legislate the laws about family life and the Qur’ān and *aḥādīth* have given detailed rules and regulations about family matters. They also hold that the *sharī‘ah* laws including family laws, as envisaged

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<sup>1</sup> Qur’ān 4:34.

in the Qur'ān and *aḥādīth*, have divine sanctity. Therefore, no one has executive power and authority to amend or reform them. The acceptance and practice of traditional family laws are deep-rooted in Muslim societies. However, with the beginning of the nineteenth century and mainly due to the Western colonization of Muslim lands, these laws came under discussion by the modernists and the governments all over the Muslim world. The main emphasis during this discussion was on the rights of women in matters relating to marriage and divorce. As a result, the reforms were carried out either by abolishing the Islamic personal law and adapting Western laws wholesale or by reengineering the Islamic personal law itself.<sup>2</sup>

This paper starts with a general historical account of the development and transformation of family laws in some Muslim countries. It then surveys in details the adoption and adaptation of family laws in Pakistan since August 1947. The attitude and response of the '*ulamā*' and *muftīs*, associated mainly with the *Ḥanafī* school of law, have also been discussed through content analysis of the *fatāvā* literature and public statements of the Pakistani '*ulamā*' and *muftīs* issued regarding these reforms. The '*ulamā*' and *muftīs* associated with some religio-political parties also expressed their views in and outside the legislatures of Pakistan, which also came under discussion. The paper also examines a famous court case related to the Muslim family laws (MFLs). The main argument of this paper is that though the '*ulamā*' were successful to get their desired decisions approved by the sitting governments on several occasions,<sup>3</sup> they failed to get the Muslim Family Laws Ordinance, 1961 (MFLO) null and void, which adversely affected their religio-political and social role. This argument has been elaborated in the last section.

The founder of Modern Turkey, Mustafa Kemal Pasha (1881–1938), after abolishing the centuries-old caliphate in March 1924, reorganized the entire legal system of Modern Turkey and repealed the existing MFLs that were based on the *Ḥanafī* school of law. On September 11, 1924, a commission of the twenty-six lawyers was constituted to work on

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<sup>2</sup> For details, see Muhammad Rashid Feroze, "The Reform in Family Laws in the Muslim World," *Islamic Studies* 1, no. 1 (1962): 107–30; S. Ali Raza Naqvi, "Modern Reforms in Muslim Family Laws - A General Study," *Islamic Studies* 13, no. 4 (1974): 235–52; Fazlur Rahman, "The Controversy over the Muslim Family Laws" in *South Asian Politics and Religion*, ed. Donald Eugene Smith (Princeton: Princeton University Press, 1966), 414–27; Fazlur Rahman, "A Survey of Modernization of Muslim Family Law," *International Journal of Middle East Studies* 11, no. 4 (1980): 451–65.

<sup>3</sup> The most important example is the inclusions of some Islamic provisions in the 1956 and 1973 Constitutions of Pakistan.

adapting the Swiss Civil Code as per Modern Turkish needs. The completed code entered into force on October 4, 1926. By this, polygamy was outlawed and marriage partners were given equal rights to divorce. Moreover, the marriage of a Muslim woman to a non-Muslim man became legal.<sup>4</sup> The Egyptian governments codified and reformed the Personal Status Laws in 1915, 1920, 1923,<sup>5</sup> 1929, 1935, 1960,<sup>6</sup> 1976, June 1979, May 1985,<sup>7</sup> and 2000. The Syrian Law of Personal Status of 1953 made some changes to the existing family laws in order to restrict polygamy and limit the age for bride and bridegroom.<sup>8</sup> The new Code of Personal Status for Tunisian Muslims, promulgated by a decree in August 1956, introduced significant changes to the Muslim Personal Law, particularly abolishing polygamy, declaring it criminal infraction, and allowing the courts of law to intervene in divorce cases.<sup>9</sup> The Article 21 of the Tunisian Amendment Law of 1964 declared bigamous marriage as invalid.<sup>10</sup> In November 1959, Algerian Family Code was promulgated which brought some changes in the marriage and divorce laws.<sup>11</sup> The Tunisian Law of Personal Status inspired the Yemeni jurists to adopt

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<sup>4</sup> Bernard Lewis, *The Emergence of Modern Turkey* (London: Oxford University Press, 1961), 267; Muhammad Rashid Feroze, "Family Laws of the Turkish Republic," *Islamic Studies* 1, no. 2 (1962): 131–32. The newly adopted Turkish family laws, which allowed polygamy with certain conditions, were strongly criticized by the 'ulamā' and many intellectuals representing different segments of society. The old ways of family laws remained in practice in countless villages. For more details, see Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 425–26, 498; Deniz Kandiyoti, "End of Empire: Islam, Nationalism and Women in Turkey" in *Women, Islam and the State*, ed. Deniz Kandiyoti (London: Macmillan, 1991), 22–47; *The Reforms of Atatürk* (Istanbul: İstanbul Matbaası, n.d.), 7–42.

<sup>5</sup> In 1923, the Egyptian Parliament fixed minimum marriage-age for women at sixteen and men at eighteen. Jonathan A. C. Brown, "Reaching into the Obscure Past: The Islamic Legal Heritage and Reform in the Modern Period" in *Reclaiming Islamic Tradition: Modern Interpretations of the Classical Heritage*, ed. Elisabeth Kendall and Ahmad Khan (Edinburgh: Edinburgh University Press, 2016), 111.

<sup>6</sup> In 1960, some restrictions were imposed on polygamy. Mumin Choudhury, "Development of Family Laws in Selected Muslim Countries and Pakistan: A Historical Survey" in *Modernization of an Agrarian Society—A Sociological Study of the Muslim Family Laws Ordinance and the Conciliation Courts in East Pakistan*, ed. S. A. Qadir (Dacca: National Institute of Local Government, 1981), 141.

<sup>7</sup> Dawoud Sudqi El Alami, *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992), 5–6.

<sup>8</sup> John L. Esposito, "Modern Muslim Family Law Reform," *Scrutiny* 4, no. 3 (1978): 31. It was further amended in 1975.

<sup>9</sup> Feroze, "Reform in Family Laws in The Muslim World," 123–26.

<sup>10</sup> Tanzil-Ur-Rahman, *Islamization of Pakistan Law* (Karachi: Hamdard Academy, 1978), 81.

<sup>11</sup> Jules Roussier, "Al-Jazā'ir main Shādī aur Ṭalāq kē Qavānīn," trans. Muḥammad Navāz, *Fikr-o Nazar* 18, no. 4 (1980): 49–55. It was further amended in 1984.

their own family laws in 1974, allowing polygamy and divorce with some conditions and fixing the age for marriage.<sup>12</sup> Morocco, after getting independence from France in April 1956, established a commission in August 1957 to reform its existing MFLs in order to have “unity and clarity.”<sup>13</sup> In 1998, a programme was launched to revisit the *Mudawwanat al-Aḥwāl al-Shakḥsiyyah* and subsequently in February 2004, the Moroccan Parliament ratified its reformed version. Indonesia also reformed its existing family laws in January 1974. After 1991 with the new Compilation of Islamic Law in the country, polygamy remained legal under some conditions and inter-faith marriages continued to be banned.<sup>14</sup> The Iraqi Code of Personal Status of 1959 and its amendment in 1963 also made some changes in the family laws in order to restrict the polygamous union in Iraq.<sup>15</sup> The Jordanian Law of Family Rights, 1951 also put some restrictions on the second marriage.<sup>16</sup> In Iran, a Civil Code, primarily based on the *Shīʿah Ithnā ‘Asharī* laws was adopted in 1928, which was supplemented by some amendments in 1931, 1937, December 1938, and 1940. In June 1967, through the “Family Protection Act of Iran,” some major reforms were introduced in its Civil Code “in order to bring the Iranian family laws up to date” in the light of the conditions and needs of its emerging modern society. The act imposed certain restrictions on the right of the husband to divorce and restricted polygamy, but did not prohibit it.<sup>17</sup> This act was expanded in 1975. However, soon after the February 1979 Revolution, it was annulled and replaced by the *Shīʿah Ithnā ‘Asharī* laws. The Libyan Marriage and

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<sup>12</sup> Maxine Molyneux, “The Law, the State and Socialist Policies with Regard to Women: The Case of the People’s Democratic Republic of Yemen 1967–1990” in *Women, Islam and the State*, ed. Deniz Kandiyoti (London: Macmillan, 1991), 255, 258–60. They were again amended in 1992.

<sup>13</sup> El Alami, *Marriage Contract in Islamic Law*, 7.

<sup>14</sup> Hallaq, *Sharīʿah*, 496–97.

<sup>15</sup> Esposito, “Modern Muslim Family Law Reform,” 32. “The Personal Status (Amendment) Law, 1963” modified some articles of the Iraqi Code of Personal Status of 1959, under the public pressure. Tanzil-Ur-Rahman, *Islamization of Pakistan Law*, 81. Also see Tanzil-Ur-Rahman, *A Code of Muslim Personal Law*, vol. 1 (Karachi: Hamdard Academy, 1978).

<sup>16</sup> Muhammad Tahir Mansoori, *Family Law in Islam: Theory and Application* (Islamabad: Shari’ah Academy, 2012), 240.

<sup>17</sup> Sayyid Ali Reza Naqvi, *Family Laws of Iran* (Islamabad: Islamic Research Institute, 1971), 2–4, 8–13. For details, see Ali Raza Naqvi, “The Family Protection Act of Iran,” *Islamic Studies* 6, no. 3 (1967): 241–65. The Iranian Family Law explicitly recognized a temporary marriage as legal. ‘Alī Razā Naqvī, “The Family Laws of Iran (II),” *Islamic Studies* 7, no. 2 (1968): 133.

Divorce Act of 1972 also modified its existing family laws.<sup>18</sup> Islamic Family Law (Federal Territories) Act of 1984 was an attempt to reform and create uniform Islamic family law statutes in Malaysia<sup>19</sup> and several amendments were made to them between 1992 and 2005 for that purpose. After the separation of East Pakistan in December 1971, Bangladesh enacted the Muslim Marriages and Divorces (Registration) Act, 1974<sup>20</sup> to amend some sections of the MFLO. Moreover, family courts were established through an ordinance in 1985. The Bangladeshi courts treated *nikāḥ* just as a contract and decided many cases of maintenance, dower, and dissolution of marriages under the Contract Act of 1872.<sup>21</sup> Among the Central-Asian Muslim countries, Tajikistan prohibited polygamy in 2011.<sup>22</sup>

After having an overview of the reforms made in the family laws of several Muslim countries, one may argue that under the strong sway of these phenomena, the governments in Pakistan also followed the same practice of reforming and codifying these laws.

### Muslim Personal Laws in British India

During the British rule in India (1858-1947), the British generally did not interfere in the Muslim personal laws. However, for their colonial and commercial interests and for the “social uplift” of society, they tried to reform the existing personal laws of the local people, particularly

<sup>18</sup> Alamgir Muhammad Serajuddin, “Muslim Family Law and the Legal Rights of Muslim Women in South Asia,” *Journal of the Asiatic Society Bangladesh (Humanities)* 32, no. 2 (1987): 147.

<sup>19</sup> Nik Noriani Nik Badli Shah, “Legislative Provisions and Judicial Mechanisms for the Enforcement And Termination of the Islamic Marriage Contract in Malaysia,” in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel, (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2008), 184.

<sup>20</sup> This act was mainly a reformed version of the Bengal Muhammedan (Marriages and Divorces) Registration Act, 1876.

<sup>21</sup> Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Karachi: Oxford University Press, 2011), 188–89; Anisur Rahman, “Development of Muslim Family Law in Bangladesh: Empowerment or Streamlining of Women?” *Journal of the Asiatic Society of Bangladesh (Humanities)* 53, no. 2 (2008): 265–66. It is important to note that in January 2001, the High Court Division of the Supreme Court of Bangladesh, in a case related to the family laws, ruled that all *fatāvā* are unauthorized and illegal as the legal system of the country empowers only the courts to decide on all legal questions. It also suggested teaching of the MFLO in the *madāris*. *Communalism Combat* (Mumbai), January 2001, 25–26.

<sup>22</sup> H. O. Hushkadamova, “Tajikistan: Influence of Transformation Processes on Family and Marriage Relations in Central Asia,” *Russia And The Moslem World* no. 8 (2014): 51.

Muslims and Hindus.<sup>23</sup> As the British replaced these laws with legal texts by means of the parallel process of translation, legislation, and adjudication throughout the nineteenth century, they increasingly marginalized the participation of the ‘*ulamā*’ and *muftīs* in the judicial administration of the religion-based laws.<sup>24</sup>

The first step towards “reform” in the MFLs in British India was taken in September 1929, when the Council of State (India) adopted the Sarda Bill. This private Bill was presented in the Central Legislative Assembly of India by Har Bilas Sarda (1867–1955) in order to reform the Hindu Code of Marriages. The British expanded the jurisdiction of the Bill and through this, tried to make inroads into the Muslim personal laws. The Indian Muslims strongly resisted this move and forced the British to exclude them from the domain of the Sarda Act.<sup>25</sup> The other most important British decision was the enactments of the “The Muslim Personal Law (Shariat) Application Act, 1937” and that of the “The Dissolution of Muslim Marriages Act, 1939” (VIII OF 1939).<sup>26</sup> These acts were also strongly criticized for disregarding some important provisions of the *Ḥanafī* school of law in order to maintain the customary laws.<sup>27</sup>

### The Muslim Personal Laws in Pakistan

After the establishment of Pakistan in August 1947, the first step taken for legal reforms was the enactment of “The West Pakistan Muslim Personal Law (Shariat) Application Act, 1948,”<sup>28</sup> followed by “The Muslim

<sup>23</sup> For instance, the 1860s and 1870s witnessed the abolition of the Islamic laws of procedure, criminal law, and evidence, which were gradually replaced by the British laws enacted by statute. Hallaq, *Sharīʿa*, 378, 383.

<sup>24</sup> Ibid., 372–77; Alan M. Guenther, “A Colonial Court Defines a Muslim” in *Islam in South Asia in Practice*, ed. Barbara D. Metcalf (Princeton: Princeton University Press, 2009), 293–94.

<sup>25</sup> Mujeeb Ahmad, “Sārdā Bil aur Qānūn-i Insidād-i Shādī-i Bachchagān: Musalmānān-i Hind kā Radd-i ‘Amal: Aik Jā’izah,” *Fikr-o Naẓar* 37, no. 2 (1999): 102–27. For details, see Sulṭān Maḥmūd, *Sārdā Bil aur Islām* (Delhi: Jayyid Barqī Press, n.d.); Muḥammad Ḥabīb Allāh, *Islām aur Sārdā Bil par Muḥaqiqānah Naẓar* (Delhi: Maṭba‘-i Mujtabāī Jadīd, 1929); Muḥammad Yūsuf, *Madhhab-i Islām aur Ṣighir-i Sinnī kī Shādī* (Aligarh: Akhtar Printing Works, n.d.); and Muḥammad Ibrāhīm, *Falāḥ al-‘Asīr fī Nikāḥ al-Ṣaghīr* (Banaras: Maṭba‘-i Nūrānī, 1929). This act is also known as “The Child Marriage Restraint Act, 1929” (XIX OF 1929). For the text of the act see Tanzil-Ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Islamic Publishers, 1980), 2:642–44.

<sup>26</sup> For the text of the act, see Tanzil-Ur-Rahman, *Code of Muslim Personal Law*, 2:645–47.

<sup>27</sup> Mujeeb Ahmad, *Janūbī Aishiyā kē Urdū Majmū‘ah-hā’ē Fatāvā (Unnīsivīḥ aur Bīsivīḥ Ṣadī ‘Īsivī)* (Islamabad: National Book Foundation, 2011), 37–38.

<sup>28</sup> For a critique of the act, see Malik Muḥammad Akbar Khān Sāqī, ed., *Mujāhid-i Millat Maulānā ‘Abd al-Sattār Khān Niyāzī kī Panjāb Asambli main Pānch Tārīkhī Taqrīrian* (Gujrat: Maktabah-i Raḍwīyyah, 1977), 37–61.

Personal Law (Shariat) Application (Sind Amendment) Act, 1950” passed in May 1950 and “The NWFP Muslim Personal Law (Shariat) Application (Amendment) Bill” passed in November 1952. Through these acts, some amendments were made to the “The Muslim Personal Law (Shariat) Application Act, 1937.”<sup>29</sup> General Mohammad Ayub Khan (1907–1974) faced bitter criticism from the Pakistani ‘*ulamā*’, regarding his efforts for social change and modernization of family laws in Pakistan. The then Law Minister Muhammad Ibrahim (1894–1966) announced the issuance of the MFLO on March 2, 1961.<sup>30</sup> The Ordinance, *inter alia*, imposed restrictions on polygamy, divorce, and minor marriages, made the registration of marriages and divorces compulsory, and granted the children of a predeceased son or daughter the right of inheritance to their grandfather. Although, it was observed that this ordinance was “the most progressive interpretation of Muslims’ family law to be implemented in the subcontinent,”<sup>31</sup> and that most of its provisions were not enforced rigorously,<sup>32</sup> but it was strongly criticized by the ‘*ulamā*’ of all schools of thought.

The said ordinance was, in fact, based on the recommendations of the report of the seven-member Commission on Marriage and Family Laws, constituted in August 1955, under the presidentship of Dr Khalifa Shuja-ud-Din (1887–1955)<sup>33</sup> to examine the existing laws of marriage, divorce, and family maintenance. A questionnaire was circulated to get

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<sup>29</sup> Rashida Patel, *Women and Law in Pakistan* (Karachi: Faiza Publishers, 1979), 10–11. In December 1962, “The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962” was enacted to consolidate and amend the provisions for the application of, *inter alia*, “The Muslim Personal Law (Shariat) Application Act, 1937”; “The West Pakistan Muslim Personal Law (Shariat) Application Act, 1948”; “The Muslim Personal Law (Shariat) Application (Sind Amendment) Act, 1950”; “The NWFP Muslim Personal Law (Shariat) Application Act, 1935” and “The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951.” For the text of the act, see Tanzil-Ur-Rahman, *Code of Muslim Personal Law*, 2:665–66.

<sup>30</sup> Due to some technical problems, the Ordinance came effective not before the third week of July as the rules under the MFLO for the defunct West Pakistan were made on July 20, 1961. Also see Tanzil-Ur-Rahman, *Code of Muslim Personal Law*, 2:654–64.

<sup>31</sup> Rachel Rosenbloom, “Islam, Feminism and the Law in Pakistan under Zia” in *Islam & Democracy in Pakistan*, ed. Muhammad Aslam Syed (Islamabad: National Institute of Historical and Cultural Research, 1995), 249. However, there was nothing “particularly exciting” about these reform measures for a Westerner. Freeland Abbott, “Pakistan’s New Marriage Law: A Reflection of Qur’anic Interpretation,” *Asian Survey* 1, no. 11 (1962): 26.

<sup>32</sup> M. Rafique Afzal, *Political Parties in Pakistan: 1958–1969* (Islamabad: National Institute of Historical and Cultural Research, 1987), 2:9.

<sup>33</sup> After the death of Dr Khalifa on October 8, 1955, Sir Mian Abdul Rashid (1888–1981) former Chief Justice of Pakistan was appointed as the president.

the public opinion regarding the family laws.<sup>34</sup> The commission published its report in June 1956, with a claim that its recommendations are “in complete conformity with the principles of Islam as enunciated in the Holy *Qur’an* and the *Sunnah*.”<sup>35</sup> Maulānā Iḥtishām al-Ḥaqq Thānavī (1914–1980) was the only ‘*ālim*’ who, as a member of the commission, wrote a detailed note of dissent in Urdu, which was published separately in August 1956 along with its English translation.<sup>36</sup> Maulānā Iḥtishām al-Ḥaqq, who was included in the commission as an “advisor” on matters of the *sharīah*, in his note of dissent, questioned the credentials of other six members of the commission and alleged that all of them were unanimous in contravening the *Qur’ān*, the *sunnah*, and *fiqh-i Islāmī* (*fiqh-i Ḥanafī*) while drafting the report. He vehemently opposed the restriction imposed on polygamy, fixing age limit for *nikāh*, administering divorce through courts, and giving the grandson or granddaughter the right of inheritance to the grandfather and vowed that these recommendations were direct interference in the *dīn*. Like other ‘*ulamā*’, he condemned the report’s preface written by Dr Khalifa Abdul Hakim (1895–1959), the member-secretary.<sup>37</sup>

The commission’s report remained lying dormant until March 1961 due to the countrywide passive protest of the ‘*ulamā*’ and their confrontation with the supporters of the report.<sup>38</sup> Different women’s

<sup>34</sup> For the replies of different religious schools of thought to the questionnaire, see Abū ‘l-A‘lā Maudūdī, *Tafhīmāt* (Lahore: Islamic Publications Limited, 1980), 3:191–215; *Ṭulū‘-i Islām* (Karachi), March 1956, 11–23.

<sup>35</sup> *The Gazette of Pakistan, Extraordinary*, Karachi, June 20, 1956.

<sup>36</sup> However, when this note of dissent was published, “interest in the matter had long passed its peak.” Abbott, “Pakistan’s New Marriage Law,” 29.

<sup>37</sup> *The Gazette of Pakistan, Extraordinary*, Karachi, August 30, 1956, 1505–30, 1540–58. This note of dissent was endorsed by the *Majlis-i ‘Āmilah* of the JUI. Mukhtār Aḥmad al-Ḥusainī, ed., *Tadhkirah-i Jam‘iyyat-i ‘Ulamā‘-i Islām Pākistān* (Lahore: Maktabah-i Ta‘mīr-i Ḥyāt, n.d.), 29. Maulānā Muḥammad Ḥanīf Nadvī (1908–1987), a scholar affiliated with the Institute of Islamic Culture, Lahore (1950) and an *Ahl-i Ḥadīth* by doctrinal orientation, severely condemned the contents of the note and fully supported the commission’s report. Muḥammad Ṭāhir, *‘Ā‘ilī Qavānīn aur Pākistānī Siyāsāt* (Lahore: Jang Publishers, 1999), 81.

<sup>38</sup> Tanzil-ur-Rehman, “Family Laws Ordinance and the Constitution,” *The All Pakistan Legal Decisions* 41 (1989): 21; *Mufaṣṣal Ripōrt Markazī Jam‘iyyat al-‘Ulamā‘-i Pākistān kī Chattī Sālānah āl Pākistān Sunnī Kānfarans* (Lahore: Maqbūl-i ‘Āmm Press, n.d.), 12. For the critical appraisal and the detailed refutation of the report, see Amīn Aḥsan Iṣlāhī, *‘Ā‘ilī Kamīshan kī Ripōrt par Tabsīrah* (Lahore: Markazī Maktabah-i Jamā‘at-i Islāmī, 1958); *Fārān* (Karachi), August 1956, 9–11; *Shams al-Islām* (Bhera), March 1957, 6–8; *Māh-i Ṭaibah* (Kotli Loharan), September 1956, 7–10, 47–48 and May 1960, 6–7; *Riḍwān* (Lahore), 7–14, August 1956, 3–16; and *al-Irshād al-Jadīd* (Karachi), July 1, 1956, 5–8 and November 1, 1956. The constitutional status of the commission also came under discussion after the promulgation of the 1956



organizations particularly, All Pakistan Women's Association (APWA)- (February 1949), vehemently campaigned for the implementation of the commission's report.<sup>39</sup> However, Ayub Khan decided to implement the recommendations, which according to him, "did not interfere in any way with any Islamic injunction on the subject; they only provided a procedure for the proper and judicious implementation of the Islamic principles relating to marriage."<sup>40</sup> The ordinance was enthusiastically welcomed by different women's organizations and the national press, calling it "a great step forward" for social reform taken by the "revolutionary regime."<sup>41</sup>

The majority of the 'ulamā', however, rejected most of the recommendations of the MFLO, declaring them against the teachings of the Qur'ān, the *sunnah*, and *ijmā'* (consensus). They also dubbed them unrealistic and irrational, drafted by the Westernized and modernist minds, and an open interference in the private and family lives of the Muslims. They were of the view that nobody, even the government had any authority to amend or reform the *sharī'ah* laws, including MFLs.<sup>42</sup> The 'ulamā' also objected to the clause of MFLO related to the right of the inheritance of the children of a predeceased son or daughter to the

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Constitution in March 1956. The report was also opposed by some other segments of society, including women. For details, see Khurshid Ahmad, ed., *Marriage Commission Report X-Rayed: A Study of the Family Law of Islam and a Critical Appraisal of the Modernist Attempts to "reform" it* (Karachi: Chiragh-E-Rah Publications, 1959), 113–14, 289–315.

<sup>39</sup> Sylvia Chipp-Kraushaar, "The All Pakistan Women's Association and the 1961 Muslim Family Laws Ordinance" in *The Extended Family: Women & Political Participation in India & Pakistan*, ed. Gail Minault (Columbia: South Asian Books, 1981), 268, 272–73.

<sup>40</sup> Mohammed Ayub Khan, *Friends Not Masters: A Political Autobiography* (Karachi: Oxford University Press, 1967), 107.

<sup>41</sup> *Dawn* (Karachi), March 5, 1961. However, it was observed that "the provisions of the Ordinance were hardly revolutionary" and "a symbolic attempt . . . of social reform" as this was only "an expression of the self-assurance of a military ruler eager to be seen in the role of 'moderniser'." Ayesha Jalal, "The Convenience of Subservience: Women and the State of Pakistan" in *Women, Islam and the State*, ed. Deniz Kandiyoti (London: Macmillan, 1991), 94–96.

<sup>42</sup> Nazāmat-i 'Āliyah Markazī Jam'iyat al-'Ulamā'-i Pākistān, *al-'Ilm wa 'l-'Ulamā'* (Lahore: Maqbūl-i 'Āmm Press, n.d.), 12–17; Shams al-Qamar Qāsimī, ed., *Adhān-i Sahr* (Quetta: Maktabah-i Fārūqiyyah, 1987), 57–58; Abū 'l-A'lā Maudūdī, *Rasā'il-o Masā'il* (Lahore: Islamic Publications Limited, 1978), 3:315; Maudūdī, *Mas'alah-i Ta'addud-i Azvāj* (Lahore: Islamic Publications Limited, 1974); Muḥammad Taqī 'Uthmānī, *Hamārē 'Ā'ili Masā'il* (Karachi: Dār al-Ishā'at, n.d.), 81–155; Muḥammad Yūsuf Ludhyānavī, *Āp kē Masā'il aur un kā Hall* (Karachi: Maktabah Ludhyānavī, 1998), 5:51, 428–29; *Shams al-Islām*, August 1962, 5–11 and October 1963, 5–7; *Arafāt* (Lahore), March–April 2004, 50; and *Khuddām al-Dīn* (Lahore), August 3, 1962, 5.

grandfather.<sup>43</sup> They asked all stakeholders to struggle against the enforcement of these recommendations.<sup>44</sup>

Fifty Pakistani 'ulamā' of different denominations issued a joint statement on March 13, 1961 in Lahore. They opposed certain clauses of the MFLO, particularly restricting polygamy, the compulsory registration of *nikāḥ*, conciliation by the union councils in divorce cases, fixing age limit for marriage, and the laws concerning inheritance. The 'ulamā' demanded that the clauses of the ordinance, which contradicted the Qur'ān, the *sunnah*, the fundamental principles of the *fiqh-i Ḥanafī*, and social and practical norms, must be deleted or brought in line with the *sharīḥ*.<sup>45</sup> Besides this joint statement, eighty-two 'ulamā' from the East Pakistan (now Bangladesh) and 127 from Peshawar separately issued statements in support of the above-mentioned joint statement of the 'ulamā'.<sup>46</sup>

The *Majlis-i Shūrā* of the *Nizām al-'Ulamā'*, *Maghrabī Pākistān* (NUMP) in its meetings held on April 24–25, 1961 and October 24, 1961 in Lahore categorically rejected the MFLO for being repugnant to the Qur'ān and the *sunnah*. The NUMP and later *Jam'iyat-i 'Ulamā'-i Islām* (JUI) sent memoranda to the parliamentarians and launched a vigorous protest movement by arranging public meetings and observing Fridays as a protest-day. During this movement, few Deobandi 'ulamā' were arrested in the defunct West Pakistan.<sup>47</sup>

On July 11, 1962, the Bareilvi 'ulamā' in an emergency meeting held in Lahore, unanimously declared the ordinance as anti-Islam and

<sup>43</sup> It is observed that this clause of the MFLO was a "clean and total break" with traditional Islamic law. N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 150.

<sup>44</sup> 'Uthmānī, *Hamārē 'Ā'ilī Masā'il*, 31–78; *Sayyārah Dā'ijast* (Lahore), January 1986, 189.

<sup>45</sup> Mian Tufail Muhammad, trans. and ed., *Statement of 209 Ulama of Pakistan on Muslim Family Laws Ordinance, 1961 (Evaluating its Religious & Social Aspects)* (Lahore: Maktaba-e-Mansoorah, 1987), 15–38. The joint statement of 209 'ulamā' was *de facto* banned during the Martial Law. After its abolition in June 1962, a regular order of Nawab Malik Amir Muhammad Khan of Kalabagh (1910–1967), then Governor of the West Pakistan, confiscated this statement in August 1962. When this order was challenged in the Lahore High Court, it was withdrawn without contest. The 'ulamā' were interrogated by the different intelligence agencies and some of them were put behind the bars. The press throughout the country was instructed not to publish anything against this ordinance. *Ibid.*, 9–10. Also see *Muslim Family Laws Ordinance as Commented by Ulama in the Light of Quran and Sunnah* (Hyderabad: Maktaba-e-Ilmi, n.d.).

<sup>46</sup> Muhammad, *Statement of 209 Ulama*, 39–54. For details, see 'Ā'ilī Qavānīn par 'ulamā' kē *I'tirāḍāt* (Peshawar: Public Art Press, n.d.).

<sup>47</sup> Al-Ḥusainī, *Tadhkirah-i Jam'iyat-i 'Ulamā'-i Islām*, 30–32; *Tarjumān-i Islām* (Lahore), March 17, 1961, 3 and November 3, 1961, 1–2; and Special Branch Report, File S. No. 1400, B. No. 76, Provincial Archives, Peshawar.

demanded its abrogation. The meeting also condemned the alleged government-sponsored women's pro-ordinance meetings and rallies.<sup>48</sup> In another meeting of the leading Bareilvi 'ulamā' and *mashā'ikh* held on March 7–8, 1963 in Lyallpur (now Faisalabad), it was demanded, *inter alia*, that the MFLO should be amended in the light of 'ulamā's direction as its present attire was un-Islamic.<sup>49</sup>

The *Majlis-i Shūrā* of the *Jamā'at-i Islāmī* (JI) in its meeting held in Lahore on August 1–6, 1962, *inter alia*, demanded to repeal the MFLO.<sup>50</sup>

The *Majlis Markaziyyah Hizb al-Anṣār*, Bhera in its annual meeting held at Bhera in March 1963, strongly condemned the MFLO and demanded the annulment of these un-Islamic laws.<sup>51</sup>

Maulānā Muḥammad 'Abd al-Ḥāmid Badāyūnī (1898–1970) supported the policies of Ayub Khan. He was appointed member of the Advisory Council of Islamic Ideology (ACII) on July 30, 1962. However, on the issue of the MFLO, he too, supported the 'ulamā's point of view. In his paper, presented at the International Islamic Conference, held in Rawalpindi on February 10–13, 1968 in connection with the 1400th anniversary of the *nuzul-i Qur'ān*, organized by the Ministry of Law, Maulānā Badāyūnī categorically stated that this ordinance consisted of several clauses, which were openly against the Qur'ān, the *sunnah*, and the *Ḥanafī* school of law. He appealed for the review of these clauses with the consultation of the 'ulamā'.<sup>52</sup> Ṣāhibzādah Sayyid Faiḍ al-Ḥasan Shāh (1911–1984) of Allo Mahar, a pro-Ayub Bareilvi *pīr* also opined that the MFLO should be amended in the light of the teachings of Islam.<sup>53</sup> Muftī Muḥammad Ṣāhibdād Khān (1898–1965) in his treatise, vehemently

<sup>48</sup> *Riḍwān* (Lahore), July 1962, 24; *Māh-i Ṭaibah*, August 1962, 7. For other opposing opinions of the Bareilvi 'ulamā', see *Raḍā-i Muṣṭafā* (Gujranwala), April 1, 1960, 2, 4; *Riḍwān* (Lahore), April 2, 1960, 5, 14 and November 1963, 3–7; *Nūr-i Islām* (Sharqpur), March 1961, 5–8; *Ṭūfān* (Multan), April 7, 1963, 4, 10; *al-Sa'īd* (Multan), July–August 1962, 5 and November–December 1962, 7; *Sālik* (Rawalpindi), January 1963, 28–34 and July–August 1963, 5; 'Arafāt, December 1968–January 1969, 2–3; *al-Ḥasan* (Peshawar), May–October 2004, 256; and 'Ulamā'-i Ahl-i Sunnat kē Muṭalabāt kā Taḥṣīlī Jā'izah (Karachi: Majlis-i 'Amal Markazī Jamā'at-i Ahl-i Sunnat, n.d.), 9–25.

<sup>49</sup> Muḥammad Jalāl al-Dīn Qādirī, *Tadhkirah-i Muḥaddith-i A'zam Pākistān* (Lahore: Ḍiyā' al-Qur'ān Publications, 2005), 1:444–46.

<sup>50</sup> Afzal, *Political Parties*, 92.

<sup>51</sup> Ṣāhibzādah Anvār Aḥmad Bugvī, *Tadhkirah-i Bugviyyah: 1945–1975* (Bhera: Majlis-i Markaziyyah Hizb al-Anṣār Pākistān, 2009), 2:233–34.

<sup>52</sup> Muḥammad 'Abd al-Ḥāmid al-Qādirī al-Badāyūnī, 'Ā'ilī Qavānīn par aik maqālāh (Karachi: Muḥammad Muḥsin Faqīh Shāfi'ī and Muḥammad 'Abd al-Wāḥid al-Qādirī al-Badāyūnī, n.d.), 1–7.

<sup>53</sup> *Mashriq* (Lahore), October 8, 1967.

criticized restrictions on the second marriage and fixing age limits for marriage.<sup>54</sup>

In April 1962, Muftī Maḥmūd (1919–1980) was elected as a member of the third National Assembly of Pakistan (NAP) and in this capacity, he strongly criticized MFLO. After discussing its different clauses, he declared it repugnant to the teachings of the Qur’ān, *aḥādīth*, and *ijmā’*. He also moved a motion on the assembly floor to annul the MFLO. However, he supported the idea of registration of the *nikāḥ*, but like most of other ‘*ulamā’*, he opposed the proposed punishment for not getting it registered.<sup>55</sup> However, Muftī Sayyid Sayyāḥ al-Dīn Kākākhāil (1916–1987) was in favour of the proposed punishment for not getting the *nikāḥ* registered, with the condition that the legality of the *nikāḥ* should not be challenged.<sup>56</sup> Maulānā Ghulām Ghauth Hazārvī (1896–1981), the member of the West Pakistan Assembly, criticized the MFLO on July 3, 1963 in the assembly and declared that it was against the letter and spirit of the *sharī’ah*.<sup>57</sup>

Muftī Muḥammad Shafī’ (1897–1976), in a letter, dated April 1, 1961, addressed to President Ayub Khan, strongly criticized the MFLO and called it against the spirit and canons of Islam. Muftī Shafī’ was more critical of the sections 4,<sup>58</sup> 5,<sup>59</sup> 6,<sup>60</sup> 7 (a), (b), (c), and (d),<sup>61</sup> 12,<sup>62</sup> and 13<sup>63</sup> and

<sup>54</sup> Muḥammad Ṣāhibdād Khān, *Sabīl al-Najāḥ fī Masā’il al-’Iyāl wa ’l-Nikāḥ* (Lahore: Idārah-i Na’īmīyyah Raḍwiyyah Savād-i A’zam, 1964), 41–42. He also considered the right of the orphaned children to inherit grandparents’ property as being against the Qur’ān and the *sunnah*. 55.

<sup>55</sup> ‘Abd al-Ḥakīm Akbarī, *Muftī-i A’zam Maulānā Muftī Maḥmūd kī ’Ilmī, Dīnī aur Siyāsī Khidmāt* (Dera Ismail Khan: Maktabat al-Ḥāmid, 2010), 453–55; *Jang* (Rawalpindi), October 5, 1962. For supportive stance on the registration of the *nikāḥ*, see ‘Uthmānī, *Hamārē ’Ā’lī Masā’il*, 79–80. Sayyid Abū ’l-A’lā Maudūdī (1903–1979) was also in favour of registration of *nikāḥ* and divorce and delegating woman with the authority to divorce, with the consent of husband. Maudūdī, *Tafhīmāt*, 3:192, 196–99. For more details, see Maudūdī, *Huqūq al-Zaujain* (Lahore: Idārah-i Tarjumān al-Qur’ān, 1979). Muftī Muḥammad Shafī’ also supported the conditional registration of marriages, but was against the provision of severe punishment for their non-registration. Muḥammad Shafī’, *’Ā’lī Qavānīn par Mukhtṣar Tabṣīrah* (Karachi: Idārat al-Ma’ārif, 1963), 30–32. Maulānā Amīn Aḥsan Iṣlāḥī (1904–1997) supported the registration of both *nikāḥ* and divorce, but was against making it compulsory. Iṣlāḥī, *’Ā’lī kamīshan kī Ripōrt par Tabṣīrah*, 101, 152–59.

<sup>56</sup> Sayyid Sayyāḥ al-Dīn Kākākhāil, *Tafhīm al-Aḥkām* (Lahore: Ma’ārif-i Islāmī, 1996), 1:102–24.

<sup>57</sup> Suhail Aḥmad A’vān, *Maulānā Ghulām Ghauth Hazārvī: Madhhabī-o Siyāsī Khidmāt; Aik Tahqīqī Dastāwīz* (Lahore: Maktabah-i Jamāl, 2009), 111–13.

<sup>58</sup> Section 4 of the Ordinance says that orphaned grandchildren may receive share from the property of their grandparents. For details on this issue, see Lucy Carroll, “Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan,” *Islamic Law and Society* 5, no. 3 (1998): 409–47; Carroll, “The Pakistan Federal

demanded the withdrawal of the ordinance and formation of a new commission having members well versed in Islamic and modern knowledge.<sup>64</sup> President Ayub Khan, in his reply, described polygamy as a “barbaric torture of the highest order” and emphasized that these laws were not repugnant to Islam.<sup>65</sup>

Maulānā Iḥtishām al-Ḥaqq, after the promulgation of the ordinance, reiterated his previous opposition and suggested postponing its implementation until the ‘ulamā’ would revise it finally.<sup>66</sup>

Maulānā Zafar Aḥmad ‘Uthmānī (1892–1974) vowed that this was a best evidence for the fact that the government was trying to introduce the Western and Kemalist ways of life in Pakistan.<sup>67</sup> Pīr Muḥammad Qāsim Mashūrī (1898–1990) in a *Mashā’ikh* Conference, presided by Ayub Khan in 1963 in Karachi, severely criticized the MFLO and advised Ayub Khan to amend them according to the teachings of Islam.<sup>68</sup> Maulānā Muḥammad ‘Abd al-Ghafūr Hazārvi (1910–1970) was a staunch opponent of the MFLO. He frequently criticized it and mobilized the ‘ulamā’ and the public against it.<sup>69</sup> Maulānā Muḥammad Zākīr (1904–1976) vehemently opposed the MFLO and penned down many articles against it.<sup>70</sup> Sayyid Muḥammad Amīr Shāh Qādirī Gīlānī (1920–2004) also criticized the MFLO.<sup>71</sup>

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Shariat Court, Section 4 of the Muslim Family Laws Ordinance, and the Orphaned Grandchild,” *Islamic Law and Society* 9, no. 1 (2002): 70–82.

<sup>59</sup> Section 5 says that a *nikāḥ* be registered with the union council to be legally valid.

<sup>60</sup> Section 6 says that no married man shall contract a second marriage without the permission of the arbitration council, which shall ensure that the man had good grounds for second marriage and had obtained his first wife’s permission to do so.

<sup>61</sup> Section 7 says that a divorcing husband shall send notice of divorce to the union council and supply a copy of it to the divorcee wife, after which an arbitration council would try for reconciliation between the two parties.

<sup>62</sup> Section 12 bans child marriage and set a minimum age for the marriage of boys 18 years and for girls 14 years.

<sup>63</sup> Section 13 states that if husband has taken an additional wife in contravention of the provisions of the MFLO, the wife will get the right of the dissolution of marriage.

<sup>64</sup> Shaḥī, ‘Ā’ilī Qavānīn par Mukhtṣar Tabṣīrah, 26–46, 51–60. He also gave detailed suggestions for the reforms in the MFLO.

<sup>65</sup> Dawn (Karachi), June 11, 1961.

<sup>66</sup> Ṭāhir, ‘Ā’ilī Qavānīn aur Pākistānī Siyāsāt, 61–62.

<sup>67</sup> Ibid., 83.

<sup>68</sup> Faiḍ Allāh Mahar, *Qāsim al-Ḥaqqā’iq* (Mashuri: al-Qāsimiyyah Akādimī, 2015), 372–73.

<sup>69</sup> Muḥammad Aṣif Hazārvi, *Faiḍān-i Shaikh al-Qur’ān* (Wazirabad: Maktabah-i Bazm-i Chishtiyyah Ghafūriyyah, 2010), 248.

<sup>70</sup> Nuṣrat ‘Alī Athīr Jayyah, *Dhikr-i Dhākir* (Lahore: Maulānā Muḥammad Dhākir Akādimī, 1997), 178.

<sup>71</sup> *Al-Ḥasan* (Peshawar), May–October 2004, 256.

Some *Shī'ah* 'ulamā' fiercely protested against the newly enacted MFLO for allegedly violating Qur'ānic principles of marriage and divorce.<sup>72</sup>

Muftī Aḥmad Yār Khān Na'īmī Gujrātī (1906–1971) was perhaps the only Bareilvi 'ālim, who supported the ordinance and issued a *fatvā* in its support.<sup>73</sup> Maulānā Sayyid Muḥammad Dā'ūd Ghaznavī (1895–1962) *amīr* of the *Markazī Jam'īyyat-i Ahl-i Ḥadīth* (MJAH) partially supported the MFLO and was not in favour of its complete rejection.<sup>74</sup> The MFLO, especially its clauses of banning minor-age marriages and pronouncing three-time divorce at once as invalid, were welcomed by the *Idārah-i Ṭulū'-i Islām*, Lahore. The *Idārah-i Ṭulū'-i Islām* was of the view that pronouncing three-time divorce at once was a legacy of Muslims' monarchical culture. It also vowed that the government accepted most of its recommendations.<sup>75</sup> It produced a series of supportive literature, congratulated President Ayub Khan on this achievement, and claimed that most of its teachings are in accordance with the Qur'ān.<sup>76</sup>

In July 1962, a private bill was introduced in the inaugural session of the newly elected NAP by the opposition member Maulānā 'Abbās 'Alī Khān, for the repeal of the ordinance for its being against the teachings of the Qur'ān and the *sunnah*. Although, the NAP admitted the bill for repeal,<sup>77</sup> but it was rejected by 56 votes to 28 on November 26, 1963 after

<sup>72</sup> Andreas Rieck, *The Shias of Pakistan: An Assertive and Beleaguered Minority* (London: Hurst & Company, 2015), 106.

<sup>73</sup> *Māh-i Ṭaibah*, August 1962, 7. The Bareilvi 'ulamā' denounced this *fatvā* and dubbed it as a personal opinion of Muftī Gujrātī.

<sup>74</sup> *Al-'itishām* (Lahore), November 9, 1962, 4–6 and August 9, 1963, 3–5. However, Maulānā Muḥammad 'Aṭā' Allāh Ḥanīf (1910–1987) secretary of the MJAH held a different position and opposed the MFLO. Ṭāhir, 'Ā'ilī Qavānīn aur Pākistānī Siyāsāt, 79–80.

<sup>75</sup> *Ṭulū'-i Islām* (Karachi), August 1956, 3 and *Ṭulū'-i-Islām* (Lahore), January 1986, 2–5. Most of the Pakistani and Indian 'ulamā' firmly believed that these recommendations were drafted by Chaudhrī Ghulām Aḥmad Parvaiz (1903–1985), the ideologue of the *Idārah-i Ṭulū'-i Islām*. *Mīthāq* (Lahore), August 1989, 4 and *Ṭulū'-i Islām* (Lahore), September 1961, 45–46. For 'ulamā's views about Parvaiz and his ideology, see *Parvaiz kē bārē main 'Ulamā' kā Muttafiqah Fatvā ma' Idāfāt-i Jadīdah* (Karachi: Shu'bah-i Taṣnīf, Madrasah-i 'Arabiyyah Islāmiyyah, 1962); Aḥmad 'Alī Sirāj, ed., *Majmū'ah-i Fatāvā Radd-i Parvaiziyyat* (Islamabad: Siraj Trust Publications, 2003). On the contrary, some believed that most of the clauses of the MFLO were derived from the book, *Ḥuqūq al-Zaujain* of Sayyid Maudūdī. Rafī' Allāh, "Ḥāliyah 'Ā'ilī Qavānīn," *Fikr-o Naẓar* 3, no. 4 (1965): 284–98.

<sup>76</sup> *Qatl-i murtadd, Ghulām aur Lōndiyān aur Yatīm Pōtē kī Virāthāt* (Lahore: Idārah-i Ṭulū'-i Islām, 1986), 71–115; Parvaiz, *Ṭāhirah kē Nām Khuṭūṭ* (Lahore: Ṭulū'-i Islām Trust, 2001); *Ṭulū'-i-Islām* (Lahore), April 1961, 2–8, 80; August 1962, 14–32; October 1962, 49–72; and November. 1962, 23–25.

<sup>77</sup> The 'ulamā' issued a statement to the press, just after the bill was admitted for repeal. The government ordered the immediate forfeiture of all copies of the statement.

a lengthy debate. The religio-political parties staged a strong protest against the rejection of the bill.<sup>78</sup> The bill was rejected mainly due to the fierce opposition of the standing committee of the NAP, strong agitation of some women's organizations, and President Ayub Khan's vow not to countenance any proposal for the repeal.<sup>79</sup> Due to the passage of the "Fundamental Rights Bill," the first amendment in the 1962 Constitution, almost all principles of law-making were made challengeable in the courts, except the MFLO. Moreover, as under the Article 6 (1) of the 1962 Constitution, the Supreme Court or the high courts were not authorized to decide which law was repugnant to Islam. Thus, Ayub Khan referred the matter to the ACII.<sup>80</sup>

The ACII took up the matter of considering the ordinance until October 1964. Consideration and discussions in the council continued until March 1967. The council, however, could present its final recommendations to the government only in December 1967. In September 1969, the council forwarded its reply to the Ministry of Law and Parliamentary Affairs after reconsidering sections 4 and 6 of the ordinance. However, the government made no response.<sup>81</sup> The council raised objections to certain sections of the MFLO. Among them, laws of inheritance, polygamy, and divorce were most important.

The ACII also sought the opinions of the 'ulamā' on the MFLO. According to Maulānā 'Abdul Ḥāmid Badāyūnī, the *sharī'ah* gave the

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Manzooruddin Ahmad, "The Political Role of the 'Ulamā' In the Indo-Pakistan Sub-Continent," *Islamic Studies* 6, no. 4 (1967): 344. On February 22, 1963, the 'ulamā', in their Friday's sermons, severely criticized the MFLO and urged the Assembly to repeal it in accordance with the teachings of Islam. Chipp-Kraushaar, "All Pakistan Women's Association and the MFLO," 275.

<sup>78</sup> Herbert Feldman, *Revolution in Pakistan: A Study of the Martial Law Administration* (London: Oxford University Press, 1967), 149; *Ṣahīfah-i Ahl-i Ḥadīth* (Karachi), July 18, 1962, 2-5; *Dawn* (Karachi), 27 November 1963. It was welcomed by the *Ṭulā'-i Islām* (Lahore), January 1964, 71-73. However, on July 3, 1963, the West Pakistan Provincial Assembly adopted a resolution by an overwhelming majority, recommending to the Central Government to repeal the ordinance. *Dawn*, July 4, 1963; *Sālik*, July-August 1963, 5; and Esposito, "Modern Muslim Family Law Reform," 40. This resolution was welcomed by the West Pakistan chapter of the JUP. *Jam'iyyat* (Lahore), August 20, 1968, 5.

<sup>79</sup> Nabeela Afzal, *Women and Parliament in Pakistan: 1947-1977* (Lahore: Pakistan Study Centre, 1999), 78-79. A group of 'ulamā' condemned the women's 'sponsored' demonstration at Rawalpindi in order to pressurize the Assembly. Chipp-Kraushaar, "All Pakistan Women's Association and the MFLO," 274-77.

<sup>80</sup> Tanzil-Ur-Rahman, "Enforcement of Islamic Law in Pakistan - A New Approach" in *Eighth Report of the Council of Islamic Ideology on Islamization of Laws Contained in the Pakistan Code* (Islamabad: Council of Islamic Ideology, 1983), 8:2-3.

<sup>81</sup> *Ten-Year Report: 1962 to 1972* (Islamabad: Advisory Council of Islamic Ideology, n.d.), 147-48.

husband the right to enter into the second marriage provided he could do justice to his first wife and her children. For this, the husband should produce evidence before the *qāḍī-i shara'* (Muslim judge) and if the latter was satisfied with the proof, he could permit him to enter into the second marriage, otherwise the husband would not be allowed to contract the second marriage.<sup>82</sup> The *Shī'ah 'ulamā'* Vilāyat Ḥusain and Muftī Ja'far Ḥusain (1914–1983) also supported the right of a man to contract second marriage, even a temporary one, with some conditions.<sup>83</sup>

Muftī Muḥammad Ḥusain Na'imī (1923–1998) and Maulānā Abū 'l-Barakāt Sayyid Aḥmad Qādirī (1906–1978), in their expert opinions, opposed the ordinance in principle and proposed several amendments to the sections regarding the laws of inheritance, polygamy, divorce, registration of marriages, and age-limits for bride and bridegroom.<sup>84</sup> Maulānā Muḥammad Ismā'īl Salafī (1895–1968) also suggested some amendments to the MFLO.<sup>85</sup> However, Maulānā Shāh Muḥammad Ja'far Phulvārvī (1902–1982) supported the MFLO in principle.<sup>86</sup>

The MFLO once again came under parliamentary debate in the NAP after the 1970 elections. Muftī Maḥmūd, in his speech on April 17, 1972 on the draft bill of the interim constitution, considered the inclusion of the MFLO in the future constitution of Pakistan against the spirit of

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<sup>82</sup> Ibid., 165.

<sup>83</sup> Ibid., 161.

<sup>84</sup> Ibid., 200–08, 214–17.

<sup>85</sup> Ibid., 209–13.

<sup>86</sup> Ibid., 218–24. For details, see Muḥammad Ja'far Shāh Phulvārvī, *Chand Izdivajī Masā'il* (Lahore: Idārah-i Thaḳāfat-i Islāmiyyah, 2010). The CII, on March 10, 2014 declared the necessary requirement of getting permission from the wife for second marriage un-Islamic. *Navā-i Vaqt* (Rawalpindi/Islamabad), March 11, 2014. The CII also endorsed underage *nikāḥ* with some *shar'ī* conditions. *Dawn* (Islamabad), March 12, 2014. However, the Sindh Assembly on April 28, 2014 enacted the “The Sindh Child Marriage Restraint Bill, 2013” and not only enhanced the age-limit of girls and boys for marriage from 16 and 18 respectively to 18 for both genders, but also made it cognizable, non-bailable and non-compoundable offence. *Dawn* (Islamabad), February 1, 2016. The Provincial Assembly of the Punjab, on March 6, 2015 also passed the “The Child Marriage Restraint (Amendment) Bill 2015.” The bill raised the duration of imprisonment from one month to six months and fine of Rs. 1,000 to Rs. 50,000. *Navā-i Vaqt* (Lahore), March 7, 2015. However, “The Child Marriage Restraint (Amendment) Bill, 2009” moved in the NAP by Dr Attiya Inayatullah (b. 1938) on August 11, 2009 was lapsed. Khalid Rahman and Nadeem Farhat, eds., *Legislation on Women & Family in Pakistan: Trends and Approaches* (Islamabad: Institute of Policy Studies, 2014), 38–49. Dr Ramesh Kumar Vankwani (b. 1974), elected on the reserved seat for the minority, presented a private bill in the NAP for some more amendments in the “The Child Marriage Restraint Act, 1929,” in April 2019. This bill was rejected by the House.



religious freedom.<sup>87</sup>

On September 7, 1972, Malik Karam Bakhsh Awan (d. 1989), elected member of the Council Muslim League moved a resolution in order to revoke the exiting MFLO. However, it was rejected by the House on September 21, 1972 after a detailed debate.<sup>88</sup> Maulānā 'Abd al-Ḥaqq (1914–1988), in his speech made on September 14, 1972 in the NAP, mainly criticized the ban on polygamy under the MFLO.<sup>89</sup> Maulānā 'Abd al-Ḥaqq and Maulānā Ghulām Ghauth Hazārvī, elected members of the NAP on the tickets of the JUI, also suggested some amendments in the MFLO, but these were rejected by the House.<sup>90</sup> The MFLO was also incorporated in the Interim and 1973 Constitutions in spite of the 'ulamā's opposition.

In January 1976, the Government of Pakistan set up a Pakistan Women's Rights Committee, under the chairmanship of Yahya Bakhtiar (1923–2003), then the Attorney General of Pakistan. The thirteen-member Committee in Part I of its interim report submitted in July 1976, recommended many legal reforms and amendments to the MFLO, including its implementation in a uniform manner in all provinces.<sup>91</sup> The composition and recommendations of the Committee were criticized by the 'ulamā'. The recommendations were never implemented by the government.<sup>92</sup>

The ACII was reconstituted in February 1974 with the name of Council of Islamic Ideology (CII). In November 1978, the Zia regime (1977–1988) issued a directive to the CII to review the MFLO in the light of the *sharī'ah*. The Ministry of Law on the recommendations of the Council, in January 1980 resolved that the whole MFLO was against the provisions of the Qur'ān and the *sunnah* and should be repealed.<sup>93</sup> In

<sup>87</sup> Qāsimī, *Adhān-i Sahr*, 108–09.

<sup>88</sup> *The National Assembly of Pakistan (Legislature) Debates*, vol. 1, no. 21, September 7, 1972; no. 23, September 14, 1972; and no. 24, September 21, 1972. Maulānā Muḥammad 'Abd al-Muṣṭafā al-Azharī (1915–1989), Maulānā Sayyid Muḥammad 'Alī Raḍvī (1916–2008), Maulānā Shāh Aḥmad Nūrānī Ṣiddīqī (1926–2003), Maulānā 'Abd al-Ḥaqq, Maulānā Ghulām Ghauth Hazārvī, Muftī Maḥmūd, Maulānā 'Abd al-Ḥakīm (1920–1991), and Maulānā Ṣadr al-Shahīd (1919–1990) also spoke in favour of the bill.

<sup>89</sup> *Qōmī Asambli main Islām kā Ma'rakah* (Akora Khattak: Mu'tamar al- Muṣannifīn, 1976), 211–17.

<sup>90</sup> *Ibid.*, 188.

<sup>91</sup> *Report of the Pakistan Women's Rights Committee* (Islamabad: Ministry of Law and Parliamentary Affairs, 1976), 2–13. The committee also recommended some changes in, *inter alia*, "The West Pakistan Family Courts Act, 1964" and "The Divorce Act, 1869."

<sup>92</sup> *Tarjumān-i Ahl-i Sunnat* (Karachi), November 1976, 7, 81–83; *Ḍiyā'-i Ḥaram* (Lahore), January 1977, 11–19.

<sup>93</sup> *Tenth Report of the Council of Islamic Ideology on Islamization of Muslim Family Laws*

September 1981, the Council advised the then President of Pakistan, General Muhammad Zia-ul-Haq (1924–1988) to extend jurisdiction of the Federal Shariat Court (FSC) in order to examine the MFLO in the light of the Qur’ān and the *sunnah*. However, the Federal Cabinet, on March 15, 1982, rejected this recommendation. Eventually, the MFLO remained “out of bound” for the courts, including the FSC during the Zia regime, which was opposed by the ‘*ulamā*’.<sup>94</sup> In July 1983, the Zia regime constituted “The Pakistan Commission on the Status of Women.” The commission also recommended some changes in the MFLO.<sup>95</sup> However, the commission’s report was suppressed.

In November 1991, Mian Muhammad Nawaz Sharif (b. 1949), the then Prime Minister of Pakistan, constituted an *Islāmī Falāḥī Mamlukat Kamaitī* under the chairmanship of Maulana Muhammad Abdus Sattar Khan Niazi (1915–2001), the then federal minister for religious affairs. The thirty-two-member committee, mainly consisted of the ‘*ulamā*’ of different schools of thought, submitted its final report to Nawaz Sharif in January 1993. The committee, *inter alia*, declared the MFLO un-Islamic and recommended its abrogation.<sup>96</sup> Again in October 1994, “The

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(Islamabad: Council of Islamic Ideology, 1983), 35–36; *Islāmī Nazriyātī Kaunsal kī Sālānah Ripōrt* (Islamabad: Ḥakūmat-i Pākistān, n.d.), 74–79.

<sup>94</sup> *Fifteenth Report of the Council of Islamic Ideology on Islamization of Laws* (Islamabad: Council of Islamic Ideology, 1984), 74–77; *Sālānah Ripōrt 1981–82* (Islamabad: Islāmī Nazriyātī Kaunsal, 1983), 138–48; and *Jang* (Lahore), January 25, 1984. In July 1982, Dr Israr Ahmed (1932–2010) *amīr* of the *Tanzīm-i Islāmī* resigned from the membership of the *Majlis-i Shūrā* nominated by the Zia regime in December 1981, protesting against the *status quo* on the MFLO. Moreover, from 1986, he launched a passive movement against the MFLO. *Nidā’-i Khilāfat* (Lahore), January 21–27, 2014, 11–12; *Ṭulū’-i Islām* (Lahore), May 1986, 33–36. It is important to note that the FSC was empowered under the amended Article 203-D of the 1973 Constitution to examine and decide the question whether or not any law or provision of law was repugnant to the injunctions of Islam. However, the term “law” as defined in the Article 203-B of the 1973 Constitution, debarred the FSC to do this as the “Muslim Personal Law,” *inter alia*, was excluded from the jurisdiction of the FSC. Aftab Hussain, *Federal Shariat Court in Pakistan* (n.p.: n.p., n.d.), 5–7. However, in 1994, the Shariat Appellate Bench of the SCP ruled that MFL was not outside the scope of scrutiny of the FSC. Thus, the FSC in a case related to the MFLs, directed the President of Pakistan to amend the MFLs in order to bring Sections 4, 7(3), and 7(5) of the MFLO in conformity with the injunctions of Islam otherwise these will cease to have effect from March 31, 2002. Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women*, 173, 176–77.

<sup>95</sup> *Report of the Pakistan Commission on the Status of Women* (Islamabad: Pakistan Commission on the Status of Women, 1992), 133–37. Mrs. Nisar Fatima Zahra (1935–1991) one of the members of the Commission, in her note of dissent, *inter alia*, demanded changes in the MFLO according to the demands of the ‘*ulamā*’. *Ibid.*, 167–90.

<sup>96</sup> *Ripōrt: Islāmī Falāḥī Mamlukat Kamaitī* (Islamabad: Ḥakūmat-i Pākistān, 1993), 24.

Commission of Inquiry for Women” was set up, which in its report published in 1997, *inter alia*, recommended some reforms in the MFLO.<sup>97</sup>

In 1985, it was rumoured in the national press that the government intended to reform or void the MFLO through proposed ninth amendment to the Constitution of Pakistan.<sup>98</sup> Muftī Muḥammad Ḥusain Naʿīmī was of the view that as the MFLO failed to safeguard women’s rights, there was a need to amend these laws according to the *sharīʿah*.<sup>99</sup> The APWA claiming that its most notable accomplishment was the enactment of the MFLO,<sup>100</sup> staged demonstrations in Islamabad (October 1986) and Lahore (January 1987) and demanded that the MFLO be retained exactly as it was promulgated in March 1961. It was also demanded that the MFLO should be fully implemented and the family courts should be more empowered to deal with all family matters.<sup>101</sup>

In June 1993, the Supreme Court of Pakistan (SCP) gave ruling that no statute or codified law, which applies to the Muslims in general, cannot be excluded from the jurisdiction of the FSC. Hence, the MFLO is not outside the purview of the FSC.<sup>102</sup> Thus, the FSC heard objections put forward jointly by some ‘*ulamā*’ belonging to all schools of thought. The plea before the court was that sections 4-7 and 12 of the MFLO be declared repugnant to Islam. The petitioners opposed the above-provisions of the ordinance, particularly the irreducible legal requirement to register the *nikāḥ* and divorce at the union council, holding that the unregistered divorce must be considered valid. They also favoured the right of men to contract additional marriages without intercession of the union council and consent of the first wife. They

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<sup>97</sup> *Report of The Commission of Inquiry for Women* (Islamabad: Ministry of Women Development, Social Welfare, and Special Education, 1997), 129–34. Maulānā Muḥammad Ṭāsīn (1923–1998) one of the members of the commission, in his note of dissent, supported the ‘*ulamā*’s stance on the MFLs. *Ibid.*, 118–20.

<sup>98</sup> *Jang* (Lahore), February 11, 1986; ‘Āmir Mīr, ed., *Wārith Mīr kā Fikrī Athāthah* (Lahore: Jang Publishers, 2004), 3:83–87.

<sup>99</sup> ‘*Arafāt*, March–April 2004, 51–52.

<sup>100</sup> Chipp-Kraushaar, “All Pakistan Women’s Association and the MFLO,” 263, 265. However, the personal and political relationships between President Ayub Khan and key APWA leaders were most significant in securing the MFLs reforms.

<sup>101</sup> *The Pakistan Times* (Islamabad), March 16, 1987. In August 1996, on the recommendations of the Pakistan Law Commission, the NAP passed a bill, which was assented by the President of Pakistan on August 1, 1996. Under the act, some amendments were made in the West Pakistan Family Courts Act, 1964, *inter alia*, the time of disposal of cases and appeals was reduced from six months to four. *The Gazette of Pakistan, Extraordinary*, Islamabad, August 5, 1996.

<sup>102</sup> Dr. Mahmood-ur-Rahman Faisal v. Government of Pakistan, *The All Pakistan Legal Decisions* 1994 SC 607–SC 621.

opposed the ban on child marriage and considered the right of the orphaned children to inherit from grandparents' property against the Qur'ān and the *sunnah*. As for the documentation of the *nikāḥ*, they proposed that the person who solemnized the *nikāḥ* should be allowed to issue a personal certificate for legal purposes.<sup>103</sup>

The FSC, at that time, did not have the mandate to adjudicate on family laws, but in 1985, the eighth Amendment made the Objectives Resolution, passed in March 1949 by the first Constituent Assembly of Pakistan, part of the main body of the 1973 Constitution and gave the FSC the justification to consider family laws too. Pakistani judiciary has had set aside the condition of *nikāḥ* registration, under Section 7 of the MFLO, in a number of cases where couples were saved from the punishment. The Sindh High Court in 1988 decreed that since an unregistered *nikāḥ* was acceptable under the *sharī'ah*, the accused couple were not living in sin. Subsequently, the FSC accepted the Sindh High Court verdict and ruled against Section 7 of the ordinance.<sup>104</sup> A similar decree was given by the Shariat Appellate Bench of the SCP in March 1993.<sup>105</sup>

While listening to the defense, the FSC set aside the report of the CII, arguing that provisions against polygamy be further strengthened in Section 6 of the MFLO. The ground taken by the FSC was that the report had no effect. Therefore, it could not be considered binding. The full bench of the FSC also held that the MFLO provision regarding the divorce was against the injunction of Islam.<sup>106</sup>

In 2005, the CII once again commenced revision of the MFLO and viewed that the ordinance was not a comprehensive legal document. In August 2006, the CII constituted a six-member law committee to critically analyze the MFLO. After two years' pondering, the committee submitted its report in November 2008.<sup>107</sup>

The '*ulamā*' of all schools of thought, except *Shī'ahs*, condemned the Council's recommendations, *inter alia*, for giving the right of divorce to wife, because most of them held that it was an exclusive right of the

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<sup>103</sup> PLD 2000 Federal Shariat Court 1.

<sup>104</sup> For details about different cases, see Abdul Wahid Chaudhry, *Select Ruling Family Laws Cases: 1978-2003* (Lahore: Lahore Law Times Publications, n.d.), 100, 106, 109-11, 123, 126-29, 134; Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women*, 111-69, 177, 267-70.

<sup>105</sup> *Raḍā-i Muṣṭafā* (Gujranwala), March-April 1993, 4.

<sup>106</sup> Rashida Muhammad Hussain Patel, "Legal Status of Women" in *Status of Women in Pakistan 2000* (Karachi: Pakistan Federation of Business and Professional Women, n. d.), 17.

<sup>107</sup> *Muslim 'Ā'ilī Qavānīn Ārḍīnans 1961: Naẓar-i Thānī aur Sifārishāt* (Islamabad: Islāmī Naẓriyātī Kaunsal, 2009), 1-3, 93-116.

husband. The Barelvi 'ulamā' like Dr Muḥammad Sarfarāz Na'imī (1948–2009), Muftī Munīb al-Raḥmān (b. 1945), Ṣāḥibzādah Muḥammad Faḍl-i Karīm (1954–2013), Deobandi 'ulamā' like Muftī Muḥammad Rafī 'Uthmānī (b. 1936), Muftī Muḥammad Taqī 'Uthmānī (b. 1943), Muftī 'Abd al-Ra'ūf Sakhkharvī, Dr 'Abd al-Razzāq Sikandar (b. 1935), Muftī Sa'īd Aḥmad Jalālpūrī (d. 2010), and Muftī Muḥammad Na'im (b. 1958), the leadership of the JI, and Maulānā Ḥasan Madanī, in their observations, argued that these recommendations were not only against the teachings of the Qur'ān, the *sunnah*, and the traditional Islamic norms, but also against the constitutional mandate and jurisdiction of the Council.<sup>108</sup> Considering the observation of the 'ulamā', the government assured that it would not implement these recommendations in the present form.<sup>109</sup>

In April 2009 and May 2010, Justice (R) Fakhar-un-Nisa Khokhar (b. 1942) presented Muslim Family Laws (Amendment) Bill 2009 and Muslim Family Laws (Amendment) Bill 2010 in order to amend Sections 6, 7 and 9 of the MFLO, but these were not adopted by the NAP, hence lapsed.<sup>110</sup>

### Politics on the Family Laws

The MFLs were not only debated and discussed in the religious realm of Pakistan, but they also remained an electoral issue in the national electoral politics. During the 1962 Elections for the NAP and the Presidential Election of 1964-65, contested mainly by Ayub Khan and Miss Fatima Jinnah (1893–1967), the JUI and the *Jam'iyat-i 'Ulamā'-i Pākistān* (JUP) were critical of maintaining the MFLO in its original form.<sup>111</sup> These parties made it a bargaining point for supporting Ayub Khan.<sup>112</sup> Although, during the election campaign and after becoming

<sup>108</sup> Ibid., 136, 139, 142–44, 148–50, 152.

<sup>109</sup> Ibid., 144.

<sup>110</sup> Rahman and Farhat, *Legislation on Women & Family in Pakistan*, 16–26, 56–59.

<sup>111</sup> *Tarjumān-i Islām*, April 20, 1962, 3.

<sup>112</sup> Rānā 'Abd al-Ḥamīd, *Ṣadāratī Intikhāb main Mashā'ikh-i 'Izām aur 'Ulamā'-i Kirām kā Ta'āvun* (Lahore: Maktabat al-Kitāb, n.d.), 31, 63. It is important to note that the Combined Opposition Parties, an umbrella alliance of some opposition political and religious parties formed in July 1964, nominating Miss Fatima Jinnah as their presidential candidate against Ayub Khan, agreed on a nine-point programme, which, *inter alia*, included amendment of the MFLO, making laws in accordance with the Qur'ān and the *sunnah*, and establishment of a Islamic society. *Joint Communique and Nine Point Programme of The Combined Opposition Political Parties* (Dacca: Publicity Secretary East Pakistan Muslim League, n.d.), 5–7; *Pākistān kā Ṣadāratī Intikhāb: Dō Shakhshiyāt nahīn Dō Nazriyyāt* (Karachi: Muttahidah Ḥizb-i Ikhtilāf, n.d.), 6–8 and *Tarjumān-i Islām*, December 25, 1964, 1, 7, 9. However, it was observed that the MFLO was not a "bone of contention" for Miss Jinnah; the problem was the manner in which it was promulgated. M. Reza

victorious, Ayub Khan promised to amend the MFLO,<sup>113</sup> he did not fulfil his promises, which was condemned by the ‘ulamā’<sup>114</sup> and thus, the ordinance also played a role in the downfall of the Ayub regime in March 1969.

In the first general elections, held in December 1970, the leadership of almost all the religio-political parties, including *Jam‘iyyat al-Muslimāt*, first-ever Pakistani women’s political party, during their election campaigns, demanded amendments to the MFLO in accordance with the *sharīah*.<sup>115</sup> It is interesting to note, however, that except for the JI and *Kull Pākistān Markazī Jam‘iyyat-i ‘Ulamā’-i Islām*,<sup>116</sup> none of the religio-political parties in its election manifesto pledged to annul the MFLO, if elected to form a government. Nevertheless, the debate on the issue continued in the newly elected NAP and the JUP did not sign the constitutional bill as, *inter alia*, it demanded the annulment of the MFLO.<sup>117</sup>

In none of the upcoming elections, the MFLO could get the attention of the religio-political parties, even by the well-represented and strong alliance of six religio-political parties, the *Muttaḥidah Majlis-i ‘Amal* (MMA). After the October 2002 Elections, MMA formed a government in the North-West Frontier Province (now Khyber Pakhtunkhwa). In its endeavour to “Islamize” the province, it criticized only two clauses of the MFLO, related to the requirements of registration of divorces and the husband’s getting permission from his wife for the second marriage.<sup>118</sup>

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Pirbhai, *Fatima Jinnah: Mother of the Nation* (Cambridge: Cambridge University Press, 2017), 233.

<sup>113</sup> Sayyid Maḥmūd Aḥmad Raḍvī, ed., *Sayyidī Abū ‘l-Barakāt* (Lahore: Shu‘bah-i Tabliḡh, Dār al-‘Ulūm Hizb al-Aḥnāf Lāhūr, 1979), 49.

<sup>114</sup> *Tarjumān-i Islām*, March, 11, 1966, 1, 3 and April 1, 1966, 20; *Mashriq* (Lahore), January 1, 1969.

<sup>115</sup> Aziz Ahmad, “Activism of the Ulama in Pakistan,” in *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500*, ed. Nikki R. Keddie (Berkeley: University of California Press, 1972), 269–70; *Mashriq* (Karachi), July 26, 1970.

<sup>116</sup> *Manshūr: Jamā‘at-i Islāmī Pākistān* (Lahore: Shu‘bah-i Nashr-o Ishā‘at, Jamā‘at-i Islāmī Pākistān, 1970), 15–16; *Manshūr: Kull Pākistān Markazī Jam‘iyyat-i ‘Ulamā’-i Islām-o Nizām-i Islām* (Karachi: Ṣiddīq Aḥmad, n.d.), 29. These parties vowed to amend the MFLO in the light of the *sharīah*.

<sup>117</sup> Mujeeb Ahmad, *Jam‘iyyat-i ‘Ulama-i Pakistan 1948–1979* (Islamabad: National Institute of Historical and Cultural Research, 1993), 103; *The National Assembly of Pakistan (Legislature Debates*, vol. 1, no. 23, September 14, 1972.

<sup>118</sup> Anita M. Weiss, “A Provincial Islamist Victory in Pakistan: The Social Reform Agenda of the Muttahida Majlis-i-Amal,” in *Asian Islam in the 21st Century*, ed. John L. Esposito, John O. Voll, and Osman Bakar (New York: Oxford University Press, 2008), 161.

### Publicized Court Case

There are many family courts in Pakistan, which deal with the cases related to the family laws on daily basis. However, Saima Waheed Case became famous not only in Pakistan but also outside Pakistan as it unveiled the struggle between feminist and religious segments of Pakistani society. In February 1996, Saima Waheed, the daughter of a Lahore-based *Ahl-i Ḥadīth* 'ālim-cum-businessman Abdul Waheed Ropri got married at her own. Her family filed a criminal charge against Asma Jehangir (1952–2018), a woman activist and senior lawyer who gave refuge to Saima and pleaded her case. Saima's family alleged that she had been abducted and brainwashed and that it was illegitimate to conduct marriage without the consent of the *walī*.<sup>119</sup> The Lahore High Court, in March 1997, by a majority of two to one, held that the marriage contracted without the consent of the *walī* is not invalid, thus, the civil marriage of Saima was declared legal and according to the *sharī'ah*. However, it urged the state to outlaw secret marriages.<sup>120</sup> The SCP, in December 2003, also upheld the decision.<sup>121</sup>

### Practical Defiance of the MFLO

The 'ulamā' and *muftīs* of British India staged a passive resistance against the colonizers' legislation to reform the family laws and managed to develop their own mechanism for resolving the family-related issues of their adherents. Moreover, in the newly emerged Muslim nation-states like Turkey, Egypt, Tunisia, Algeria, and Indonesia, the 'ulamā' and *muftīs* protested against the state's legislation to modify the *sharī'ah* laws, particularly related to family matters, but they often failed to achieve the desired results.

<sup>119</sup> *Zindaqī* (Lahore), March 23–29, 1997, 6–9.

<sup>120</sup> Hafiz Abdul Waheed v. Miss Asma Jehangir, PLD 1997 Lahore 301–84. For details, see Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women*, 177–81; *Takbīr* (Karachi), March 23–29, 1997, 41–43 and April 6–12, 1997, 22. The decision was in accordance with the *Ḥanafī* school of law. However, it was observed that it will encourage the elopement or runaway marriages of the girls. Ludhyānavī, *Āp kē Masā'il aur un kā Ḥall*, 5:46–53; *Ḍiyā'i Ḥaram*, April 1997, 9–10. For details, see Shaheen Sardar Ali, "Is an Adult Muslim Woman *Sui Juris*? Some Reflections on the Concept of 'Consent in Marriage' without a *Wali* (with Particular Reference to the Saima Waheed Case)," *Yearbook of Islamic and Middle Eastern Law* 3 (1996): 156; Martin Lau, "Opening Pandora's Box: The Impact of the SAIMA WAHEED Case on the Legal Status of Women in Pakistan," *Yearbook of Islamic and Middle Eastern Law* 3 (1996): 518; Karin Carmit Yefet, "What's the Constitution Got to Do with It? Regulating Marriage in Pakistan," *Duke Journal of Gender Law & Policy* 16 (2009): 357–59.

<sup>121</sup> Hafiz Abdul Waheed v. Mrs. Asma Jehangir, PLD 2004 SC 219–37.

In 1911, “The Special Marriage Bill, 1872” which, *inter alia*, allowed a Hindu man to marry a Muslim woman was opposed by the ‘*ulamā*’.<sup>122</sup> Similarly, in November 1917, a delegation of ‘*ulamā*’, led by Ḥāfiẓ Muḥammad Aḥmad (1862–1928), met Edwin Samuel Montagu (1879–1924), then Secretary of State for India in Delhi and presented 10-point memorandum demanding, *inter alia*, non-interference in the MFLs and establishment of a *qaḍā*’ department for the safeguard of the Muslim Personal Law.<sup>123</sup>

In British India, Maulānā Shāh Muḥammad Aḥmad Raḍā Khān Bareilvi (1856–1921) established a *Dār al-Qaḍāh Shar‘ī* in March 1921, in Bareilly.<sup>124</sup> Maulānā Abū ‘l- Maḥāsīn Sayyid Muḥammad Sajjād Naqshbandī (1883–1940), in June 1921, established *Imārat-i Shar‘iyyah* and a system of *qaḍā*’ in Bihar and Orissa in order to get Muslims’ disputes especially family matters solved.<sup>125</sup> Some of Indian Muslim states had their own *dār al-qaḍā’ wa ‘l-iftā’*, which used to function under the Islamic law.

The *Qāḍī* Courts in British India were abolished by the British in 1864. In 1982, the Zia regime announced to reestablish *Qāḍī* Courts in Pakistan, which was warmly welcomed by the ‘*ulamā*’. They were of the opinion that the present judicial system of the country is ineffective and unable to give relief to the people.<sup>126</sup>

Although, it has been observed that the role of Pakistani courts especially that of the apex courts in protecting, interpreting, and applying the MFLO’s provisions to the benefit of women, has been no less active and creative,<sup>127</sup> they are widely defied by the majority of the public. Under the provision of the MFLO, in July 1964, Family Courts were established to resolve the cases related to the family affairs within a period of six months.<sup>128</sup> These courts in several cases, issued decrees of *khul’* without the consent of husbands, as the courts believed, most

<sup>122</sup> P. Hardy, *The Muslims of British India* (Cambridge: Cambridge University Press, 1972), 180.

<sup>123</sup> *Al-Rashīd* (Sahiwal), March–April 1980, 138.

<sup>124</sup> Ahmad, *Janūbī Aishiyā kē Urdū Majmū‘ah-i Fatāwā*, 53.

<sup>125</sup> Qāḍī Mujāhid al-Islām Qāsīmī, ed., *Imārat-i Shar‘iyyah: Shubhāt-o Javābāt* (Phulwari Sharif: Imārat-i Shar‘iyyah-i Bihār-o Aḥsāh, 1999), 4. Also see Ebrahim Moosa, “*Shari‘at Governance in Colonial and Postcolonial India*,” in *Islam in South Asia in Practice*, ed. Barbara D. Metcalf (Princeton: Princeton University Press, 2009), 317–25.

<sup>126</sup> ‘*Arafāt*, March–April 2003, 67–69; *al-Na‘īmiyyah* (Lahore), March 2005, 85–89.

<sup>127</sup> Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women*, 154.

<sup>128</sup> In 1971, “the Punjab (Amendment) Act XXIV,” in 1996, “the Sarhad (Amendment) Act XVIII,” and in 1997, “the Sind (Amendment) Act II” were enacted by the respective provincial governments to amend some clauses of the Family Courts Act. *Muslim ‘Ā‘lī Qavānīn Ārḍīnans 1961*, 28–30.



probably after 1967, that the *khul'* cannot be refused.<sup>129</sup> When the aggrieved parties approached the *Ḥanafī muftīs*, they issued *fatāvā* that these decrees of divorce (judicial *khul'*) were invalid according to the Islamic law and the woman was still a legal wife of the man.<sup>130</sup> The *Ahl-i Ḥadīth 'ulamā'*, however, believed in the legal and *shar'ī* validity of the judicial *khul'*.<sup>131</sup> Muftī Munīb al-Raḥmān, declared the procedure of courts to issue decrees of *khul'* without the consent of husbands as null and void and advised the courts that they should understand the difference between *khul'* and *faskh* (rescission). Therefore, instead of issuance of decrees of dissolution of marriages on the name of *khul'*, they should bring about a reconciliation between the husband and wife.<sup>132</sup> The majority of *Ḥanafī 'ulamā'* in their *fatāvā* also declared that according to the *shar'īah*, the divorce given by a husband three times even at once will be valid,<sup>133</sup> regardless of whether it was registered in the local union council or not, as required under the MFLO. The '*ulamā'* and *muftīs* in

<sup>129</sup> *Ibid.*, 128; Patel, *Women and Law in Pakistan*, 123–33. However, in some decisions, it was ruled out that marriages could not be dissolved on ground of *khul'* merely because wife desired dissolution of marriage. For details, see Muhammad Bilal v. Nasim Akhtar, 1983 CLC 2390 and Muhammad Zafar Iqbal v. Parveen Akhtar, NLR 1992 Civil 522(a).

<sup>130</sup> Iqtidār Aḥmad Khān Na'īmī, *al-'Aṭāyā al-Aḥmadiyyah fī Fatāvā Na'īmiyyah* (Lahore: Ḍiyā' al-Qur'ān Publications, 1999), 4:553–60; Qamar al-Qādirī, ed., *Fatāvā Muḥaddith-i A'zam Pākistān* (Faisalabad: Maktabah-i Qādiriyyah, 2001), 119; Ludhyānavī, *Āp kē Masā'il aur un kā Ḥall*, 5:400–01; *Fatāvā-i Ahl-i Sunnat Nambar 3* (Karachi: al-Madīnah al-'Ālamiyyah, n.d.), 40–42; *Fatāvā-i Ahl-i Sunnat Nambar 5* (Karachi: al-Madīnah al-'Ālamiyyah, n.d.), 63–64; Muḥammad 'Abd al-'Ālim Siyālvī, *Fatāvā Dār al-'Ulūm Na'īmiyyah, Lāhūr* (Lahore: Idārah-i Manshūrāt-i Na'īmiyyah, Lāhūr, 2008), 1:149–56; Munīb al-Raḥmān, *Tafhīm al-Masā'il* (Lahore: Ḍiyā' al-Qur'ān Publications, 2012), 6:315–17; *Fatāvā Nu'māniyyah Amjadiyyah* (Karachi: Bazm-i Amjadī Raḍvī, n.d.), 39–40; Rashīd Aḥmad Ludhyānavī, *Aḥsan al-Fatāvā* (Karachi: H. M. Sa'īd Company, 1999), 5:383; Muḥammad Riyāḍ Durrānī, ed., *Fatāvā Muftī Maḥmūd* (Lahore: Jam'iyyat Publications, 2006), 4:250–54; 'Arafāt, February 2010, 55–57; and *Ahl-i Sunnat* (Gujrat), March 2000, 29–31, July 2002, 27–31, August 2002, 27–32, and September 2006, 13–14.

<sup>131</sup> *Al-I'tiṣām*, September 16, 1994, 7–8 and June 16, 1995, 5–7; 'Abd al-Sattār Ḥammād, *Fatāvā Aṣḥāb al-Ḥadīth* (Lahore: Maktabah-i Islāmiyyah, 2009), 2:321–22; Ḥammād, *Fatāvā Aṣḥāb al-Ḥadīth* (Lahore: Maktabah Islāmiyyah, 2013), 3:374–75.

<sup>132</sup> Munīb al-Raḥmān, *Tafhīm al-Masā'il* (Lahore: Ḍiyā' al-Qur'ān Publications, 2012), 4:328–35. Also see Muḥammad Taqī 'Uthmānī, *Fatāvā 'Uthmānī* (Karachi: Maktabah-i Ma'ārif al-Qur'ān, 2007), 2:445.

<sup>133</sup> Some of the '*ulamā'* and CII believe that according to *Ḥanafī* law, although pronouncing three consecutive times divorce at once is against the *sunnah*, so, to discourage this trend the man should be punished. However, the divorce will be effective. *Dawn* (Islamabad), January 22, 2015. Muftī Muḥammad Yāsīn Shāh (1914–1999) was a *Ḥanafī 'ālim*. However, he was of the view that the three simultaneous divorces are equivalent to one time divorce. Sayyid Muḥammad Ajmal Shāh, ed., *Fatāvā Yāsīn* (Jhang: Panjāb Ṭibbiyyah Kālij, n.d.), 149–55.

their *fatāwā* also advocated the polygamy and no age-limit for marriage.<sup>134</sup>

### Hudood Ordinance and Protection of Women Bill

In 1979, Zia regime issued the Hudood Ordinance<sup>135</sup> in order to Islamize the Pakistani society. This ordinance right from the date of its enactment became controversial not only among the members of the civil society but also among the *'ulamā'*.<sup>136</sup> In July 2000, the government established a National Commission on the Status of Women. A committee of the commission submitted its report on the Hudood Ordinance, which flamed the already existing controversy over it.<sup>137</sup> The same was the case with the Protection of Women (Criminal Laws Amendment) Bill, 2006, passed by the Parliament of Pakistan on November 15, 2006.<sup>138</sup> The

<sup>134</sup> Al-Qādirī, *Fatāwā Muḥaddith-i A'zam Pākistān*, 125–32; Sayyid Maḥmūd Aḥmad Raḍvī, *Fatāwā Barakāt al-'Ulūm* (Lahore: Shu'bah-i Tablīgh Markazī Dār al-'Ulūm Ḥizb al-Aḥnāf, n.d.), 1:25; Muḥammad Khalīl Khān al-Qādirī, *Fatāwā Khalīliyyah* (Lahore: Ḍiyā' al-Qur'ān Publications, 2008), 1:537–38, Muḥammad Khalīl Khān al-Qādirī, *Fatāwā Khalīliyyah* (Lahore: Ḍiyā' al-Qur'ān Publications, 2008), 2:60, 84–85; Siyālvī, *Fatāwā Dār al-'Ulūm Na'imīyyah*, 160–68, 198–214, 241–42; Muḥammad Ismā'īl Nūrānī, *Anwār al-Fatāwā* (Lahore: Farid Book Stall, 2007), 230–37; Muḥammad 'Abd Allāh Na'imī, *Fatāwā Mujaddidiyyah Na'imīyyah* (Karachi: Muftī-i A'zam Sindh Akaidimī, Dār al-'Ulūm Mujaddidiyyah Na'imīyyah, 1991), 233–38, 262–63; Ludhyānavī, *Āp kē Mas'āl aur un kā Ḥall*, 5:231–32; Muḥammad 'Abd al-Salām, ed., *Fatāwā Markazī Dār al-'Ulūm Ḥizb al-Aḥnāf, Lāhōr* (Jhelum: Shu'bah-i Nashr-o Ishā'at, Dār al-'Ulūm Sulṭāniyyah, 2003), 218, 242, 250–59; Muḥammad Ashraf Aṣif Jalālī, *Tahaffuz-i Ḥudūd Allāh aur Tarmīmī Bil (Ghaltiyān aur Dhōkē)* (Lahore: Idārah-i Širāt-i Mustaqīm Pākistān, n.d.), 46–47; Gul Ḥasan, *Kitāb al-Fatāwā* (Karachi: Maktabah-i Dār al-Fikr wa 'l-Ishā'ah, 2008), 37–38, 42–43; Muḥammad Naṣr Allāh Nūrī, ed., *Fatāwā Nūriyyah* (Basirpur: Shu'bah-i Taṣnīf-o Ttālīf, Dār al-'Ulūm Ḥanfiyyah Farīdiyyah, 1980), 2:194–98; Muḥammad Šāḥibdād Khān, *Islāmī Mushāvaratī Kaunsal kē Savālnāmāh kā Javāb* (Lahore: Ḥakīm Ghulām Mu'tīn al-Dīn Na'imī, 1963), 4; 'Uthmānī, *Hamārē 'Ā'ilī Masā'il*, 171–207, 208–50; and *Fatāwā-i Ahl-i Sunnat Nambar 5*, 58–63.

<sup>135</sup> Charles H. Kennedy, "Islamization in Pakistan: Implementation of the Hudood Ordinances," *Asian Survey* 28, no. 3 (1988): 307–16.

<sup>136</sup> For supportive and opposing views, see Muḥammad Ṭufail Hāshimī, *Ḥudūd Ārḍīnans: Kitāb-o Sunnat kī Rōshanī main* (Islamabad: Aurat Foundation, 2004); Sayyid Maḥzar Sa'īd Kāzīmī, *Ḥudūd Ārḍīnans par Tabširah* (Multan: Maktabah-i Mihriyyah Kāzimiyyah, 2006); Sayyid 'Azīz al-Raḥmān, *Ḥudūd Ārḍīnans: Ḥaqīqat aur Fasānah* (Karachi: Zawwar Academy Publications, 2007); and Asifa Quraishi, "Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina," *Islamic Studies* 38, no. 3 (1999): 403–31.

<sup>137</sup> *Report on Hudood Ordinances 1979* (Islamabad: National Commission on the Status of Women, 2003). Also see Farīdah Aḥmad Šiddīqī, *Ḥudūd Ārḍīnans: Qōmī Kamīshan barā'e Mansab-i Khavātīn kī Ripōrt par Tanqīdī Jā'izah-o Sifāriḥāt* (n.p.: n.p., n.d.).

<sup>138</sup> In September 2006, the government consulted some leading *'ulamā'* of all sects in order to get consensus on the bill. The *'ulamā'* not only suggested substantive amendments to the bill, but also recommended some measures to be taken for the

'ulamā', including the MMA parliamentarians, opposed the act and declared it an interference in the *ḥudūd Allāh* and against the spirit of the 1973 Constitution, but they could not stop its adoption and implementation.<sup>139</sup>

## Conclusion

Almost every religious group of Pakistan is of the view that MFLs should be legislated according to their respective personal laws. However, the governments often through the parliament and judiciary endeavoured to make MFLs compatible with the needs of modern times. In this way, the governments played an interpretative role in modifying the *sharī'ah* laws, using the authority of *siyāsah shar'īyyah* (the administration of justice by the state beyond the explicit law of the *sharī'ah*).

Since *fatāvā* constitute a major means of exercising 'ulamā' and *muftīs*' doctrinal authority in the public sphere to pronounce formal judicial opinion, they issued several *fatāvā* against the MFLO. However, they failed to get it annulled or amended in line with their

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safeguard of the women's rights. However, the government did not accept these suggestions. Abū 'Ammār Zāhid al-Rāshidī, *Ḥudūd Ārḍīnans aur Tahaffuz-i Nisvān Bil* (Gujranwala: al-Sharī'ah Akādīmī, 2007), 104–08, 112–20; *Report on Hudood Ordinances 1979* (Islamabad: National Commission on the status of women, 2003). Also see Şiddīqī, *Ḥudūd Ārḍīnans*; Samīḥah Rāḥīl Qādī, *Tahaffuz-i Nisvān yā Tahaffuz-i 'Isyān Bil* (Karachi: Islamic Research Academy, 2006); and Rānā Muḥammad Shafīq Khān Pasrūrī, ed., *Nisvān Aikt kiyā hē?* (Lahore: Makhzan-i 'Ilm, n.d.).

<sup>139</sup> The MMA presented a private bill for the protection of women, but it was turned down. Muḥammad Munīb al-Raḥmān, *Ḥuqūq-i Nisvān Aikt* (*Tahqīqī Tajziyah*) (Lahore: Kaunsal āf Jarā'id-i Ahl-i Sunnat Pākistān, n.d.), 3–16. This monograph, based on a *fatvā* issued on November 26, 2006 was endorsed by 400 Barelvi 'ulamā' of Karachi. Munīb al-Raḥmān, *Tafhīm al-Masā'il* (Lahore: Dīyā' al-Qur'ān Publications, 2012), 3:481; Jalālī, *Tahaffuz-i Ḥudūd Allāh aur Tarmīmī Bil*, 5–47; Muḥammad Taqī 'Uthmānī, *Ḥudūd Qavānīn maīn Tarmīm: Tahaffuz-i Ḥuqūq-i Nisvān Bil kiyā hē? Aik Muṭāla'ah* (Islamabad: Institute of Policy Studies, 2006); Rāshidī, *Ḥudūd Ārḍīnans aur Tahaffuz-i Nisvān Bil*, 100–01, 139–40, 147–49; Muḥammad 'Umar Ḥayāt al-Ḥusainī, ed., *Tahaffuz-i Ḥuqūq-i Nisvān aur Islām: Aik Taqābulī Muṭāla'ah* (Birmingham: Tahrik-i 'Ulamā'-o Mashā'ikh-i Jammūn-o Kashmīr, Bartāniyah, 2007), 268–398; 'Arafāt, September 2006, 3–5; *Sū'ē Hijāz* (Lahore), December 2006, 29–37; *Raḍā-i Muṣṭafā*, December 2006, 1–2; and *Jalāliyah* (Bhikhi), December 2006, 3–5. After the passage of this bill, only Syed Mazhar Saeed Kazmi (b. 1945) and Haji Hanif Muhammad Tayyab (b. 1947), both belonging to the Barelvi denomination, resigned from the membership of the CII in November 2006 in protest. However, no member of the Parliament belonging to any religio-political party resigned. It is interesting to note that the CII, in December 2006, in a meeting chaired by the then President of Pakistan General Pervez Musharraf (b. 1943) endorsed the bill. Rāshidī, *Ḥudūd Ārḍīnans aur Tahaffuz-i Nisvān Bil*, 67. However, in September 2013, CII declared some clauses of the ordinance as un-Islamic and demanded its withdrawal. *Navā-i Vaqt* (Lahore), September 20, 2013.

understanding of the *sharī'ah* because there was no institutionalized mechanism to enforce the *fatāvā*. The MFLO was given constitutional protection and remained outside the purview of the Pakistani courts for many years.<sup>140</sup> However, the 'ulamā' gave little attention to challenging the MFLO for its violation of the fundamental rights guaranteed to the people of Pakistan in the Objectives Resolution and in the Constitutions of 1956, 1962, and 1973. Under these rights, every citizen has the freedom to profess his religion and to manage his religious institutions. The 'ulamā' also failed to develop and organize public opinion and could not launch any massive movement against the MFLO, although, they vowed that the majority of the people of Pakistan would resist its enforcement.<sup>141</sup> However, except for some minor events, the public resistance did not happen in any part of the country, because the 'ulamā' preferred to engage themselves only in the theoretical debates about the MFLO. Some 'ulamā' and *muftīs* argued against the MFLO on the authority of medieval *fiqhī* texts, whereas the governments supported the MFLO mostly on the basis of *istiṣlāḥ* (public interest) and social justice.

The 'ulamā' and *muftīs* claimed that since they were trained in the Islamic law, they had direct access to the Islamic sources, but the judges did not. Although, in the family cases, the Pakistani courts decide according to the MFLO, there are some divergent decisions, especially in *khul'* cases.<sup>142</sup> People often resort to the courts to settle their disputes. Most of them accept court decisions, as they are legally bound to do so. They also seek *fatāvā*, which are looked on with great authority and follow them as a righteous act. The other main reason for this public attitude could be the hindrances they face in proper understanding of the MFLs. The implementing machinery has also not been very active and supportive of the public. In sum, the MFLO created a gulf between the state and Muslim religious groups and its continuous implementation reveals the limitations of the 'ulamā' and *muftīs* with respect to the constitutional and judicial authority in Pakistan.

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<sup>140</sup> However, the "Enforcement of Shariah Ordinance" promulgated on June 15, 1988, empowered the Supreme and high courts in their appellate jurisdiction to examine the question of the *vires* of Muslim Personal Law, including MFLO, from the *sharī'ah* point of view. Tanzil-ur-Rehman, "Family Laws Ordinance and the Constitution," 28.

<sup>141</sup> Ahmad, *Marriage Commission Report X-Rayed*, iv, xiv; Iṣlāḥī, 'Ā'ilī *Kamīshan kī Ripōrt par Tabṣīrah*, 7.

<sup>142</sup> See, PLD 1952 LHR 113; PLD 1959 LHR 566; PLD 1967, Vol. XIX SC 97–149; PLD 1984 SC 329–33; Muhammad Munir, "Judicial Law-Making: An Analysis of Case Law on *Khul'* in Pakistan," *Islamabad Law Review* 1, no. 1 (2014): 7–24.