

CONTROVERSY BETWEEN MODERNISTS AND TRADITIONALISTS IN PAKISTAN: THE CASE OF COMMISSION ON MARRIAGE AND FAMILY LAWS, 1955

Naila Maqsood & Muhammad Jamil*

Abstract

The creation of Pakistan may be said to have involved activities carried out by persons who had acquired modern Western education. During the crucial years of their struggle, they explicitly made use of Islamic symbols for mobilization of the Muslim populace in the subcontinent. In this, they were joined by a number of Muslim ulama who had initially opposed Western modern education and institutions. After independence in 1947, divergence of views between the two, emerged on several occasions. In the case of Report of the Commission on Marriage and Family Laws, 1955, divergence was embodied in a majority report and a Note of Dissent. This article discusses the divergence between them as expressed in two documents, namely Report and Note of Dissent, both published in The Gazette of Pakistan Extraordinary, the former in June 1956 and the latter in August, the same year. The article advances the view that arguments of both largely became an exercise in polemics. The article speculates on the way, whereby, the two could have undertaken a more serious analysis and could have resolved the difference.

Key Words: Note of Dissent, Mobilization, Divergence, Marriage and Family Laws, Male-dominated Society

Introduction

Women from educated and well-to-do families played a visible role in the mobilization of the Muslim populace during the Pakistan Movement, thereby, achieving public space and a degree of emancipation in the otherwise patriarch and male-dominated society. After independence, women's role in political life was not as visible as it was during the Pakistan Movement. Women, however, did continue their endeavours to organize, and formed All Pakistan Women's Organisation headed by the wife of the

* Dr Naila Maqsood is working as Assistant Professor at University of Engineering and Technology, Taxila and Dr Muhammad Jamil is working as Assistant Professor at School of Economics, Quaid-i-Azam University, Islamabad.

Prime Minister. In 1955, the Prime Minister of the time contracted a second marriage and the event triggered an activist response against the practice. On the representation of the upper class women to the bigamous Prime Minister¹, the government constituted Commission on Marriage and Family Laws with the terms of reference to study the existing laws governing marriage, divorce, maintenance, among Muslims that require modification in order to give women their proper place in society and other ancillary matters according to the fundamentals of Islam.² The commission was headed by a retired Chief Justice of Pakistan, replacing the first president of the Commission who died suddenly. The other members had parity, three males and three females. One of the male members was an alim (scholar in Islamic fiqh). The report of the Commission was not unanimous; the alim (pl. ulama) wrote a note of Dissent. The Commission's majority report (henceforth the Commission's report) and the Note of Dissent both were published in the Gazette of Pakistan Extraordinary, the former on June 30, 1956 and the latter on August 30, 1956.

This article analyses the two documents as a case of controversy between modernists and traditionalists in Pakistan. The modernists emphasized 'progressive' interpretation of Islamic Law through *Ijtihad* (forming independent opinions in Islamic fiqh), when the basic sources i.e. the Quran and the Sunnah (tradition) of the Prophet of Islam, were silent on a question. The traditionalist maintained that the Sharia (Islamic Law) was now embodied in the teachings of four schools of law, upon which consensus had come to exist by the end of the third century of Hijra and were now to be followed as authentic schools of Islamic law. Differences among the four schools are understood to be inconsequential and, therefore, tolerated.

This article briefly traces the origin of both traditionalism and modernism to appreciate the divergence between the two. In the case of the Commission, the two contending parties largely adopted polemical stance and did not utilize the opportunity to moderate the divergence. The article

attempts to explore the manner, whereby, the polemics could be minimized and some measure of convergence achieved.

Establishment of the Tradition (Taqleed)

The establishment of tradition takes us to the evolution of Islamic Law.

a. Islamic Law under the Prophet and His Successors

Islam, as a religion, is based on teachings contained in the Quran, believed by Muslims to have been revealed by God to the Prophet (S.A.W.S) of Islam. The Quran is the basic source of law, known as the Shari'a. It is believed to represent the divine will for human conduct that would assure a person's success in this world and salvation in the hereafter. When acted upon faithfully, the Quranic law promised prosperity and durability of the Muslim community.³ During the life of the Prophet, if the Quranic injunctions needed explanation, they were provided by the Prophet himself through his words and deeds, both things usually summed up under the term Sunnah. Acquisition of deeper knowledge of faith and, thereby, law was enjoined upon Muslims in Quranic verses revealed during the last year of the Prophet's life. The Prophet's successors during the period 632-662 A.D. carried out public affairs according to the injunctions of the Quran and the Sunnah of the Prophet.

Meanwhile, many persons having more knowledge of what was right and lawful began to emerge as a result of the deeper study of the Quran and Sunnah of the Prophet. Considerable supply of experts of Islamic law, or ulama (singular: alim), became available during the next period in Islamic history, i.e. the Umayyad period, 662-750 A.D. By the end of the Umayyad period, Islam witnessed a transformation from a religious community in Arabia into a vast polity absorbing a great number of races, cultures and religions. Administration in the complex situation exercised the minds of ulama, who were usually charged with the function. Till the beginning of the Umayyad, guidance was coming from the Rightly

Guided Caliphs. During the Umayyad period, such guidance was rare and ulama-administrators had to depend upon knowledge being generated in the educational institutions, legal exertions of ulama, both as organizations and as individuals. Ulama as judges utilised the available knowledge and tended to make use of discretion in settlement of disputes. In the process, a practical system of legal administration did come up, but not a scientific jurisprudence.⁴

b. Post-Umayyad Developments

Further development of Shari'a occurred with the realization that important dislocations had occurred during the Umayyad period. Rectification was sought both on the political and legal fronts. On the political front, movements had been afoot to dislodge the Umayyads from power and a coalition between Banu Abbass (the dynasty originating from Abbas, an uncle of the Prophet) and groups from the progeny of the Prophet. They were able to remove the Umayyad from power by 750 A.D.⁵ On the legal front, far reaching developments were taking place in the society, particularly in Kufa in Iraq and Madina in Arabia. In Iraq, Abu Hanifa (A.D 699-768) distinguished himself as the chief advocate of analogy (qiyas) as a major source of law, whenever specific Quranic verse and Sunna was not available. Qiyas (analogy) means to use human reason to compare an existing situation with one for which legislation already exists. For example, if the Quran has banned wine, it means that, by analogy, it has also banned any form of alcoholic drink, whose effect is like wine, namely one which causes intoxication.

In Madina, Malik Ibn Anas (A.D. 718-96) had selected a body of hadiths (sayings of the Prophet) acceptable to recognized jurists of Madina, as a main source of law, when the Quran appeared to be silent on a matter. This was known as Ijma (consensus) among Madina jurists. The Ijma was a weapon with which the Madina

jurists attacked the Iraqi jurists (especially Hanafis) on the ground that they had departed from the Sunnah (actions/precepts, words) of the Prophet. However, it was feared that such Ijma might constitute legislation by man. Also, a major danger in the Malki school was that emphasis on Sunnah also included some of the customs of the pre-Islamic Arabia.⁶

It was here that Shafi'i's *Risala* made its entrance.⁷ The *Risala* clarified the Quran as source of Islamic law. The Prophet's Sunnah was regarded as indispensable in clarifying meaning of particular Quranic legislation, or an ambiguous text. In trying to achieve a consistent legal theory, Shafi'i accepted the unquestionable authority of the Quran and admitted authentic Sunnah of the Prophet as next binding source of law. He also attached great significance to the consensus of the Muslim community in arriving at a rule of law. He tried to limit the use of analogy to questions of detail, when there was no relevant text in the Quran, Sunnah, or consensus. Analogy, he maintained, could not supersede the other three sources of law, but rather it must be superseded by them. Also, analogy was not to be based on a special or exceptional case, and it had to conform to the general spirit of the law. In taking this attitude, Shafi'i established a balance between those who used analogy extensively and those who rejected it as a source of law. Shafi'i's one time student Ahmad Ibn Hanbal (d. 855) also emphasized the tradition of the Prophet as a source and made his own collection of authentic hadiths, namely, *Musnad*. He came to have a large body of disciples, whereby, a fourth school of Islamic law was established in his name.⁸

Among Sunni Muslims, the four schools of law came to be fully established by the 9th century A.D. Discussions and debates continued and worked towards the solidification of these schools, a kind of Ijma occurred, on the validity of the four schools. The Ijma was permissive in the sense that it permitted differences between

the schools. Further discussion came to be precluded on points which were the subject of consensus among the four schools. Discussion was also precluded on those matters where the jurists had agreed to differ. Such *ijma* began to spread all around in the Sunni Islam, and any further use of independent reason or further *Ijtihad* beyond the four schools began to disappear. By early 10th century, the right of *Ijtihad* was replaced by the duty of *taqleed* (imitation) in the footsteps of the founders of the four schools. Tradition had been set in the formation of the four schools. Those who like to imitate that tradition became the traditionalists.

The tradition reached its zenith under the teachings of Al-Ghazali (d. 1111). His teachings emphasized that should a regional Sultan recognize the caliph, and the caliph recognize the ulama, there would be no break with the traditional Islamic political system. Al-Ghazali's formulation struck very deep roots. With the demise of the Abbasid caliphate in Baghdad in 1258, Ulama's role became more prominent. Some efforts to the contrary, notwithstanding (e.g. Ibn Taymiyyah asserting independent opinion in matters of Islamic law), *taqleed* doctrine continued to predominate among Sunni Ulama, remaining valid for succeeding generations. Muslims in the Indian Subcontinent followed the traditionalist pattern before the creation of Pakistan and became quite active after independence in 1947.⁹

c. **The Modernists**

The modernists among Muslims are those who have developed appreciation for development of science and technology and democratic political institutions in the Western World. They interpret the teachings of Islam in such a way, as to bring out its dynamic character in the context of the intellectual and scientific progress of the modern world. The modernists earnestly make efforts to reconcile differences between traditional religious

doctrines and secular scientific rationalism and between continuity of Islamic tradition and modernity.

The Indo-Pak subcontinent came into contact with Europe in the 17th century, with the British establishing their rule by 1857. The crisis among Muslims gave rise to different movements, one of which came to be known as Aligarh movement. Its originator, Sir Syed Ahmad Khan, believed that while revealed religion represented the Word of God, nature was Work of God.¹⁰ Scientific discoveries represented knowledge of nature. According to Sir Syed Ahmad Khan, Word of God and Work of God could not be at variance. Furthermore, he believed that when there appeared a contradiction between a scientific fact and a religious rule, then the latter must be reinterpreted according to scientific evidence. Sir Syed Ahmad Khan concluded: "if we keep in view the principles deducible from the Quran itself, we shall find that there is no contradiction between the modern sciences, on the one hand and the Quran and Islam, on the other."¹¹ Sir Syed Ahmad Khan, thus, attempted to build a new theology to respond to the modern change.¹²

The other towering thinker, who attempted a reconstruction of religious thought in Islam, was Allama Muhammad Iqbal.¹³ According to him, "The claim of the present generation of Muslim liberals to reinterpret the foundational legal principles in the light of their own experience and altered conditions of modern life is, in my opinion, perfectly justified. The teaching of the Quran that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems."¹⁴

Post-Independence Modernist Views in Pakistan

An important venue for debate that developed in Pakistan was, of course, the Constituent Assembly and the occasion of the framing of a

constitution. One of the central issues was the place of Islam in the constitution. Re-interpretation of Islamic law and its history in modern times has been a stupendous task for which two major positions emerged in the country, namely the modernists and the traditionalists.

Ishtiaq Husain Qureshi, an academic turned-legislator, thus, articulated modernist position on the nature of Islamic Law, "Muslims recognized Islamic law, the shariah, as sovereign. But the shariah included not only the principles found in the Quran and the Prophet's traditions, which were immutable, but a large mutable element consisting of the medieval jurists' opinions relevant to the circumstances of their own times.

During the intervening centuries, the world and the state of human knowledge had changed much. The shariah, in its existing form, could not therefore be accepted as the 'legal sovereign'; it needed 'considerable overhauling' and the principles themselves needed new interpretation. Even the Quran and Sunnah could not be made legally sovereign until new interpretations of their basic principles had been made and accepted by the people."¹⁵ Qureshi held a position in the cabinet and it would not be unreasonable to view his thesis as the government's counter offensive against the ulama in a contest for leadership.

The Ulama claimed a guiding and, thus, a controlling role in the polity, because of their claim of knowledge of Islamic law as established by four recognized school of law. The position that none of such schools' interpretation was binding, that all of them were open to reconsideration, and that the people had the right to accept or reject this or that interpretation, sought to demolish the entire moral basis and rationale of the ulama's claim to authority.

The politician was saying that Islam was what the Muslim community believed and did, that, in effect, the ulama were not indispensable to the process of Islamization thus conceived, and that he could manage it quite well by himself.¹⁶ This was liberalism at its peak.

The Report of the Commission on Marriage & Family Laws, 1956

The Commission was appointed to study the existing laws governing marriage, divorce, maintenance among Muslims that required modification in order to give women their proper place in society and other ancillary matters according to the fundamentals of Islam.

a. The Commission's Emphasis on Ijtehad

The Commission's Report took the view that laws and injunctions promulgated in the Quran deal mostly with basic principles and vital problems. They consist of answers to the questions that arose while the Book was being revealed. The entire set of injunctions in the Holy Quran covers only a few pages. The Commission held that it was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life-time.

The Commission opined that as nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his companions. This, the Commission says, is the principle of Ijtehad or interpretative intelligence working within the broad frame-work of the Quran and the Sunnah.¹⁷

b. The Commission's Polemics against Traditionalists

The Commission, in its attempt to justify Ijtehad, tended to employ loose language, particularly in the introductory portion of its report. Indeed, the Report indulged in unwarranted polemics and some illustrations of the same are in order. Ijtehad is a technical term, but it was used loosely, making the bland statement that the members of the Commission had exercised their individual judgment. Probably, the Commission took a cue from Allama Iqbal, who did express favorable views regarding participation of the

common people in Islamic legislation. But that was to be in a legislative assembly and not individually by members of a commission.¹⁸ Besides the loose statement regarding individual judgment, the Commission's Report emphasised that the members gave particular attention to the "opinion of the learned liberal and enlightened persons." "The phrase liberal and enlightened" evokes a perception of copying the Western ideas at the cost of indigenous values and morals.¹⁹ The Commission needed to be careful in stating its ideas.

The Commission asserted that Muslim state and society had become dormant and stagnant due to monarchical and feudal influences and owing to the apathy of the custodians of the law. In their view, if the process of Ijtehad had continued indefinitely, Muslim society would have received rejuvenation from time to time.²⁰ Such assertions were made without any qualifications and any mention of historical circumstance, particularly with regard to the work of the ulama, performed in maintaining the integrity of the Muslim community.²¹

The Commission reiterated that Muslims all over the world, during the last three centuries particularly, had been left behind in the rapidly accelerating race of social, political, economic and cultural advancements. Muslims needed to appreciate the significance of changing realities and the influx of new and undreamt of factors. Such changes required a modern approach, new rules of conduct, and fresh legislation in almost all spheres of life and a radical remodeling of the legal and judicial system. No nation, in the opinion of the Commission, could stand aside as an idle or wondering on-looker, while the world progressed rapidly. No nation, big or small, could now stand in indifferent isolation.²² In saying so, the Commission indulged in unwarranted rhetoric, magnifying the achievements of the Western civilization and painting a bleak picture of the conditions of Muslims in the world.

Sweeping generalization at the cost of nuanced analysis undercut the chances of receptiveness of the Commission's view. In a further attack on the ulama, the Commission held that Islam countenances no kings and recognizes no priests. Some inhabitants may be more learned in Muslim law than others, but that did not vest them with special privileges.²³ However, Ulama in Pakistani society do carry authority in matters of Islamic law, enjoy a lot of respect and people seek guidance from them in religio-social matters. The Commission made unwarranted assertions, showing carelessness in the use of words for what it wanted to convey.

The Commission asserted, "if the reforms proposed by this commission are welcomed by the liberal and enlightened section of the public and receive legislative sanction, they will form an important contribution to the scheme of reconstruction demanded by all, who are not fossilized by tradition or blinded by sheer authoritarianism."²⁴

Again, the Commission uses the phrase "liberal and enlightened section of the public." Use of this phrase invites the label of being Westernised for the members of the Commission and goes to lessen authoritativeness of their approach to the issues in question. The use of phrases like "fossilized by tradition" and "blinded by sheer authoritarianism" in a report by a Commission appointed by the government for reforms in marriage and family, was simply polemical, and generative of resistance to its ideas and proposals.

In the view of the Commission, if Muslim society wanted to become genuinely free and dynamic again, offering itself as a model for all other types of democracy, the original spirit of Islam had to be revived. The Commission made this suggestion after a highly polemical observation, namely: "Law is ultimately related to life experiences, which are not a monopoly of the theologians only."²⁵

c. **The Commission's Substantive Recommendations**

The substantive recommendations of the Commission were: there should be compulsory registration of marriages and that marriage contracts should be signed by the parties to the marriage or, if illiterate, that their thumb-prints should be affixed. A copy of the registration instruments was to be deposited in the Tehsil (a revenue collection subdivision), where the parties resided.²⁶ Limitations of age were suggested below which males and females should be deemed not competent to marry. Penalties were suggested to prevent the selling of daughters. Restrictions were put on the husband's power of divorce; particularly the 'Divorce' pronounced three times in one sitting was to count only one time. Judges in such courts were deemed to make efforts at reconciliation at pre-trial hearings.²⁷ Wife could demand divorce (called Khula) by foregoing (Mehr) property given to her by husband at the time of marriage. Measures for maintenance of divorced wives and their children were recommended alongwith suggestions for safeguarding the property of wives and minors.

To eliminate polygamy, a man contemplating to have a second wife was to present himself before a court to explain the circumstances which, according to him, could justify his taking this step. In cases with rational justification, the court could permit a man to take a second wife only on the condition that in the matter of maintenance and other treatment no injustice was done to the first wife and her children.²⁸ The Commission was of the opinion that such steps would greatly curb the unrestricted and uncontrolled practice of polygamy which in their view, caused so much distress in family life.²⁹

Note of Dissent

One of the members of the Commission was the well-known scholar of Islamic law, Maulana Ehtisham ul Haq Thanvi.³⁰ He did not agree with the Commission's report, and wrote a Note of Dissent.

The Note's Polemics

Thanvi submitted his Note of Dissent in the Urdu language and official translation of the same was published in the Gazette of Pakistan Extraordinary dated 30th August, 1956. In the Note, Thanvi offers some robust points for his disagreement with the Commission. At the same time, he also indulges in mere assertions, accusations and polemics, thereby, minimizing the academically sound aspects of his discourse.

An initial statement from Thanvi, partly serious, partly assertive, was a methodological one. According to him, Fiqh in fact means adherence to principles and rules in deducing and deriving general conclusions from particular instances. Forming of general conclusions from particular instances is not possible until one has before one's mind all the instances to which injunctions of the Holy Quran and the Sunnah are applicable. Any attempt on the part of those who do not know one single provision of the Holy Quran and the Sunnah correctly, to form general principles and draw conclusions, is deviation from the right path and complete ignorance.³¹ Members of the Commission, according to Thanvi, were not capable of preparing a new set of principles of jurisprudence that could supersede the existing ones by generalizing from specific positions. They were also not willing to be guided by the established laws of jurisprudence. To take personal and individual whims as the basis for the derivation of laws and principles was, said Thanvi, neither 'Fiqh' nor 'Ijtihad' but amounted to distorting the religion of God and the worst type of heresy.³²

Thanvi particularly attacked the lengthy 'introductory' remarks in the report. Thanvi threw a challenge: "If the Introduction-writer is fond of 'Ijtihad', he should frame his own principles of jurisprudence, which should be different from those of the four prominent Schools of Muslim law and which should lay down new rules and principles of derivation. If he succeeds in doing so, we shall be only too glad to recognize a fifth school."³³ At the same time, Thanvi stressed that drawing of conclusions in the absence of any set rules and principles was just impiety and vainglory.³⁴

The Commission, while stressing the importance of Ijtihad, charged that Muslim law was stagnant. Thanvi retorted that the charge of stagnation was the figment of the imagination of the Westernized class of people. They were too weak and feeble to check or withstand the surging tide of atheism and drifted with the current (of atheism). In that state of affairs, they were trying to drag Islam along with themselves.³⁵

According to Thanvi, Islam began to be dubbed as a rigid and outworn creed, as a result of the British education imparted through colleges and universities. Such education created in the hearts of Muslims a disgust and hatred for Islam. In his view, the Muslims who received that education, were outwardly Pakistanis but mentally Englishmen. Glory of such persons lay in their apish imitation of their white masters.³⁶ The West-ridden class of people in the subcontinent tried to foist their own selfish motives upon Islam to please their British masters. The British, in Thanvi's view, encouraged the trend that, if the right of interpreting Shariat was vested in Ulema only, the evils of priesthood and papalism would crop up and vitiate Islam.³⁷

Thanvi blamed that the emphasis on eliminating the role of the Ulama was tantamount to force the 'Ijtihad' of the ignorant, with the object of changing the religion of God. The Commission, he asserted, assumed the position of an expert authority on Shari'a and an absolute Mujtahid. Thanvi charged that all members, excepting himself, remained one and united in contravening the Quran and the Sunnah and in ridiculing the Muslim jurisprudence.³⁸ He termed the Introduction-writer as a person "utterly ignorant of elementary propositions concerning God, His Glory, the Prophethood, and the comprehensiveness and universality of religion."³⁹ In Thanvi's view, the country was confronted with a group whose entire mentality had been poisoned by the colonial educational system and these very people had captured the political leadership of the country. They were trying hard to impress upon the new generation that Islamic laws were inferior to man-made laws.

Although largely polemical, Thanvi's criticism has some constructive aspects as well. An important aspect is to encourage eradication of evils through education as against the Commission's over emphasis on legal procedures. For example, the Commission recommended signature/ thumb impressions of partners to a marriage on Nikah-Nama along with signature of Nikah Khawan to guard against forced marriage. According to Thanvi, such document could not safeguard against forcedness. It could be created by force. In his view, the evil could be stopped through education for promoting knowledge about rights and obligation regarding matrimonial life and cultivating self accountability through raising God-consciousness.⁴⁰

Towards Convergence between Modernists and Traditionalists

The Commission's report in its "Summing up" twice quotes Allama Iqbal's views for support of its analysis and recommendations. Interestingly, Thanvi also quotes Iqbal in his Note of Discent and emphasizes that "Allama Iqbal had advised against accepting the Ijtehad of shortsighted scholars." Allama Iqbal's verse reads, "it is safer to follow the footsteps of the bygone than the Ijtehad of shortsighted scholars."⁴¹

After quoting the verse, Thanvi comments: "it is obvious that the members of the Commission cannot even rank among alims or learned scholars, not to speak of their shortsightedness or [im] maturity of thought."⁴²

Allama Iqbal does espouse both the strands, the liberal as well as the conservative. He welcomes the liberal movement in Islam, but makes two important points. First, liberalism, in his view, has a tendency to act as a force of disintegration. In the aftermath of World War I, race-idea in Islam was making its entry and Allama Iqbal feared that it might wipe off the broad human outlook, which Muslims had imbibed from their religion. Secondly, religious and political reformers among Muslims "in their zeal for liberalism, may overstep the limits of reform in the absence of check on their youthful fervor."⁴³

Iqbal's thought may provide a point of convergence for Pakistan's modernists and traditionalists. According to Allama Iqbal, Quran had a dynamic outlook on life, involving the idea of evolution. At the same time, his teaching was that life was not change, pure and simple. Life had within it elements of conservation also. Islam, by means of its well-conceived institutions, succeeded to a very great extent in creating something like a collective will and conscience in a heterogeneous mass. In the evolution of such a society even the immutability of socially harmless rules relating to eating and drinking, purity or impurity, had a life-value of their own; Such conservatism tends to give the society a specific inwardness, and further secures that external and internal uniformity which counteracts the forces of heterogeneity always latent in a society of a composite character. The critics of such institutions must, therefore, try to secure a clear insight into the ultimate significance of the social experiment embodied in Islam.⁴⁴

One can find a substantiation of Iqbal's concerns through the comments he made on Zia Gokalp's view.⁴⁵ Gokalp took the Quranic rule of daughter's half share in relation to the son to mean inferior status of the female. Iqbal defended the Quranic rule, saying that the rule reflected the daughter's economic opportunities, and the place she occupies in the social structure of which she is a part and parcel. According to Law, daughter is full owner of the property given to her by both the father and the husband at the time of her marriage; further, she owns her dower-money, and the responsibility of maintaining her throughout her life is wholly thrown on the husband. Iqbal went further in asserting the wisdom of Quranic Law of inheritance: "Modern society with its bitter class-struggles ought to set us thinking; and if we study our laws in reference to the impending revolution in modern economic life, we are likely to discover, in the foundational principles, hitherto unrevealed aspects which we can work out with a renewed faith in the wisdom of these principles."⁴⁶

This presents a serious note of caution for the modernists in Pakistan, and points to the importance of education, education of all in the teachings

of the Quran, both legal and moral. Thanvi emphasizes both moral and legal education. The Commission's Report also points to education as an instrument of knowing one's rights. Consciousness of rights is important, but that can become one-sided. There should be consciousness both of rights and obligations. Pakistani society may be described as non-literate (not able to read and write), but it still possesses knowledge of culture. The process of education may be devised in a manner that can build on the 'non-literate' yet rich culture and raise consciousness about rights and obligations in the social polity.

Thanvi as well as the Commission are realistic about tendency among people to indulge in inequity, but they attribute such behaviour to different reasons. The Commission thinks that its reason lies in lack of law, while Thanvi believes that its reason is non-recognition of religious responsibility. The remedy according to the Commission is more legislation, for Thanvi it is through promotion of education based on Islamic notion of the Day of Judgment, i.e. the consciousness of God. The two parties to the controversy could have given more reflection on creating institutions that could fulfill the common purpose, namely, inculcation of habits of social responsibility. The two did not engage themselves in a fruitful dialogue, preferring debate and dissensus and in the process, losing opportunities for consensus in vital public questions.

Conclusion

The controversy in Pakistan between those who want to stick to what they see as the original Islamic principles of socio-legal organisation and those who advocate the incorporation of modern Western ideas and institution in public life, takes us back to the history of Islamic Law and institutions. Islamic religion originated in Arabia as a monotheistic religion with the revelation to the Prophet Muhammad (SAWS) forming the Holy Book, Quran, to provide guidance to its believers in the conduct of life in this world and salvation in the hereafter. The believers followed the

teachings, as they were revealed and sought clarification from the Prophet till his demise in 632 A.D.

His successors maintained the social order according to the teachings of the Quran and what Prophet left by way of his Sunnah. Meanwhile, the Arabs made conquests and brought vast areas of former Roman and Sassanid empires under their rule. Contact with other civilizations and peoples necessitated the interpretation of the Quranic teachings and the Prophet's Sunnah to new, practical legal situations. Learned men in the Quran and Sunnah styled as Imams (leaders) attempted to lay down codes of conduct, which they believed accorded with the teachings of the Quran and Sunnah. Developments continued for around four centuries, when legal innovations came to be synchronized into four accepted schools of thought among majority of the Muslims of that time. This majority was known as Sunni Muslims in contradistinction to others, e.g. Shia Muslims.

The Islamic civilization came to feel serious military, political and intellectual threats, which became particularly acute in the 19th century. By that time European powers had established their colonies in Muslims lands, and had brought in legislations perceived to be at variance with Muslim belief and way of life. A number of Muslims started to rethink the traditional law and concluded that certain desirable Western ideas and institutions accorded well with the teachings of Islam, if the latter were properly interpreted.

Jamal ud Din Afghani⁴⁷ may be said to have pioneered the modernist movement. In the Subcontinent, there appeared a number of persons, but two are of pivotal importance, namely, Syed Ahmad Khan (d. 1898) and Muhammad Iqbal (d. 1938).

Once the country was created, controversy among modernists and traditionalists became acute and showed up, whenever there arose a question in institutional reform. One such occasion was the Commission on Marriage and Family Laws 1955. Members of the Commission split up and a

Note of Dissent had to be appended to the main report. The contents of both the documents show polemical behavior between the parties, notwithstanding some major points of agreement, which could act as bases of fruitful dialogue and service to the polity. Such points come mainly from the thought of Allama Iqbal, which becomes pivotal to reform in socio-legal sphere in Pakistan. Iqbal's notion of "Reconstruction of Religious Thought in Islam" is still valid in this point in time, for generating interest for research in contemporary sciences in the light of broader principles of the Holy Qur'an and the Sunnah of the Prophet (SAWS).

Endnotes

- ¹ Akhtar Baloch, 'The Pakistani Prime Minister who Drove a Locomotive *Daily Dawn*, September 8, 2015, retrieved from <https://www.dawn.com/news/1205473>.
- ² Gazette of Pakistan Extraordinary. (1956). *The Report of the Commission on Marriage and Family Laws*. Karachi: Ministry of Law. 1207
- ³ Inayatullah. Mashriqi, Khan, *Hadees-ul-Quran* (Lahore: Al-Islah Publication, 1952).
- ⁴ Noel James Coulson, (1964). *A History of Islamic Law*. Chicago: Aldine Publishing Company. 21-35
- ⁵ Ibid. 34
- ⁶ Muhammad ibn Idrīs Shāfiī, *Al-Imām Muhammad Ibn Idris Al-Shāfiī's Al-Risāla Fi Uṣūl Al-fiqh: Treatise on the Foundations of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1997), 41.
- ⁷ Ibid.
- ⁸ Coulson, op. cit., 72
- ⁹ In the Indo-Pak subcontinent, Shah Wali Ullah (1703-1962), a great scholar of Madrisa Rahimiah of Delhi, followed Ibn Tamiyya in asserting the right of Ijtihad by successive generations to meet new situations. But it did not strike deeper roots. Allama Iqbal admitted in 1920's that it was difficult to speak on the subject of Ijtihad in the prevailing environment among South Asian Muslims. See Iqbal, *Reconstruction of Religious Thought in Islam*. 131.
- ¹⁰ Sir Syed Ahmad Khan was the first prominent Muslim leader of the 18th century who left his unmistakable impact through famous Aligarh Movement on Muslims in education, religion, social life and politics. He realized that the plight of Indian Muslim could not be improved without educational revolution. Through articles, speeches, pamphlets, scientific and translation societies, he was able to convert his people to his line of thought.
- ¹¹ Tauseef, Ahmad Parray. (2011). 'Islamic modernist and reformist thought: A study of the contribution of Sir Sayyid and Muhammad Iqbal'. *World Journal of Islamic History and Civilization*, 1(2), 79-93.
- ¹² Ibid; 84
- ¹³ Allama Muhammad Iqbal (1877-1938) is generally known as a greatest poet-philosopher of all ages. His poetry inculcated a new spirit of freedom among the Muslim of India in 19th century. As a result, the Muslim nationalism surfaced as a strong force and the Pakistan Movement acquired purpose and direction.
- ¹⁴ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*. Lahore: Iqbal Academy Pakistan. (2013), 118
- ¹⁵ Syed Anwar Hussain. (1982). *Pakistan: Islam, Politics, and National Solidarity* New York: Greenwood Publishing Group. 74
- ¹⁶ Ibid; 75
- ¹⁷ Gazette of Pakistan op. cit., 1199
- ¹⁸ Iqbal, *Reconstruction*..... 138.
- ¹⁹ Ibid. 1201
- ²⁰ Ibid.
- ²¹ Ibid; To appreciate the historical role and motivations of the ulama for taqleed.
- ²² Ibid; 1202
- ²³ Ibid.

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- ²⁴ Ibid; 1203
- ²⁵ Ibid; 1205
- ²⁶ Ibid; 1208
- ²⁷ Ibid; 1214-15
- ²⁸ Ibid; 1216
- ²⁹ Ibid.
- ³⁰ Maulana Ehtisham ul Haq Thanvi (1915-1980) was a renowned religious scholar. He was member of the commission set up to recommend reforms, wrote a powerful dissenting note against the commission's recommendations.
- ³¹ Ibid; 1564
- ³² Ibid.
- ³³ Ibid; 1568
- ³⁴ Note of Dissent in The Gazette of Pakistan, Extra., August 30, 1956 op. cit., p. 1568
- ³⁵ Ibid; 1568-69
- ³⁶ Ibid; 1569
- ³⁷ Report, 1571-72
- ³⁸ Ibid; 1573
- ³⁹ Note of Dissent, op. cit., 1576. The writer was no other than Mian Abdur Rashid, Ex-Chief Justice of Pakistan, who assumed chairmanship of the Commission after the death of the first chairman, namely, Khalifa Shuja-ud-Din.
- ⁴⁰ Gazette of Pakistan op. cit., 1577
- ⁴¹ Ibid; 1229-1232
- ⁴² Note of Decent op. cit., 1568
- ⁴³ Iqbal, op. cit., 129
- ⁴⁴ Ibid.
- ⁴⁵ Zia Gokalp (1876-1924)) was a Turkish poet, writer, political activist and sociologist. As a sociologist, Gokalp was influential in the negation of Islamism, pan-Islamism, and Ottomanism as ideological, cultural and sociological identifiers.
- ⁴⁶ Iqbal op. cit., 135
- ⁴⁷ Sayyid Jamal al Afghani (1838-1897) was a political activist and Islamic ideologist in middle east, south asia and Europe during 19th century. He was recognized as one of the founders of Islamic modernism and a strong advocate of pan-Islamic unity against Western imperialism.