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- (30) Dissolution of Muslim Marriage s Act 1939, Sub sections i-ix of Section 2.
- (31) Mulla, D.F., “Principles of *Mahomedan Law*”, (Lahore, PLD Publishers, 1995), 414-420.
- (32) Section 9 of the Muslim Family Laws Ordinance 1961.
- (33) Section 5 of West Pakistan Family Court Act (XXXV of 1964).
- (34) Mian Arif Mehmood vs Mst. Tanveer Fatima PLD 2004 Lahore 316.
- (35) Mulla, D.F., “Principles of *Mahomedan Law*”, (Lahore, PLD Publishers, 1995), 432-435.

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- presenting the norms of domestic, social, and religious life in India (500 BC) under the Brahmin influence, and is fundamental to the understanding of ancient Indian society ([http://hinduism.about.com/od/scripturesepics/a/laws\\_of\\_manu.htm](http://hinduism.about.com/od/scripturesepics/a/laws_of_manu.htm) retrieved May 12, 2015)
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- (17) For example: *Gobind Dayal vs Amir Muhammad* (1885), *Jafri Begam vs Amir Muhammad* (1885) 7 All 822.
- (18) In 1877, Syed Amir Ali CAH founded the “*National Muhammadan Association*” in Calcutta, which branches had been started in other cities of India also (E.J. Brill's First Encyclopedia of Islām 1913-1936), 483.
- (19) “Pasai”, also known as Samudera Pasai and Samudera Darussalam was a Muslim harbour kingdom on north coast of Sumatra from 13th to 15th century CE ([en.wikipedia.org](http://en.wikipedia.org), retrieved January 26, 2015)
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Laws Ordinance 1961<sup>(32)</sup> West Pakistan Family Court Act<sup>(33)</sup> and Court Decision<sup>(34)</sup>

- d. For the payment of dower, she has to refer to the Principles of Mahomedan Law<sup>35</sup> derived from Jurisprudential books

This situation obviously shows the complexity of matter for a woman who is illiterate or less educated. As far as the case of Malaysia is concerned in the above mentioned situation, a woman has to refer to the Act 303 only which has answers to all these questions in the specific chapters in a single volume and in a codified way.

### **Recommendation**

The comparison of Muslim Family Laws of Pakistan and Malaysia from the perspective of codification reveals that Malaysian Family Laws stand in a better position than Pakistan's Family Laws. Codified Malaysian Family Laws provide easy access to public without referring to a lawyer or expert. Therefore, the general public easily facilitates from the enactments in case of any issue. On the other hand, Pakistan's Muslim Family Laws which are scattered and explained by court decisions do not provide easy access and facilitation to the general public and they have to hire a legal expert to get solution of their family issues. This situation overburdens the Family Courts of Pakistan for deciding each and every issue of Family matters. On the other side of the coin, many people who cannot afford the expenses of hiring a lawyer remain aggrieved and cannot approach to the courts for solving their problems as well as claiming their due rights under the law. Therefore, it is recommended, in the light of the current study, that Muslim Family Laws of Pakistan should be codified from scattered documents in order to provide easy access of public to get facilitation in case of grievances after necessary legislation from the National Assembly and Senate. In this regard, the work of Justice (Retd) *Tanzil-ur-Rehman* "A Code of Muslim Personal Laws" may serve as a guide.

of the federal government. Federal Territories have developed its own body of Islamic law that governs the lives of Muslims living in Federal Territories and establish Islamic courts for administering justice.<sup>(27)</sup>

After independence from colonial authority, the major enactment in the sphere of Family or Personal Laws was the "Act 303, Islamic Family Law (Federal Territories Act, 1984)". This Act has been amended by the Act 1261 of 2006. Prior to this Act, the Family and Personal matters were governed by "The Administration of Muslim Law Enactment, 1952 of Selangor". This Act had 180 sections, of which section 119 to 144 and section 155 to 159 were concerned with Family matters.<sup>(28)</sup>

### **Chances of benefiting from Malaysia in Codification**

Malaysia got independence in 1957; almost ten years after the creation of Pakistan but she moved swiftly as compared to Pakistan in the Islamization of laws. In 1984, Act 303 was promulgated after necessary legislation which covered all spheres of Family Laws for Muslims in a codified manner. Whereas the case of Pakistan is concerned, Family laws are left uncoded on the large scale and remain scattered in many Acts, Ordinances, Court Decisions, Jurisprudential and Anglo Muhammdan Law's books. This situation creates a puzzle for a victim who needs to seek redressal of his or her problem from the court where he or she has to hire the services of a lawyer to find out concerned laws. In many cases the victims are women, who cannot approach to the courts easily and remained victimized for the long time. For example, if a woman launches a suit in the Court against her husband for non-payment of dower, dissolution of her marriage due to harsh and abusive behaviour of her husband and arrears of her maintenance while their marriage is not registered; she has to quote many laws scattered in various places;

- a. For validity of her marriage, she has to quote various court decisions<sup>(29)</sup> as their marriage is not registered as per Muslim Family Laws Ordinance 1961 and there is no document which shows the detail of their marriage deed.
- b. For the annulment and dissolution of her marriage, she has to quote the Dissolution of Muslim Marriages Act 1939<sup>(30)</sup>
- c. For the payment of maintenance for her and her children, she has to refer to Mahomedan Law<sup>(31)</sup>, Muslim Family

Malay states were not British territories, hence, as per principle of English law; the same could not be imposed upon them directly. British convinced the Sultans of these states to enact English law voluntarily through legislation. Historically, the English law influenced Malay States right before the enactments of 1937 and 1957, respectively. The British residents were appointed in Malay states under the treaties signed by the British with the rulers of these states. In return to these treaties, the native rulers submitted to the appointment of British judges or British trained judges used to administer justice in accordance with the advice of British residents. A number of enactments were promulgated, modeled on Indian legislation which was based on the English law such as the contract ordinance (Malay States) 1950 and the Malay Penal Code were copied from Indian Contracts Act 1872 and the Indian Penal Code 1860, respectively.<sup>(23)</sup>

Historically, First legislation regulating Islamic marriage in Straits Settlements was Mohammedan Marriage Ordinance 1880, mainly procedural in content which was continued to be applied in Penang and Malacca until State Acts passed in 1959. In Federated Malay States, the first Islamic legislation was “Registration of Muhammadan Marriages and Divorces Orders” in Perak and Selangor in 1885.<sup>(24)</sup>

Legislative Assembly was established in 1955 before independence which was achieved in 1957. From 1948, States were granted jurisdiction over application and legislation of *Sharī‘ah* and from 1952 to 1978, new laws were promulgated in 11 Muslim majority States of Malaysia and Sabah; generally entitled as the Administration of Islamic/Muslim Law Enactments and cover the official determination of Islamic law, explanation of substantive law, and jurisdiction of *syariah* [*Sharī‘ah*] courts. New laws relating to personal law enacted in most States between 1983 and 1987.<sup>(25)</sup>

Constitutionally<sup>(26)</sup>, after independence, each state of Malaysia is free to establish its own State Islamic Courts to administer justice and resolve disputes under Islamic law. All states of the federation have exercised a series of legal efforts for legislation and promulgation of Islamic law and have established an increasing number of regulations that are binding on Muslims within their respective boundaries. The article 74 of the constitution does not apply to the Federal Territories which are under the full control

century BC, which suggest the possibility of trade links with Malaya Peninsula being in the mid of the trade route. In that age, Indians were interested in settlements as compared to Chinese who had tendency in trading. Hence, the Chinese did not work out any significant impressions on peninsula, while the Indians left long lasting impacts over the inhabitants of peninsula. The Hindu-Buddhist influences over political and cultural aspects of peninsula reached to its end with arrival of Islām in the region in the thirteenth century.

Most probably, Muslim traders introduced Islām in the peninsula, who were from India by and large. Islām was familiarized in Malaya when the state of Melaka was established by a converted Muslim refugee Prince *Parmeswārā* (d. 1414) from the sultanate of *Palembang* (Indonesia) after marrying a Muslim princess from *Pasāī*<sup>(19)</sup> and changed his name as *Megat Iskander Shāh*. The Melaka state expanded and surrounding areas merged in it, resultantly, the whole Malay Peninsula came under his control in the mid of the fifteenth century. This sultanate remained for almost a hundred years and left deep religious and cultural consequences.<sup>(20)</sup>

Colonialists reached Malaya Peninsula at the start of the sixteenth century when a Portuguese commander Afonso de Albuquerque (d. Dec 16, 1515) landed there in 1511 AD. Portuguese were followed by the Dutch who arrived in 1641 AD and British who stepped there in the end of the 18<sup>th</sup> century.<sup>(21)</sup>

Before the advent of the British in this region, the law in vogue was the same as in the sultanate of Brunei because the Malay states were part of the said sultanate in the past. This law was *Sharī'ah* based, inspired by the Malay *ādat* law, and it was also known as the Malay Muslim law. This law was meant for Muslims. As far as the case of non-Muslims was concerned, the indigenous local people were subjected to the native customary law. Native law was recognized formally by Royal Charter of British Crown on November 1st, 1881, through article No. 9. The Malay [Muslims] were subjected to the Malay *adat* law in personal matters while non-Muslims were governed by their own respective customary laws except those who were British subjects as they were governed by English law.<sup>(22)</sup>

- III. Dissolution of Muslim Marriages Act 1939
- IV. The NWFP Shari'at Application Act of 1935
- V. Muslim Personal Law (Shari'at) Application Act, 1937

Pakistan emerged as an independent country on August 14, 1947. As it was a newly born state, hence it had to initiate most of its business from the beginning. The new state adopted the colonial legal system, primarily, to run judicial business. However, following legislations had been made after the independence in the field of Family or Personal matters:

- I. The West Punjab Muslim Personal Law Shari'at Application Act, 1948
- II. The Muslim Personal Law (Shari'at) Application (Sindh Amendment) Act, 1950
- III. The Punjab Muslim Personal Law (Shari'at) Application (Amendment) Act, 1951
- IV. Sind Marriages and Divorces Registration Act 1955
- V. Muslim Family Laws Ordinance 1961
- VI. The West Pakistan Rules under Muslim Family Laws Ordinance, 1961
- VII. The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shari'at) Application Act, 1962 (West Pakistan Act V of 1962)
- VIII. The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shari'at) Application (Amendment) Ordinance, 1963
- IX. The Punjab/Sindh/NWFP/Baluchistan Personal Law (Shari'at) Application (Amendment) Act, 1964
- X. The West Pakistan Family Court Rules, 1965
- XI. Dowry and Bridal Gifts (Restriction) Act, 1976

### **Brief Legal History of Malaysia**

Malaysia is situated in the South East Asia. It won independence on August 31, 1957. Its total area is 329,487 km<sup>2</sup> and population is recorded as 28.3 million in 2010's census in comparison to 23.3 million recorded in 2000's census.

Historically, the Malay Peninsula was a land bridge between Asian's soils and South West Pacific soils. Malaya had been inspired deeply by foreign influences. It had embraced effects of Indian, Chinese, Muslim and European invaders. The Chinese archives state business ties between India and China as early as the seventh



of Bengal, to compile the translations of Muslim and Hindu laws to make these laws accessible to those Europeans who had to administer it.<sup>(15)</sup>

Consequently, the admired and reliable anthology of Islamic Jurisprudence according to *Hanafi* school of thought, *Al-Hidāyah* by 'Allāmah Burhān'uddīn 'Alī bin Abī Bakr al-Marghīnānī [d.593H] was chosen and task of translation was assigned to Mr. Charles Hamilton [d. 1792], but the dilemma was that Hamilton did not know the Arabic language rather he had proficiency in Persian. Therefore, three Muslim religious scholars were deputed to translate the Arabic text into Persian, hence the English translation was accomplished in 1791 AD but it lacked whole portion of inheritance which was considered one of the most important areas regarding Muslims. Therefore, realizing the need of the area concerned, Sir William Jones [Died: April 27, 1794] translated a specific book himself on the subject of inheritance called *al-Sirājiyī* compiled by *Syed Sharīf al-Jurjānī* [d.1413 AD] directly from Arabic to English.<sup>(16)</sup>

Another addition to these compilations of translations was the work of the Mr. Neil Baillie [1799-1883] in which he translated the famous *Fatāwā 'Ālamgīrī* and a specific portion from the jurisprudential book of *Shiā* school, *Sharā'ī' al-Islām* by *Sheykh Najmuddīn Abū al-Qāsim Ja'far bin Mu'ayyid al-Hilālī* [d. 676 H], dealing with forensic law. It was named as "A Digest of Muhammadan Law". This set had been given the title of Anglo-Muhammadan Law. This combination of translations had many shortcomings and errors which had been recorded by the honorable courts in their commentaries, partially.<sup>(17)</sup>

Up to 1872 AD, the British crown put an end to every kind of Islamic laws. Moreover, abolition of *Qāḍī* courts was adding difficulties to Muslims, therefore, in 1882 AD, National Muhammadan Association<sup>(18)</sup> demanded of the British government to reinstate the *Qāḍī* court system as its absence had affected the Muslims personal law's domain very badly and it was causing delays of justice or even denying in some cases. The major legislations made in the colonial period in the sphere of Family or Personal laws are as under:

- I. Guardians and Wards Act, 1890
- II. Child Marriage Restraint Act 1929

### **Brief Legal History of Pakistan**

The legal system of Pakistan has been inherited from the British who entered the Indian subcontinent under the patronage of their organization: East India Company<sup>(8)</sup> as businessmen and traders<sup>(9)</sup>. The Company achieved the rank of a confirmed political force in the region in 1765 when it got the responsibility of collection of *Dīwānī* [revenue] and *Nizāmat* [police and Justice] in Bengal.<sup>(10)</sup>

The Company maintained the structure of the Mughal judicial system in the earlier period, but later on, substituted it according to the ideas of the British administrators. The Company did not interfere in the personal laws of the various communities and the customary laws were allowed to be followed in these areas. Lord Warren Hastings, after assuming the office of governor-general in 1772 AD, proposed a plan for the administration of justice which was adopted by the Company in the provinces under its control. Under this plan, one religious officer each from Muslim and Hindu communities used to be appointed in courts for elucidation and assistance in the administration of justice.<sup>(11)</sup>

Later on, under the section 27 of the regulation of 1780 AD, it was decided "in all suits regarding inheritance, marriage, and caste and other religious usages or institutions the laws of the *Qur'ān* with respect to the *Muhammadans* and those of the *Shāster*<sup>(12)</sup> with respect to the *Gentoos* [Hindus] shall be invariably adhered to".<sup>(13)</sup> If only one of the parties were a Hindu or a Muslim, the laws and usages of the defendant were to be applied.<sup>(14)</sup>

After the adoption of the Lord Hastings's plan for the administration of justice, the prime obstacle was the scarcity of competent English officers who possess serviceable indigenous legal and language knowledge. The Lord Hastings believed that the British must interfere in the local judicial system for its improvement on Western style. As per his plan, new hierarchies of courts, both in civil and criminal areas, were established. The next significant job was the translation of such Islamic as well as a Hindu collection of rules which can apply to all persons professing their adherence to Islām and Hinduism, respectively. Based on the urgency of the matter, Sir William Jones [Sep 28, 1746- Apr 27, 1794], a philologist, proposed to Lord Hastings, governor-general

which will facilitate and expedite the process of judicial system as well as its procedure for the provision of easy and fast justice.

The main objective of the *Sharī‘ah* commandments is the achievement of the wellbeing of the human in this world and hereafter. This can be realized by pondering on the philosophy of these commandments as the Almighty Allāh commanded the humans for what is good for them and prohibited them from what is harmful.<sup>(5)</sup> The companions of Prophet (ﷺ) were those persons who used to apply the notion of public interest when inferring solutions from the authorities for new situations, e.g. nomination of *Ḥaḍrat ‘Umar* as caliph by *Ḥaḍrat Abū Bakr*, initiation of maintaining different registers for administration by *Ḥaḍrat ‘Umar*, establishment of police department and prisons and determination of various penal punishments. Similarly, *Ḥaḍrat Uthmān* ordered share in inheritance for the woman who was divorced by her husband in death disease (*Mard al-Mawt*) and *Ḥaḍrat ‘Alī* directed *Abū al-Aswad Dawlī* (d. 69 H) to compile the rules of *Arabic* grammar.<sup>(6)</sup>

The above instances show that Muslim ruler or administrator can decide and issue orders in the matters of public interest. Keeping in mind this notion, many Muslim countries have paid attention to the codification of *Sharī‘ah* commandments. The codified *Sharī‘ah* commandments will provide an easy access to judges and *quḍāt* in deciding the cases.

Codification of Islamic laws is a matter which is not prohibited by any command, therefore, keeping in view the notion of "الأصل في الأشياء الإباحة"<sup>(7)</sup> which means:

*“Principally, all things are permissible”*

As all things are permissible in original, therefore, codification of laws will be considered as an allowed act. This will provide a swift judicial system in the country making the life of the public comfortable. Obviously, a perfect judicial system cannot prevail without the teachings of Islām and, for effective utilization of Islamic laws; its codification, as per demands of modern day, is direly needed. Under the tenet of expediency or administrative authority of ruler, if codification is done with the order of ruler, its observing can be made mandatory for judicial officers as well as general public.

The supporters of codification justify their standpoint keeping in view the analogy of the compilation of the *Qur'ān* and *Sunnah*. This instance of compilation of *the Qur'ān* supports the standpoint of codification of Islamic laws because the Prophet (ﷺ) did himself not gather the scriptures of *the Qur'ān* into single book as there was no need of it at that time, but when its need was realized by his companions after the martyrdom of almost 700 Ḥāfiẓ (ones who had committed themselves to study and memorization of the *Qur'ān*) in the battle of *Yamāmah*, they decided to compile it and the whole *ummah* consented to their suggestion.

Another example is that during the war of Armenia and Azerbaijan, the companion of Prophet (ﷺ) *Ḥudhayfah bin Yamān* realized the gravity of difference among the Muslims in recitation of the *Qur'ān* in various Arabic dialects, which might lead to a terrible dissent. He returned to *Madīnah* and informed him of the situation. *Uthmān* after consultation with other companions decided and ordered to compile the *Qur'ān* on the single dialect of *Quraysh* and to burn all other copies of it.

The renowned Muslim scholar *Ibn al-Qayyim* (1292-1349 AD) comments on this as:

*“The compilation of the Qur'ān on the single dialect for recitation and banning other recitations, which were allowed by the Prophet (ﷺ) in the past, was adopted keeping in mind the interest and welfare of the public in avoidance of disagreement on a large scale<sup>(4)</sup>”*

Similar is the case of compilation of the traditions (*Aḥādīth*) of Prophet (ﷺ). Initially, the Prophet (ﷺ) forbade writing down his sayings but, later on, he allowed the writing of them. The caliph *'Umar bin 'Abdul 'Azīz* (681-720 AD) ordered the compilation of all traditions of the Prophet (ﷺ) as it was the need of the time to serve the purpose of public interest and it proved right to do so anticipating the challenges in the coming years.

In the past, the need for codification was not realized as the Muslim jurists and judges had the ability of *ijtihād* and they had the capability of inference from the original sources of Islamic *Sharī'ah*. However, in the present age, most of the Islamic scholars do not possess this capability, therefore, there is a dire need of codification,

**Introduction:**

Codification has been defined by Gerald and Kathleen Hill as:

*“Codification is the collection and systematic arrangement, usually by subject, of the laws of the state or country or the statutory provisions, rules and regulations that govern a specific area or subject of law or practice”*

It is further explained as:

*“The term "codification" denotes the creation of codes which are compilations of written statutes, rules and regulations that inform the public of acceptable and unacceptable behavior<sup>(1)</sup>*

On the subject of codification, Justice (Retd) *Tanzil-ur-Rehman* has commented as below:

*“Islamic law is present in the books of jurisprudence; however, its codification is needed as per demands of the modern day. The first ever attempt in this regard was made in Turkey and *Mejallah al-Aḥkām al-‘Adliyah* was published in 1876 which contains 1858 clauses. After that, the practice of codification was followed in Egypt and some countries of Middle East”<sup>(2)</sup>*

The issue of codification of Islamic Laws, in general, and, Islamic Family Laws, in particular, is a topic of hot debate among the contemporary Muslim scholars. Some of them argue that codification of Islamic Laws is as necessary as the codification of Western Laws. While, there are some who do not agree with this standpoint and oppose the opinion of codification. In the present age, some prominent scholars, who are considered as authority in the contemporary issues, have not only supported the former opinion but considered codification as a need of the day e.g. *Sheykh Abū Zahrā’* (1898-1974), *Dr. Yousuf al-Qarḍāwī*, *Sheykh Muṣṭafā al-Zarqā* (1904-1999) and *Dr. ‘Abdul Karīm Zaydān* (1917-2014). The supporters of the codification are growing day by day as compared to the opponents who are decreasing with the passage of time.

In Pakistan, A Code of Muslim Personal Law is compiled by the Justice (Retd) *Tanzil-ur-Rehman*<sup>(3)</sup>, which is a prominent effort of codification in the country and a milestone towards Islamization of laws in Pakistan.

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**Codification of Muslim Family Laws of Pakistan and Malaysia  
(An Evolutionary Comparative Study)**

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**ABSTRACT**

Codification is the creation of codes, the compilation of written statutes, rules, and regulations that inform the public of the acceptable and the unacceptable behaviour. Muslim jurists had differed in their opinion of codification of Islamic laws; some supported the idea, while the others opposed it. However, in the contemporary global situation, Muslim scholars are emphasizing the importance of codification of Islamic laws and efforts have been initiated in many Muslim countries to codify them.

In the current paper, the evolution of Muslim Family Laws of Pakistan and Malaysia has been comparatively studied. Malaysia has been selected due to its technological and economic advancement among the Muslim countries. Malaysia serves as an example in the modern codification of Islamic Laws. In Pakistan, Criminal and Penal Laws are codified while the Muslim Family Laws have not been codified and left scattered in various acts, ordinances and court decisions. The Malaysian Family Law are codified in one volume and enacted after necessary legislation through an act of the parliament.

The objective of this comparative evolutionary study is to provide a practical model for the Islamization and codification of Muslim Family Laws in Pakistan.

***Keywords:*** *Codification, Family Laws, Marriage, Divorce, East India Company, Muslim Jurists, Malaysia, The Subcontinent*

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