Legislative Evolution Of Muslim Family Laws For The Protection Of Women’s Rights In The 19th Century

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Abstract
The current study aims at examining the formation of laws pertaining to child marriage, free consent, and the role of guardian, dower, marital privacy, judicial divorce, polygamy, post-divorce maintenance, adolescents, and majority age for marriage issues in Ottoman Family Laws. It also inquires into the jurisprudential methodology of eclecticism adopted by the Ottoman Empire. Further, this study explores the enacting efforts highlighting the salient features of the Ottoman Family Law of 1917. This study has also presented some recommendations which will pave the way for reformation of Muslim Family Laws. Family, a fundamental unit of every society, reflects a comprehensive purview of its marital relations, culture and religion. After worships, Islam gives much importance to marital matters as a symbol of Muslim cultural identity. Muslim family laws are formed in accordance with the Quran and Sunnah or the works of the Fuqaha. In the 19th century, the atmosphere of western codification influenced the Ottoman Empire also. The Muslim superpower dynasty refined family laws in the light of flexible interpretations of Sharia’h for the objective of women’s empowerment and the social development of the community. In contrast to the classical view, women and child rights were secured from the perspective of gender equality and human rights.

Keywords: Muslim Family Law, Child marriage, Polygamy, Rights of Women, Dissolution grounds.

Introduction
Family law guarantees the protection of individual rights and peaceful society. It has a key role and fundamental position in any society, particularly in the Muslim world. Marital rights and responsibilities are revealed and dispensed with by this field of law.
Muslim Family Law generally relies upon the Quran and the Sunnah, or the upshot of competent religious scholars. The world’s legal revolutionary movements and their codifications were well known in the nineteenth century. Similarly, the Ottoman Empire modified its legal framework for its subjects in a pluralistic society. The Ottoman Empire is the fourth biggest Muslim empire in the world. It has a big contribution to the history of the world (1300 to 1924) (Donald. 2005). This Empire had a reform era named the “Tanzimat Era” (Reorganization 1839), which led to the denial of the Empire. In 1839, at the dawn of reformation, a decree was issued by Sultan Mahmud, named the Gulhance Decree (Hatt-I Sharif). This Farman ensured adjudication between Muslims and non-Muslim subjects. In 1856, another Imperial Rescript (Hatt-i Hümâyun), reformed the legal structure, securing equal rights for minorities and appreciation from the west. (Ishtiaq. 2011). These imperial documents are referred to as the protection of fundamental rights.

Indeed, the ‘Tanzimat’ era introduced to the Empire a democratic atmosphere, establishing the parliament as well as the constitution. The title ‘Father of the Tanzimat Era’ is given to Mustafa Rashid, a real contributor to the nineteenth century. (Kevin.2006). ‘Young Turk’ organization got familiar in the age of Abdul Hamid. Its members were influenced by European thoughts. Their slogan was to adopt the model of Europe and introduce reforms and, later on, gave birth to the Ata Turk. (2020). Before the Tanzimat era, most reformations were about the continuity of peace and order in the empire. (Bernard. 2002). There were some upholdings introduced regarding military and civil administration, such as the demarcation of territories, the levying of new taxes, and so on, with no regard for marital laws. (Roderic. 2016). There was no enforced law, but all marital matters were regulated by their religious injunctions. For the first time, the Muslim World under the supervision of the Ottoman Empire intended to codify and refine women’s and children’s empowering laws. Consequently, the Ottoman Empire introduced the first Muslim family laws in 1917. Unfortunately, this revolutionary law prevailed merely two years but, later on, several Muslim countries adopted this unique legislation drafted by the Muslim Superpower Dynasty.

**Historical Evolution to Marital Laws**

In the early Muslim era, rulers or Shurá members were well known as mujtahids. There has been no instance of codification before Majallah. Majjalah Al-Ahkam Adliyah was the first Ottoman legal set.(Sidra. 2018). In the initial stages, numerous Mukhtasirs, Fatwas, and other compilations attempted to achieve legal uniformity. The first proper Islamic civil code, titled the Majallah al-Ahkām al-‘Adliyyah (Dora. 1977) was enacted to regulate civil matters. Under the presidency of Ahmed Judat Pasha, a commission extracted ninety-nine legal maxims in the introductory portion, and sixteen chapters regarding civil areas but not marital life. From 1870 to 1877, it mostly based this draft on Hanafi’s point of view. (Kareem.2014).

**Women’s Movements and Press Media**

In the 19th century, women started movements and protests against their status and role in society. Besides, a western victimized publication put the fuel in and created a critical
situation. Various magazines, journals, and newspapers promoted women's stance. Along with this, the official school of thought was Hanafi, which held a narrow view on some marital issues. In 1868, the first newspaper, Taraqi (Progress), then in 1888, Terakki Muhaddearat (Progress of Women), published essays on discrimination against women. Besides, an illiterate woman questioned polygamy in 1869. (Devrim. 2003). Namik Kamal (Young Turks leader) produced a newspaper titled the “Ebrat”. In 1876, some organizations were established with the support of officials for the wounded soldiers. The daughter of Ahmad Jawdat Pasha, Fatma Aliye Kimdir, wrote on the polygamy issue. She stated in her article that polygamy is not compulsorily required by Shariah (Eric R. 2010).

Matrimonial Imperial Decrees
In 1915, two imperial decrees were issued regarding women’s rights to divorce. Women were granted permission to ask for the dissolution of their marriage based on abandonment of their husbands or illness. These decrees relied upon the opinion of Maliki and the Hanbali School of thought. Then, a committee was constituted to compile preferred and individual views within the Hanafi School on marital matters. The work of the committee was monitored by another committee, and the first book was produced on marital issues, titled Kitab’un-Nafakat (The Book on Alimony). This production was sent to examine it before some courts. (Mehmet.1992).

Establishment of Family Law Commission
The CUP (1908) government constituted 3 legal commissions named İhzar-ı Kavanin to enact civil matters, commercial issues as well as marital problems. (NİHAN.2014). The in-charge committee preparing the family code examined various legal codes such as the Roman code, British and American codes, and the family laws of Hungary. Hukuk-u Aile Komisyonu (Family Law Commission) constituted a sub-committee to enact marital laws for non-Muslim communities of the empire. (Ziyaeddin.1936). Unfortunately, only the Family Law Commission accomplished the task. (Gottard. 1972). Later on, in 1917, it was officially declared that Ottoman courts would not hear family cases without the consent of both parties, where they had different religions. (Kalemi 1917). In Kazan, a minute report on women’s issues was tabled and latterly debated by the General Congress of Russian Muslims in Moscow. Consequently, Ziya Gokalp argued before the CUP for marital reforms. (Uriel.1979). After a detailed submission, the decision was made that the ministry of justice would regulate the courts of the state. (Ramazan.1992). Sultan Mehmed V Reşâd rectified this law and the CUP shifted off the opposition’s voice that it is just a temporary law. (Sukru.2008).

BOR (Body of Regulations)
The state aimed to enhance its control of the population’s record for military purposes and interfered with its citizens’ marriage affairs also. On December 30, 1917, the Body of Regulations of the OLFIR was prepared by the ministers, including, Şeyhulislam Musa Kazım, which contained 20 articles providing details regarding the application of
the procedures. (Düstur, 1928). Here, the word of nationality was replaced by religion. Under these regulations, a license from the respective religious leader or court was mandatory to get married. It is also compulsory to inform the population officer after the ceremony. (Cem. 2004). Through these injunctions, the marital zone has become systematic. (Mehmet. 1985).

Methodology for Enactment
The Ottoman Empire tried to refine its family law in line with social development. The official Hanafi School of thought had a very narrow circle for the annulment of marriage. They permitted a woman to enter into a marriage contract without her guardian. Every school of thought has its own leniencies and detriments to marital laws. Thus, the drafters of OLFR adopted the classical methodology of selection (talfiq). They preferred viewpoints that empowered women. As a result, a woman achieved the right to ask for a divorce in case of desertion or contagious disease of the husband, etc. (Seval. 2005). Besides it, the husband’s second marriage, or polygamy, has been declared a ground for divorce. Women were granted the right to impede a second marriage or annul their marriage.

Juridical Prominence of the OLFR
Before this enactment, each religious community practiced its own internal norms on marital matters. (Darina, 2009). The enactment of OLFR was modelled on a Western-styled reliance on Shari’ah content. Besides, it consulted other jurisprudential opinions other than the Hanafi School of thought. Moreover, it contained special provisions for Jews and Christian subjects. (Aḍhūb 2005). The OLFR 1917 was considered a milestone departure from conventional fiqh to modern legislation. (Tahir. 2015). The Muslim family law only existed in various fiqh books in the past. Through the OLFR, it was enacted seriously and systematically in a modern legal shape. Moreover, this law provided the basis for Middle East countries to codify marital laws and would have an important impact in line with progress and social change. (Anderson, 1976) The OLFR 1917 is contained in two distinct books. The first is titled, Munakehat (marriages), with six chapters contained in 15 sections. It is drafted from 101 articles. The second one is entitled Mufarakat (Separation) with three chapters. It encodes five-sections into 56 articles. This law has 157 articles in total. The first portion deals with the pre-marriage message, eligibility for marriage, child marriage, polygamy, prohibitions. This zone also touches dower and maintenance matters. Moreover, it discussed marriage registration, duress and coercion, and stipulation issues. The 2nd zone regulates the matters of divorce, grounds of dissolution of marriage, and the waiting period. (Kayabaş, 2014). Through this law, the integrity of a pluralistic society was also aimed at. (Fahri.1936).

The OLFR prescribed the age for marriage and prohibited child marriages, citing that boy and girl have 18 and 17 years age respectively as mandatory age to enter into a marriage contract. (OLFR, 1917). Similarly, articles 5 & 6 denote exceptions also that a judge may permit a person to have no respective age where his/her physical ability is fit. There was no permission to conduct marriage where the boy is under 17 and the
girl is under 9 years. These articles prohibited child marriages due to insufficient education, disruption of free consent. This prohibition intended to protect the health of the mother and child. The Ottoman Family Law of 1917 declared mandatory registration of marriage and consent of the guardian. Moreover, the Homogamy (Kefaet/equal status) of spouses was also denoted accordingly. It is the basic obligation of Islamic law to insist that couples have similar economic, social, and religious status. Unlike a man, if a woman marries an unequal man, her father can annul the marriage. Classical Islamic law discussed detailed criteria for this purpose, such as religion, fortune, occupation, piousness, freedom, and family origin, etc., while the OLFR adopted only two things for homogamy: wealth and honor. (Cem. 1991). Article 45 discussed the husband’s ability to pay dower, to support his wife and children, as well as what his occupation should be like as the wife’s father. Article 47 states that in cases of inequality, the girl’s guardian can ask the court to annul the marriage. Article 48 mentions that after giving consent, the guardian can’t annul the marriage, except in the case of a couple having no equal status. According to this law, marriage and divorce under duress or coercion were void. Besides, it introduced a reconciliation council in case of disturbance between the spouses. Article 130 reveals that a court has to establish a reconciliation committee from both families. In the case of the failure of the council, the divorce occurs following the divorce procedure or khula, as the case may be. Article 131 states that a divorce decision by the council constitutes an irrevocable divorce. It is a very significant article regarding the rights of women. In this enactment, post-divorce maintenance was also recognized for the wife by mutual consent or the court. Article 38 of the OLFR, which stipulated against polygamy, relied on the Hanbali madhhab. The protection of women was aimed at through the abrogation of polygamy. Some scholars criticized the declaration that impediment to permission from the first wife on a second marriage is contrary to Islamic law. This article is a mid-path between moderns and conservatives. (Mansurizade, 1914). Along with the stipulations, it introduced a wide circle for annulment/repudiation of marriage. Articles 126 and 127 grant wife rights of annulment when her husband left her or his absence or disappearance. Article 128 protects the second marriage even if the first husband does return. The OLFR has included fundamental family law provisions, but it left various zones of family matters such as guardianship, succession, and custody matters, etc. Only non-Muslim man’s marriage with Muslim woman is banned no other type of marriage is prohibited. This law didn’t make a distinction between void and voidable marriages, such as a foster marriage is declared voidable. Besides, Islamic law presents detailed instructions on support and care of a woman while the OLFR talks merely about two articles, 70-72. (Judith E., 1996).

**Conclusion and Recommendations**

The whole world has witnessed the glorious contribution of the Ottoman dynasty. The OLFR is considered the fundamental enactment on Muslim family laws. It is an esteemed enactment that became the baseline for several marital codes. This law has been practiced in Jordan till 1951, and in Syria till 1949, and is still legitimate for Muslim citizens of Lebanon and Israel. (Eijk.2013). The major achievement was to ban
child marriage by prescribing the minimum age for marriage. The OLFR empowered women to explore a list of grounds for dissolution of marriage as well as reduced the unilateral man’s right to divorce. This remarkable enactment established the polygamy stipulation. Modern jurisprudential methodologies such as eclecticism and patching were practiced. It was referred to as a human rights and gender equality promoting law, but it also skipped many other significant and weighty zones of family law, such as guardianship, custodial, and inheritance matters. Currently, the Muslim world is facing the same difficulties as the Ottoman Empire had, particularly in Pakistan. To compete baking issues of family law can be addressed through the adoption of the OLFR’s methodology. Due to the shortage of its English and Urdu versions, this law is not searched and discussed in Pakistan. It is highly recommended that this remarkable enactment should be translated and benefit from it. It is proposed that academicians and researchers should work on several dimensions of Ottoman legal heritage, particularly family laws. The Methodology exercised by Ottoman legislators is an appraisable and vital need for contemporary legal reforms in marital issues in Pakistan. It is a sympathetic attitude for women’s and children’s empowerment in society.

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29. Ministry of Internal Affairs of Ottoman Empire, Ecâniib Kalemi (Notification), 15 March 1917.
30. OLFR, article 128.
31. Ibid. 47, 48.
32. Ibid. 4.
34. Turkish terminology ‘Tanzimat’ refers to “Reorganization” or chain of reforms done in Ottoman Empire. It is used to denote an era of reforms in the 19th century. 
35. CUP (Committee of the Union and Progress). 1908 is constituted by Young Turks secretly and later on ruled as political party. Its members started revolution against sultan Abdulhamid II.