

Islamization of Laws in Islamic Republic of Pakistan: An Analysis

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Abstract

Islamization in Pakistan subjects implementation of Islamic injunctions in individuals' lives. The leadership believed that Islamization is a urgent need of the Muslims of Pakistani society. Communal life in Muslim society of Pakistan must be shaped through Islamic Laws and this Islamic system can only conserve the social life against evils. This country is born on the ideology of Islam that is explicitly stated in the objectives of resolution. The current research paper discusses the Islamization of Laws in Pakistan. It provides a brief analysis of the Islamized laws. It also highlights the main disciplines of the laws in which the emphasis have been made by the legislature. The current paper also evaluates history of Islamization of Laws before independence. The study concludes with indication that supreme law, the Constitution of Islamic republic of Pakistan, law of evidence, criminal law as well as family laws are Islamized by the legislative bodies of the Islamic Republic of Pakistan by questioning its implementation.

Keywords: Islamization, Law, Pakistan, Islamic Law, Family Law, Evidence Law, Criminal Law, Constitutional Law.

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I. Introduction

Several key terms used require definition. “Islamization” does not mean conversion to Islam, nor does this mean, the transformation that Muslims must undergo to adhere more strictly to preexisting, already-established Islamic norms. Rather, the term is used to refer to the historical process at work during the formative era of Islam, by which persons and objects were made Islamic in character and became imbued with Islamic principles or forms.¹ Islamization rightly conceived and practiced is thought to bring a profound renewal, a peaceful revolution through evolution, a process of building a society of love and charity, of truth and creativity. Islamization represents a society in which men are equal before the law, in which men are accorded honour not for their status and privilege but for their merit and contribution towards well-being of the society.²

Islam stimulates for initiative, liberates man from bondage known and unknown. The man liberated by Islam develops a personality of great originality and energy. In making a just social order and prerequisite to divine favour, Islam has given its followers a purpose which, when followed, becomes a highly constructive influence in human life.³ Recognizing diversity in human life, the development of Islamic view of life entails an association with practical activity. Men of vision weave their dreams into the fabric of actuality. Their attitude is one of victory over one’s existence, not escape from it. It is not indifference that is exalted, but equilibrium.⁴

Islamic laws and institutions had given protection to those who need it the most. They have been kind to the unfortunate and fair to the downtrodden. Islamic law aims for a system which assures works and security to all adults, proper education for the youth and equitable distribution of wealth and resources. Accordingly, objective of Islamization is to bring an economic and social change in a peaceful, non-violent manner. The process of Islamization is not an academic learning alone but an education of the heart and the imagination, and of true adoption of Islamic ethics.⁵

In recent years, an increasing emphasis on Islamic approach to life is being expressed. Islamic bonds appear to provide a sense of cohesion and purpose to various groups and classes. Islamization of laws, therefore, is a must for Pakistani society mainly because Islamic law is the sum and substance of our faith.⁶

II. Islamization of Law before independence of Pakistan

Before partition, Muslims were living in India resolving their problems through the colonial courts in accordance with Shariah, particularly personal issues.

A. Islamic Law in Pre British Muslim Rule in India

Muslim era in Pre-British India can be divided into four periods, from advent of Islam with Muhammad bin Qasim in 712 to 991, from 991 until 1206; with a little record for the administration of Justice is found for our purposes, from 1206 to 1526, encompassing slave dynasties (Qutbuddin Aibak, Iltutmish, Balban, Khalji, Tughlaq, Lodhi and Suri); where the Muslims permanently settled in India, and the last period is the rule of glorious Mughals (1526-1757), ending unceremoniously with the slaying of Bahadar Shah Zafar's family by British and his forced exile to Burma.

a. Under Pre-Mughal Muslim Rulers

It is said that throughout the history of India, Indian villages maintained their autonomy. Indian Judicial system was decentralized for obvious reasons of different races, languages, customs, traditions and national outlooks. However, law in the modern sense was only represented by the liability to pay certain taxes and to abstain from certain acts which were contrary to the interests of the state.

Shariah laws were applied with a favourable view for local customs and the local institutions retaining their autonomy. Muslim Kings were tolerant towards their subjects and treated them equally without discriminating on the basis of religion, race, caste or status in the society⁷.

b. Under the Mughals

Mughal rulers were generally followers of the Hanafi school of thought as prevailed in the subcontinent. Emperor Akbar was not strict in the enforcement of Shariah and a beholder of secularist thoughts and following him, there was considerable intermingling of the Muslim law and the customary law of various sections of the people who came under the way of Mughal Empire. Under Mughal rule Islamic criminal was in force in major parts of the subcontinent excluding areas where non-Muslims were governed by their own criminal laws.⁸

In Akbar's court attempt was made to synthesize rationalist and classical elements in the Muslim jurisprudence with Sufi's philosophies and Indian experience. Under Aurangzeb, "FatawaAlamgiri" was prepared under the committee of lawyers. This

was a compilation of the approved statement of the law. In Oudh where the rulers were adherents of the Shia sect, Hanafi law remained prevalent as long as there was allegiance to the Delhi Sultanate. On repudiation of this allegiance, Shia law was made applicable in the society.⁹

B. Islamic Law in British Rule in India

The policy of British government of 'divide and rule' is well known therefore they developed separate laws for various communities except in case where their own interest demanded common legislation. Secondly, in order to appease certain vested interests such as "Indian Princes", *Taluqadars* and *Zamindars*, they perpetuated the encroachment of these sections on common rights of the people supporting customary law. As a result, Indian states were left free to flout all cannons of law (even ordinary human treatment) when dealing with their subjects. Muslim landlords refusal to give daughters their due share in the father's property was made valid and the Shariah law was set aside concerning "Mehr" or dower of the wife, and the husband was permitted to pay her not the sum stipulated at the time of Nikah but 'according to his means'.¹⁰

Modern thinkers in India endeavored to bring Muslim law in line with contemporary requirements. Among them Sir Syed Ahmed Khan who was a prominent scholar said: "the British have not yet realized that the new age demands totally new legal system to deal with social, political and administrative affairs". Sir Syed called upon Muslims to formulate a new legal code suited to their present needs. Amongst others were justice Karamat Hussain (U.P) Abbas Tyyabiji (Bombay), Syed Amir Ali (Calcutta), Sir Mohammad Shafi (Lahore) so on and so forth.¹¹

After World War-I and end of Khilafat, there was a wave of progressive movements in several Islamic countries, in India also progressive men and a large number of Muslim women's organizations clamoured for the reform in the practice of personal law of Muslims.¹²

The following legislation was made during the British period:-

a. The Shariat Application Act, 1937¹³

This Act, though did not include any progressive measures for amending the personal law of Muslims in India, nonetheless laid stress on such provisions in the Shariah which were beneficial to women but had been denied under the plea of customary law prevailing. Thus the Shariah Act

demanded that the share of the daughter in the father's property be restored. This Act received tremendous support from Muslim women in India and was vigorously opposed by the orthodox section who had always sworn by the Shariah.¹⁴

b. The Dissolution of Muslim Marriage Act, 1939

This was another important step to provide relief to Muslim women. This law entitled Muslim women to obtain a decree for dissolution of marriage in the following instances:

- a. If whereabouts of husband were not known for four years;
- b. If husband had failed to provide maintenance for two years;
- c. If husband had been sentenced to imprisonment for seven years or more;
- d. If husband was impotent at the time of marriage and continued to be so;
- e. If husband was insane for two years or suffering from leprosy or any venereal disease;
- f. The wife was given in marriage before age of fifteen and she repudiated the marriage before 18 year age;
- g. If husband treated her with cruelty.
- h. Any other ground under Muslim law.¹⁵

Later, a notable advance was inclusion of section 125 in the Code of Criminal Procedure enacted in 1973. This for the first time gave a statutory right to all women including Muslims to maintenance from the husband after divorce.¹⁶

C. Anglo Muhammadan Law

British Colonialism, represented by the East India Company, started its penetration of India as early as 1601 and continued under different charters. The British brought to India the legal rules of Common Law. With the Common Law they also brought their traditions, outlook and techniques in establishing, maintaining and developing the judicial system. But the common law they introduced was not pure Common Law; it was intermixed with Islamic law and came to be known as Anglo-Muhammadan law. Centralization and unification of the legal system was important for British rule. This was seen as a condition of progress toward modern nationhood, and law and legal institutions were seen as the best means to achieve this end. The confrontation with myriad forms of legal authority and variegated local practices highlighted one of the foremost problems of colonial control: how

to obtain simple, reliable, and reasonably accurate understanding of indigenous social life without sacrificing great labour and capital? Law and legal institutions provided a solution.¹⁷

In the beginning, British looked upon the laws of the natives with neutrality, since their basic purpose was the collection of revenue. British penetration of Islamic law was slow. During the later part of the eighteenth century Islamic criminal justice was replaced by British. But Hindu and Islamic law continued to be applied as the personal law of Indians such matters as inheritance, succession and religious endowments. This was the first time that Islamic law became the object of a systematic and constitutional legislation. The British courts also gave verdicts, where no specific rules were laid down in Islamic or Hindu holy books, the judges were to act according to justice, equity and good conscience. In this way, western legal thought in India came primarily through British sources. Islamic legal rules were retained in personal status in cases involving Muslims. However, these rules were interpreted by British judges or by indigenous judges with British training. Islamic law was interpreted along the lines of British legal thinking.¹⁸

III. Islamization of Laws in Islamic Republic of Pakistan

The Islamic Ideology, according to Objectives Resolution, is the belief of the Sovereignty of Almighty Allah over the whole universe; complete surrender and obedience of man to the sovereignty of Almighty Allah. A complete system of faith and action practiced under His sovereignty; and Faith in Life Hereafter and the Day of Judgment, reward by Almighty Allah for His obedient servants and punishment against those who deny His sovereignty or transgress the limits prescribed by Him, thus making all human beings answerable to Him for all their acts, deeds and things.

Pakistan came into existence as an Islamic State in order to bring this Islamic ideology into a reality. In all the three Constitutions of Pakistan of 1956, 1962 and 1973, it was pledged that measures will be taken to enable the people to order their lives according to the teachings of Islam and in consonance with the injunctions of the Holy Qur'an and the Sunnah. It has been made mandatory in the Constitution of the Islamic Republic of Pakistan, 1973 that no law shall be made repugnant to the injunctions of the Holy Qur'an and Sunnah and all such legislation shall be rendered as null and void.

a. The Ideology of Pakistan

Pakistan had not yet come into existence, the Muslims in Indian sub-continent stressed that Hindu and Muslims are two nations but the Hindu majority refused to face the reality. Muslims and Hindus had been living together but no political and ideological concordance was ever existed between the two distinct identities and civilizations. The claim of Indian Muslims for the establishment of Pakistan was thus based on:

- i. The growing conviction of the Muslims that they were quite distinct from the Hindus socially, culturally and spiritually.
- ii. Their intense desire to mould their thoughts and behavior on the pattern and traditions of their own distinctive culture.

These were the precise bases of the Pakistan movement. Unique and prominent aspects of the Pakistan movement were precisely its appeal to Islam. Thus, it would be wrong to say that the basis on which Pakistan was founded was communalistic fanaticism, or the anxiety of the Muslims to establish an Islamic theocracy in the areas where they constituted a numerical majority. It was rather normal, although unusually intense, craving of an oppressed community to lead a balanced and a wholesome life in the light of guidance from the faith they professed.

The oppressed Indian Muslims wanted not only to realize their own life but also laid stress that the salvation of humanity lay in practicing the Islamic way of life. Pakistan was founded because the Muslims of the subcontinent wanted to build up their lives in accordance with the teachings and traditions of Islam because they wanted to demonstrate to the world that Islam provides a panacea of many diseases which have crept into the life of humanity today. The demand for Pakistan was thus based on ideological and humanitarian grounds.¹⁹ The Ideology of Pakistan was not to be secular but Islamic. The Objectives Resolution was adopted by the Constituent Assembly in March 1949. Theoretically it was acceptable to the Muslim members of the Assembly that Pakistan would be an Islamic state.²⁰

Pakistan came into existence as an Islamic State to bring this Islamic ideology into a reality. In all the three Constitutions of Pakistan, namely, the Constitution of 1956, the Constitution of 1962 and the Constitution of 1973, it was pledged that Islamic Law will be enforced in Pakistan and measures will be taken to enable the

people to order their lives according to the teachings of Islam. But these solemn declarations and constitutional assurances, in fact, never materialized.²¹

The need for ideology led the rulers of Pakistan to resort to Islam, as this was the best possibility. This was understandable because it is commonly known that Pakistan is a homeland for Muslims and Islam has become the foundation of state legitimacy. The Muslim league stressed the existence of two Muslim nations within the subcontinent and insisted that there was no solution to the problems of the two nations other than the creation of a separate homeland for the Muslims.²²

b. Quaid-e-Azam Muhammad Ali Jinnah and Islamization

The Quaid-e-Azam Muhammad Ali Jinnah categorically stated that Pakistan is an ideological state. The objective of the state is to establish Islamic ideology. He was desirous of inducting those persons as administrators in the setting of Pakistani Government who believed in the ideology on which it is based and who adhered to the Divine Law which they are required to administer in the state of Pakistan.²³

Quaid-e-Azam seemed to have favoured the view that no law should be repugnant to Islam. It would guarantee equality, protection and treatment for all citizens. He also enjoined the contention that no law should prevent the members of a religious community or denomination from professing or from providing instruction in its religion. Coming to the Islamic way of life, Quaid-e-Azam took a very enlightened view in relation to the Muslims. He advised the teaching of Qur'an and Islamic Studies.²⁴

Quaid-e-Azam Muhammad Ali Jinnah visualized in the state of Pakistan an opportunity for Islam to mobilize its laws, education and its culture in order to bring the lives of the Muslims into closer contact with the spirit of Islam. He argued that Islam could reconcile itself to a status of national freedom of Muslims in Pakistan. It was the obligatory duty of the Muslims of India, in his opinion, to strive for a separate state. In a state so formed, the Muslims would create a society and an administration which would be modeled entirely on the conception of an Islamic state. A great deal of effort was devoted throughout the mission of Quaid-e-Azam to define this state in terms of Islamic Ideology. The Ideal state was sought by him not in any other contemporary system but the Islam itself. He upheld the view that in the Islamic state of Pakistan, the vicegerency of God would fulfill itself and honour its trust, by acknowledging that the ownership of all land

vests in God, and by accepting that man's duty is to produce wealth for the benefit of nation.²⁵

The objective of establishing a separate homeland for the Muslims of the subcontinent, in his opinion, was to prevent Hindus from exploiting Muslims. He was interested in safeguarding the liberty of Muslims. In the newly created state, Quaid-e-Azam aimed at evolving and developing a well balanced system of social justice which was set forth by Allah in His Holy Book. He had expressed his desire to eradicate all forms of evil and to encourage all types of virtue in Pakistan.²⁶

He believed that by living according to the Shariah the Pakistani citizens would place their whole existence under the command of Allah Almighty. He suggested that Shariah should sanctify the whole of social life in Pakistan and should give religious significance to what may appear as the most mundane of human activities.²⁷

c. Objectives Resolution and Islamization

The Constituent Assembly of Pakistan passed the Objectives Resolution in 1949. This Resolution was designed, in part, to serve as a framework for the drafting of Pakistan's first constitution, an exercise that proved agonizingly difficult. It took nine years from Partition for the Second Constituent Assembly (the first was dismissed in 1954) finally to agree upon a draft of a constitution. To those advocating the adoption of an Islamic constitution, the resultant 1956 document was disappointing. Indeed, the Objectives Resolution was relegated to the status of a preamble. Similarly, the Objectives Resolution was included merely as a preamble in the 1962, interim 1972, and 1973 constitutions. The question whether the Objectives Resolution as preamble provided a basis to challenge other provisions of Pakistan's constitution was answered clearly and unequivocally in 1973 by the Supreme Court of Pakistan in *State v. Zia-ur-Rehman*.²⁸ In its decision, the Court ruled that the Objectives Resolution as preamble does not hold sway over the "normal written constitution". From the decision of Chief Justice Hamood -ur- Rehman as stated:

“The Objectives Resolution of 1949 even though it is a document which has been generally accepted and has never been repealed nor renounced, will not have the same status or authority as the constitution itself until it is incorporated and made a part of it. If it appears only as a preamble to the constitution, then it will serve the same purpose as any other preamble serves, namely that in the case of any doubt as to the intent of the law-

maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof”.²⁹

However, in the year 1985 the “restored constitution” of President Zia-ul-Haq incorporated the text of the Objectives Resolution as Article 2-A, and thereby made it an operative part of the constitution. It is on the basis of this revision that the doctrine of the supra-constitutionality of the Objectives Resolution relies.

There are several prevalent arguments which support the contention that the Objectives Resolution is supra-constitutional, First, the Founding Fathers of Pakistan, including Liaquat Ali Khan, and the First Constituent Assembly, considered the Objectives Resolution to be the “foundation” for the creation of the State. The relevant debate before the Constituent Assembly indicates this, as does the text of the document itself. Further, the Objectives Resolution has been consistently seen as a crucial element of the ideology of the State, as evidenced by its inclusion as preamble in each of Pakistan's constitutions. Indeed, even the Supreme Court in *Zia-ur-Rehman*, which disallowed the contention that the Objectives Resolution as preamble was supra-constitutional, nevertheless admitted that the Resolution constituted the Grundnorm of the State.

Second, the inclusion of the Objectives Resolution through the vehicle of Article 2-A of the constitution changed the constitutional status of the Resolution. The Supreme Court's unwillingness to apply the Objectives Resolution to an interpretation of the constitution in *Zia-ur-Rehman* did not stem from a deficiency in the authority of the Resolution but rather from the fact that it was not part of the normal constitution. The 1985 constitution (Order) remedied this deficiency.

Third, it was the intention of the framers of the 1985 constitution (Order) that Article 2-A would “normalize” the constitutional status of the Objectives Resolution. This is evidenced by the meetings that were held between President Zia and those responsible for drafting the 1985 constitution; it is also evidenced by President Zia’s “consistent devotion” to advancing the cause of Islam, as per his Islamization programme. Indeed, the changes wrought by the revision of the 1985 constitution (Order) not only allow the courts to exercise jurisdiction through the mechanism of the Objectives Resolution (Article 2-A) but enjoin them to exercise it. From this perspective the restrictions upon the jurisdiction of the Federal Shariat Court (FSC) as found in Article 203-B applies only to that Court. In all other

matters, not reserved for the FSC, Pakistan's superior judiciary (the High Courts and the Supreme Court) have no limitations, including the constitution itself.³⁰

The main purpose of this resolution was that the constitution of Pakistan will be based on this resolution. It proclaimed that the future of the constitution of Pakistan would not be modeled on European pattern but on the ideology and democratic ideas of Islam. In as such as the Holy Qur'an is the only guide to man, both in public and private life.³¹

In Pakistan, no law is to be made repugnant to the injunctions of Islam and FSC has to analyse and check the legitimacy of laws. Generally, there are three fields of laws Islamized including the Constitution of Islamic Republic of Pakistan.

- I. The Constitutions of Islamic Republic of Pakistan
- II. Criminal Law
- III. Family Law
- IV. Law of Evidence

All the above laws are Islamized in Pakistan, the preamble of the Constitution of Islamic Republic of Pakistan and some other Islamic provisions are mentioned in detail in the Constitution of 1973. Before this other constitutions such as Constitution of 1956 and Constitution of 1962 were also having the Islamic provisions. The Criminal Law was Islamized in the era of General Zia-ul-Haq by the enactment of Hudud Laws 1979 and later on Qisas and Diyat Ordinance. He also tried to implement such sever punishments as well. Although, there were some issues of procedure and interpretations as well as misconceptions that were resolved by the FSC decisions later on. In law of Evidence, the Qanoon-e-Shahadat Order 1982 was enacted and it is made in accordance with the injunctions of Islam as laid down in Qur'an and Sunnah. There are many provisions that are not clear and needed to be elaborated. Family Law is also one of the area that is Islamized in shape of Muslim Family Law Ordinance, 1962, The Dissolution of Muslim Marriage Act, 1939, The Guardians and Wards Act, 1882 as well as The Child Marriage Restraint Act, 1929. We will discuss each field of law as Islamized one by one. Due to the tinier space of the article all the areas could not be covered.

IV. Conclusion

Pakistan is the country came into existence with a slogan of two nation theory. The Ideology of Pakistan was the Muslim have to spend their lives in accordance with the teachings of Islam. However, the spirit of the divine law was not initiated by

the legislature in Islamizing the Laws of Pakistan. The main purpose was to get the devotions and commitments of the people of Pakistan since some of the fields were required to be Islamized and codified such as Family Laws. The initiative of Islamization of Laws was begun before independence such as Shariat Application Act and Dissolution of Muslim Marriage Act, 1939. After independence all the constitutions were Islamized as well as Muslim Family laws, Hudud Laws and Evidence Law to adhere Islamic ideology. This research finally concludes that the desired objectives were not achieved because these objectives were primarily raised to invoke public sentiments to serve specific agendas; however, the laws were enacted without proper implementation.

References & Notes

¹*The Oxford English Dictionary* defines the verb “Islamize” rather narrowly, yet provides more expansive definitions, which I have here adapted, of “Christianize” and “Judaize.” It may seem tautologous to speak of the process of “Islamization” in reference to Muslims; such a formulation, if awkward, is necessary to convey the notion that men and women who identified themselves as Muslims were involved in the making and shaping of Islam.

²Dr. S. M. Haider, ‘*Shariah and Legal Profession*’, Feroz Sons, Lahore, 1985, 2.

³*Ibid.*, 3.

⁴*Ibid.*

⁵*Shariah and Legal Profession*, 4-5.

⁶*Ibid.*, 6.

⁷Rubya Mehdi, *The Islamization of the Law in Pakistan*, Curzon Press, Richmond, 1994, 2-4.

⁸Tahir Mehmood, *Criminal law in Islam and Muslim World; A comparative perspective*, Qazi publishers & Distributers, Delhi, 1996, 422.

⁹Zakia A. Siddiqi and Anwar Jahan Zuberi, *Muslim Women problems and prospects*, M D Publishers PVT Ltd. New Delhi, 1993, 27.

¹⁰*Ibid.*, 28.

¹¹*Ibid.*

¹²*Ibid.*

¹³In Pakistan, this act was repealed by the enactment of Muslim Personal Law (Shariat Application Act 1962) This Act may be called the West Pakistan Muslim personal Law (Shariat) Application Act, 1962. It extends to the whole of Pakistan.

¹⁴*Ibid.*

¹⁵*The Dissolution of Muslim Marriage Act, 1939*, Article 2.

¹⁶*The Code of Criminal Procedure, 1973*, section 125.

¹⁷Rubya Mehdi, *The Islamization of the Law in Pakistan*, 4.

¹⁸*Ibid.*, 5.

¹⁹Musa Khan Jalalzai, *Islamization and Minorities in Pakistan*, Jumhori Publications, Lahore, 2005, 7- 8

²⁰Rashida Patel, *Islamisation of Laws in Pakistan*, Faiz Publishers, Karachi, 1986, 7.

²¹Dr. S. M. Haider, *Shariah and Legal Profession*, Feroz Sons, Lahore, 1985, 47-48.

²²Rubya Mehdi, *The Islamization of the Law in Pakistan*, 18.

²³Dr. S. M. Haider, *Shariah and Legal Profession*, 101.

²⁴*Ibid.*, 15-16.

²⁵Dr. S. M. Haider, *Shariah and Legal Profession*, 13-15.

²⁶*Ibid.*, 100.

²⁷*Ibid.*, 99.

²⁸*The State vs. Zia-ur-Rehman*, PLD 1973 SC 49.

²⁹Charles H. Kennedy, "Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan," *The International and Comparative Law Quarterly* 41, no. 4 (1992):781, <http://www.jstor.org/stable/761030> (accessed November 7, 2009).

³⁰Gul Muhammad Khan, *Islamization of Laws in Pakistan*, PLD 1986 249.

³¹Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford University Press, 2007, 59.