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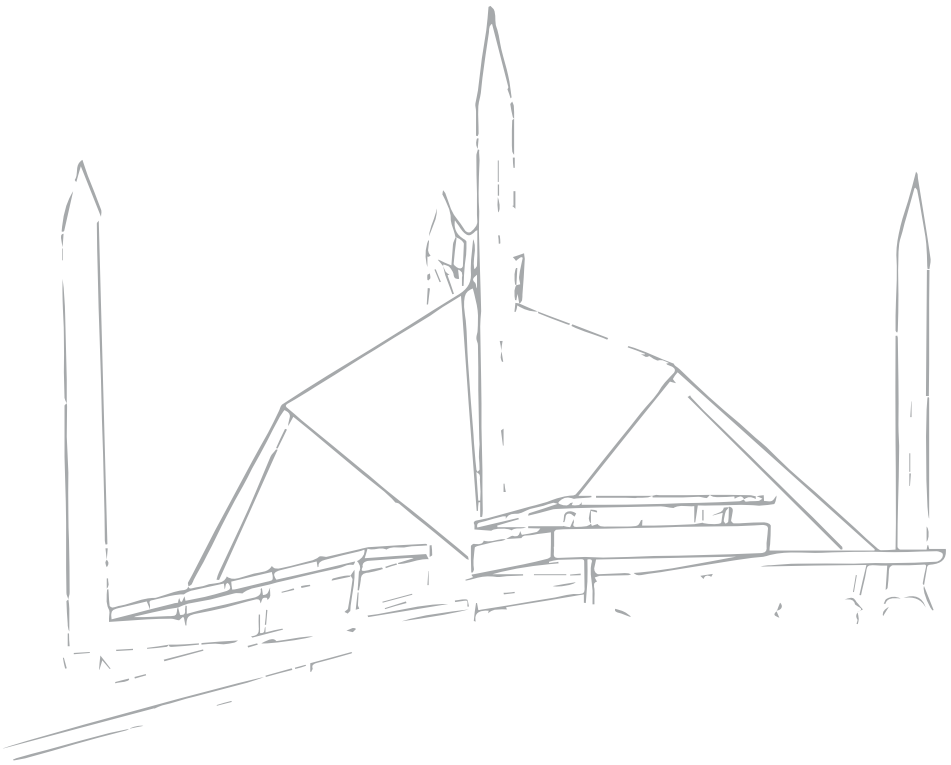

The *Islamabad Law Review* (ISSN 1992-5018) is a high quality open access peer reviewed quarterly research journal of the Faculty of Shariah & Law, International Islamic University Islamabad. The *Law Review* provides a platform for the researchers, academicians, professionals, practitioners and students of law and allied fields from all over the world to impart and share knowledge in the form of high quality empirical and theoretical research papers, essays, short notes/case comments, and book reviews. The *Law Review* also seeks to improve the law and its administration by providing a forum that identifies contemporary issues, proposes concrete means to accomplish change, and evaluates the impact of law reform, especially within the context of Islamic law.

The *Islamabad Law Review* publishes research in the field of law and allied fields like political science, international relations, policy studies, and gender studies. Local and foreign writers are welcome to write on Islamic law, international law, criminal law, administrative law, constitutional law, human rights law, intellectual property law, corporate law, competition law, consumer protection law, cyber law, trade law, investment law, family law, comparative law, conflict of laws, jurisprudence, environmental law, tax law, media law or any other issues that interest lawyers the world over.

Editorial Office

Room D-29, Faculty of Shariah & Law, Imam Abu Hanifa Block, International Islamic University, Sector H-10, Islamabad, Pakistan, Postal Code: 44000, Email: ilr@iiu.edu.pk , URL: http://www.iiu.edu.pk/ilr

Phone: +92-51-9258022, +92-51-9019782

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FACULTY OF SHARI'AH & LAW
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Preface

The International Islamic University Islamabad provides academic services to men and women through separate campuses for each segment. The Faculty of Shariah & Law was established in Quaid-e-Azam University Islamabad in 1979 but subsequently incorporated into Islamic University Islamabad in 1980. Currently, almost two thousand students are enrolled in different programs of the Faculty of Shariah & Law and IIUI has the largest full time law faculty in Pakistan. The Faculty of Shariah & Law enjoys a respectable position among the reputed Law School/Law Faculties of reputed universities of South Asia. The Faculty offers programmes of study leading to the degrees of Doctors of Philosophy in Shariah, Doctors of Philosophy in Law, LL.M in Corporate Law, LL.M in International Law, LL.M in International Trade Law, LL.M in Human Rights Law, MS Human Rights, LL.M in Shariah (Islamic Law & Jurisprudence), MS Shariah, MS / LL.M Islamic Commercial Law, MS / LL.M Muslim Family Law, LL.B Shariah & Law and LL.B Three Years.

The Faculty of Shariah and Law is a unique centre of learning in South Asia which provides good quality education of Law, Shariah, Jurisprudence and *Fiqh* under the supervision of highly qualified teachers. This is the only Law Faculty which has twenty four academicians holding PhDs in various fields of Shariah & Law; most of them obtained their degrees of doctorates from the leading universities of the world. The faculty has prominent place in the academic world as distinguished scholars from foreign universities such as Al-Azhar and Cairo come to teach here. The Faculty provides good academic environment in which students can pursue their studies of Law and Shariah under the supervision of well qualified, dynamic and research oriented scholars who come from various parts of the world and constitute a strong faculty.

Besides, being the only institution in the country which offers a largest range of under and post grade programs in legal studies, the faculty puts ample emphasis on the Legal Research. It launched Islamabad Law Review (earlier in 2ooo) with a focus on the comparative research on Shariah and Common Law. The *Law Review* is a high quality open access peer reviewed Quarterly Research Journal of the Faculty of Shariah & Law, International Islamic University Islamabad. A worldly renowned author and publicist on Islamic Law, Prof. Imran Ahsan Khan Nyazee was pioneering editor of the journal. For few years ILR was unable to catch it regular frequency and had gathered a lot of backlog.

The Faculty is grateful to Arizona State University for undertaking to uplift Islamabad Law Review. The Department of Law has recently executed a project – Legal Education Support Program in Pakistan- in collaboration with Sandra O'Connor College of Law at Arizona State University, USA. Besides, establishment of Law Clinic and introduction of Legal Writing and research Course, the issue in hand of ILR is published under the project grant.

Assistant Editor, ILR

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CONTRIBUTORS

TAJ MUHAMMAD
Lecturer in Law, Department of Sharia and Law, University of Swat.

MUDASRA SABREEN
serves as Chairperson Department of Shari'ah, Faculty of Shari'ah and Law, International Islamic University, Islamabad

MUHAMMAD IMRAN
is working as Assistant Manager in Shaikh Ahmad Hassan School of Law (SAHSOL) Lahore University of Management of Sciences (LUMS) Lahore. He can be accessed at mimran@lums.edu.pk.

MARYAM MUKHTAR
serves as Advocate High Court and teaches as Visiting Faculty Member of Federal Urdu University, Islamabad

SHAHBAZ AHMAD CHEEMA
serves as Assistant Professor, University Law College, P.U. Lahore

AFTAB AHMED RANA
serves as Civil Judge/Research Officer Lahore High Court, Rawalpindi Bench, Rawalpindi.

SYEDA FARAH YASIN
is LLM, Family Law Scholar in the Faculty of Shariah and Law, International Islamic University, Islamabad

SAMIA MAQBOOL NIAZI
Is Assitant Professor Law Department of law, Faculty of Shariah and Law, International Islamic Islamabad.

Immigration and Citizenship in Islam and the Laws of Pakistan and Saudi Arabia: A Comparative Study

Taj Muhammad*

Abstract

Immigration to prosperous–or taking refuge in safe–lands has become one of the most serious international issues in our time. People from all over the world in general and war hit Muslim countries in particular migrate to the countries which are safe and can offer a peaceful and prosper life with better financial conditions. Despite the fact that Islamic teachings regarding immigration and nationality are more generous, liberal and based on humanity, the role of Muslim countries particularly in the recent refugee crises in Syria has not been satisfactory. This paper discusses the teachings of Islamic Law regarding immigration and nationality and evaluates the practice and laws of Islamic Republic of Pakistan and Kingdom of Saudi Arabia in this matter and points out some serious inconsistencies of the legal system of these countries with Islamic teachings. This papers argues that, since Islam encourages all Muslims to migrate to the Dār al-Islām *(the term used for Muslim state in Islamic law) and binds the Muslim government to accept the Muslims migrating there and also Islam binds the Muslim government to accept the application of nationality put forward by a non-Muslim person, the citizenship laws of Pakistan and Saudi Arabia, as incorporated in the Pakistan Citizenship Act 1951 and Saudi Citizenship System respectively has many inconsistencies with the teachings of Islamic law. The paper also points out some inconsistencies of these laws with the international human rights law. The paper, thus, urges these countries in particular and all Muslim countries in general to incorporate the humanitarian and generous nature of Islamic law in their immigration and nationality laws and bring these laws in conformity with Islam because this is an obligation on them for recognizing Islam to be the state religion. The inconsistencies with International human rights law will automatically be resolved in that case.*

Keywords: *Immigration, Citizenship, Pakistan, Saudi Arabia, Dār al-Islām*

* Lecturer in Law, Department of Sharia and Law, University of Swat and he could be accessed at: tajsazini@gmail.com.

1. Introduction

According to the popular belief, humanity began its journey on the earth from Sri Lanka[1] but now the specie, known as human being, is inhabitant of six continents with all diversities in color, race, ethnicity, language, custom and religion. All this happened because of massive migrations which human being made across the history.[2] There had been various factors –detailed discussion of which is not of our concern for this study– which encouraged or compelled people to migrate from one territory to the other so that they would be able to lead a prosperous life, improve their living standard and/or find safety from the persecution, violation of fundamental rights and effects of wars in their native countries.[3] The technological advancement in the means of transportation has made it easier for mankind to change their territories. This, on the one hand, led the number of immigrants across the globe to increase, and, on the other hand, called for comprehensive legal system which would govern the affairs related to immigration, citizenship, nationality and asylum. Consequently, almost every country on the planet has formulated a combination of laws which govern the matters pertaining to immigration and citizenship.[4]

Like other countries, Islamic Republic of Pakistan and Kingdom of Saudi Arabia also, as we shall discuss, have comprehensive laws regarding citizenship and immigration. Since both the countries recognize Islam to be the state religion and the *Sharī'ah* shall be complied with in making laws,[5] the immigration laws of these countries, as a legal and constitutional obligation, should be in accordance with the principles of *Sharī'ah*. Believing in the

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[1] Ronit Ricci, *Islam Translated: Literature, Conversion and the Arabic Cosmopolis of South and Southeast Asia*, (Chicago: The University of Chicago Press, 2011) P. 136.

[2] Al-Fāruqī, Ismā'īl al-Rājī (d. 1986), *Trialogue of the Abrahamic faiths,* (Riyadh: International Islamic Publishing House, 1995) P. 49.

[3] Teichmann, Iris, *Immigration and the Law* (Mankato: Black Rabbit Books, 2006) P. 8

[4] Ibid.

[5] Article 2 of *the Constitution of Pakistan 1973* acknowledges Islam to be state religion and article 227 of the constitution promises that all laws shall be brought in conformity with the principles of Islam and no new law shall be made inconsistent with *Shari'ah*. The article 1 of the Saudi Arabian *Basic Law of Governance 1992,* –which is quite similar to constitutions elsewhere– affirms the Qur'an and the Sunnah to be the constitution of the Kingdom.

universal brotherhood[6], Islam –as we shall discuss, has built its immigration and citizenship laws on very liberal and generous foundations. Despite the fact that Islamic law of immigration and citizenship is quite generous and flexible, these two countries – particularly Saudi Arabia– are generally known for the strict immigration laws.

In the following an attempt would be made to answer the questions; "are the immigration and citizenship laws of Pakistan and Saudi Arabia consistent with Islamic laws? Is there any contradiction in these laws with international human rights law? And how the inconsistencies, if any, can be removed?

2. Immigration and Citizenship

Before going to the detailed discussion, it seems appropriate to define what immigration, citizenship and nationality exactly are. Thus, in the following these terms are being defined briefly.

2.1. Immigration

Black's law dictionary defines immigration as "*The coming into a country of foreigner for purposes of permanent residence*". The same dictionary differentiates immigration from emigration as the former denotes the coming into other country while the later refers to the act of leaving one's own country.[7] John bouver defines immigration as "*The removing into one place from the other*".[8] Oxford Dictionary of Law defines the term as "*The act of entering a country other than one's native with the intention of living there permanently*".[9] The Merriam-Webster Dictionary of Law defines the term as "*[T]o come into a country of which one is not a native for permanent residence*".[10]

Looking into these different definitions, one can reach to the conclusion that 'immigration' has some essentials which

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[6]Ismā'īl al-Rājī traces the concept of universal brotherhood in the teachings of Jesus Christ. He, further claims that it was promoted by his followers and Islam also believes in it. See: Trialogue of the Abrahamic Faiths p. 57.

[7] Henry Campbell Black, M.A., *Black's Law Dictionary*, (St Paul: West Publishing Co, 1979) 676.

[8] John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, (Philadelphia: George W. Childs, 1862) 1:606.

[9] Elizabeth A. Martin MA ed., *Oxford Dictionary of Law*, (London: Oxford University Press, 2001) 241.

[10] "Definition Of IMMIGRATION". 2019. *Merriam-Webster.Com*. https://www.merriam-webster.com/dictionary/immigration.

distinguish this kind of movement from others. The first essential is entering in a country to which the person is not native. Thus, moving within one's own country or moving to another country to which a person is citizen – as the case of a person who has dual citizenship when he moves from one country of his citizenship to the other– will not be regarded to be immigration. The second character of this movement is the intention of the person that he will settle in the new country permanently. He might get naturalized[11] there or find some work as an immigrant worker.[12] This distinctive feature distinguishes immigration from ordinary tourist or other visitor as the former does not have any intention to return to his own country while the latter is for a temporary period of time to a certain work and he intends to go back to his own country.[13]

2.2. Citizenship

Black's law dictionary defines citizenship as "*the status of being a citizen*".[14] This definition does not provide a clear understanding of the term.[15] Bouvier, whose law dictionary has been adapted to the laws and constitution of the United States of America, did not even define the term citizenship. Instead, he defines the term citizen which gives idea of citizenship as it is the status of the person who is 'citizen'. In his words citizen is "*one who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is*

[11] Naturalization is one of the modes of acquiring citizenship as it is the process by which any country grants citizenship to any foreigner. See, PH Collin, *Dictionary of Law*, (London: Bloomsbury Publishing Plc, 2004) 198. Being the same concept, the application of naturalization varies from one jurisdiction to the other and the conditions for naturalization are also different in different countries. Some most common conditions for naturalization include residence for a certain period, education, good character and fluency in the official language of the country.

[12] Dudley L, Poston Jr., and Leon F. Bouvier, *Population and society: An introduction to demography*, (Cambridge University Press, 2010) p. 197.

[13] Poston Jr, Dudley L., and Leon F. Bouvier, *Population and society: An introduction to demography*, (Cambridge University Press, 2010) p. 197.

[14] Black, *Black's Law Dictionary*, 222.

[15] The understanding of this term depends on the understanding of the term 'citizen'. To fill the gap, the dictionary provides quite a clear definition of citizen. It says "*One whom, under the Constitution and laws of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights*". See, Black, *Black's Law Dictionary*, 221.

qualified to fill offices in the gift of the people".[16] After a considerable search in different dictionaries I could find the most comprehensive definition of citizenship in Collins Dictionary of Law. It is defined as "*the legal link between an individual and a state or territory as a result of which the individual is entitled to certain protections, rights and privileges, and subject to certain obligations and allegiance*".[17] Looking what has been written about the definition of 'citizen' and 'citizenship, one can easily arrive at the same and single conclusion of the different wordings. That is, the citizenship is a status, available to all citizens, comprising of two basic essentials. First of all, the citizens have all the political rights i.e. that have right to vote for public offices. Further, they are entitled to certain protections from their respective states. Secondly, they owe allegiance and loyalty to the state or territory to which they are citizens. John Mathiason summed up these two essentials as he describes the citizen to be the person belonging to a nation or state who pledges his allegiance to the state and in return is entitled to protection which would be provided by the state. In a nutshell, citizenship is a barter in which one party extends his loyalty to the other in return of certain rights and protections.[18]

2.3. Nationality

Nationality has been defined by Henry C. Black in his famous law dictionary as "*the quality or character which arises from the fact of a person's belonging to a nation or state*".[19] This definition shows the resemblance of nationality with citizenship. Bouvier defines the term as "*the state of a person in relation to the nation in which he was born*".[20] On the face of it, this definition is not inclusive to the kinds[21] of nationality other than the nationality of birth or origin. Bouvier, however, in his other law dictionary provides a much better definition of the term which makes nationality quite similar to citizenship. He defines nationality as "*Character, status, or condition with reference to the rights and duties of a person as a member*

[16] Bouvier, *A Law Dictionary*, 231.

[17] *Collins Dictionary of Law*. S.v. "citizenship." Retrieved June 16 2019 from http://legal-dictionary.thefreedictionary.com/citizenship.

[18] John, R. Mathiason, *World Citizenship: the individual and international governance*, (New York: New York University, 1997). Available at: http://www.un.org/esa/socdev/egms/docs/2012/WorldCitizenship.pdf last accessed, June 17, 2019.

[19] Black, *Black's Law Dictionary*, 925.

[20] Bouvier, *A Law Dictionary*, 1357.

[21] These kinds include, nationality by marriage and naturalization.

of someone state or nation rather than another".[22] W.J. Stewart defines nationality as "*the legal relationship between a person and a state*".[23] This definition is *prima facie* ambiguous because it is not certain to which relation it refers with the words "*the legal relationship*". Further, the definition would have not been exclusive if the article '*the*' –which specifies and particularizes general things – had not been there at the beginning of the definition. This is because in that case the definition could include any sort of legal relationship of any person with any state. The oxford law dictionary provides a definition similar to that of citizenship. It defines the term as "*the state of being a citizen or subject of a particular country*".[24]

The combination of all these diverse definitions of nationality provides one clear picture of the notion of nationality. According to that, the nationality is a legal bond between an individual and a particular state which binds the individual to extend his loyalty to the state and in return enjoy protection, legal rights and privileges. Ivan Shearer and Brian Opeskin summed up the concept of nationality in words as follows;

> "Under domestic law, a national owes a duty of allegiance to the State, and may be obliged to pay taxes and render military services to that State. A national has the right of permanent residence and the right to participate in public life and, in most countries, enjoys social benefits available only to nationals".[25]

2.4. Difference between Citizenship and Nationality

The terms citizenship and nationality are very often used interchangeably and mostly common people take them as synonym.[26] There are, therefore, some countries where nationality and citizenship are taken as a same concept. These countries include Canada, the United States of America (USA), Australia and Turkey.[27] However, in technical and legal sense these two are

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[22] John Bouvier, *Bouvier's Law Dictionary A Concise Encyclopedia of The Law*, (St. Paul: West Publishing Company, 1914) 3: 2297.

[23] *Collins Dictionary of Law*. S.v. "Nationality." Retrieved June 19 2019 from http://legal-dictionary.thefreedictionary.com/nationality .

[24] Elizabeth ed., *Oxford Dictionary of Law*, 325.

[25] Ivan, Shearer and Brian Opeskin, "Nationality and Statelessness" in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, eds. *Foundation of International Migration Law* (Cambridge: Cambridge University Press, 2012) 93.

[26] Ivan, Shearer and Brian Opeskin, *Foundation of International Migration Law*, 95.

[27] Thomas Faist ed, *Dual citizenship in Europe: From nationhood to societal integration*, (Hampshire: Ashgate Publishing, Ltd., 2012) 8-9.

quite different terms having different meanings and implications in other parts of the world.[28] There are two major differences between the citizenship and nationality. The first and foremost distinction between the two terms is that, the nationality is usually a subject of public international law as under the public international law this is an affiliation of an individual with a particular state by virtue of which the state may impose certain responsibilities on the individual and can exercise its jurisdiction on him. The individual has right against the state to be protected by providing consular advice abroad and diplomatic help where possible. Citizenship, on the contrary, is a notion which is used in domestic law of the country whereby the citizens have political and civil rights: they can vote and be elected for the public offices.[29]

The other difference between the two terms is that citizenship is the legal connection between person and state whereby a citizen enjoys full civil and social rights against his affiliation with the state. In this context, the citizenship of any state is beyond the color, religion, ethnicity and race of the person. Nationality, on the other hand, is the social, historical and ethnic bond of a person with other people of the same background. In this context, the term nationality is more similar to the term ethnicity and a state may, thus, comprise multiple nationalities and some nationalities could not have their own state. In this perspective the citizenship is the creation of the state as the state grants, and at times snatches, citizenship to the individuals while the nationality is the bases for the nation-state.[30] In this context, citizenship is created by operation of law and a person can acquire any sort of citizenship given under the law of any state while nationality, as that is membership of an individual in a community with shared history, culture and tradition, is beyond the need of any legal operation in its existence.[31]

[28] Stefan Kadelbach, "Citizenship Rights in Europe" in Dirk Ehlers ed, *European Fundamental Rights and Freedoms,* (Berlin: De Gruyter Recht, 2007) 547.

[29] Kim Rubenstien, "Globalization and Citizenship and Nationality" in Catherine Dauvergne ed, *Jurisprudence for an Interconnected Globe*, (Farnham: Ashgate Publishing Ltd, 2003).

[30] Olivier W. Vonk, *Dual Nationality in the European Union,* 21.

[31] Faist, Thomas, ed, *Dual citizenship in Europe*, 9.

3. Immigration and Citizenship in Islamic Law

Before going into the detailed discussion of Islamic law of immigration and nationality, it seems appropriate to discuss the various kinds of people residing in an Islamic state. According to the classification made by Islamic law, there are three classes of people living in *Dār al-Islām*[32], a term used for Islamic state.

3.1. Muslims:

The Muslim citizens of *Dār al-Islām*, are those who, by virtue of being Muslim, have the right of citizenship. Muslim jurists have established that a Muslim is by birth citizen of *Dār al-Islām.* As far as the current legal and political situation is concerned, based on the *Ḥanafī* definition of *Dār al-Islām,* all the Muslim majority states –where Muslims are in government – are *Dār al-Islām.* Muslim scholars of modern era differ on the issue whether or not more than one *de jure Dār al-Islām* are allowed under Islamic law. Some scholars opine that it is permissible to have more than one *Imām*[33]while others hold that it is not permissible to have more than one *Imām.*[34]Even after the *de facto* establishment of numerous Muslim states, Muslim jurist did not consider the Muslims of

[32]In order to determine what makes any territory *Dār al-Islām,* Shams al-Dīn Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī (d. 1096) gives one simple principle i.e. the dominance over any territory. Thus, if Muslims have dominance over a territory and they have capability of enforcing the *Sharī'ah* of Islam; the territory will be regarded to be *Dār al-Islām.* Conversely, if a territory is under the dominance of non-Muslims the territory would be *Dār al-Kufr.* See: *al-Mabṣūṭ*, 10:193.

[33] See, Muhammad Munir, *Sharia'ah and Nation-State: The Transformation of Maqasid al-Shari'ah Theory,* (Jakarta: International Conference on "The Practice of Islamic Law in the Modern World", 2014).

[34] These scholars base their opinion primarily on the *Ḥadīth* which has been narrated by Imam Muslim which reads; " إذا بويع لخليفتين فاقتلوا الآخر منهما". This means "*When bay'ah is concluded for two Khalifah, kill the second one*". See, Muslim, *Ṣaḥīḥ Muslim*, Bāb Idha Buyi'a Li Khalīfatayn, 3:1480. The *Ḥadith* has also been narrated by many other *Muḥaddithūn* including Imam Aḥmad b. Ḥanbal, See Abū 'Abdullah Aḥmad b. Muḥammad b. Ḥanbalal-Shaybānī, *Musnadal-Imām Aḥmad b. Ḥanbal,* (Cairo: Dār al-Ḥadīth, 1995) and Imam Abū Dāwūd, see, Abū Dawūd Sulaymān b. al-Ash'ath al-Sijistānī, *Sunan Abī Dāwūd,* Bāb Dhikr al-Fitan Wa Dalā'iluhū, (Beirut: Dār al-Risālah al- 'Ālamiyyah, 2009) 6:302.

Muslim Spain to be non-citizens in Abbasside caliphate.[35] The Kuwaiti Encyclopedia of Fiqh concludes;

> "من المتفق عليه بين الفقهاء أن المسلمين يتوارثون فيما بينهم مهما اختلفت ديارهم ودولهم وجنسياتهم، لأن ديار الإسلام كلها دار واحدة لقوله تعالى {إنما المؤمنون إخوة}، وقوله صلى الله عليه وسلم: المسلم أخو المسلم ولأن ولاية كل مسلم هي للإسلام وتناصرهم يكون به وله".[٣٦]

> "Among what have been unanimously decided by jurists is that the Muslims inherit each other no matter how their residences, countries and citizenship differ because all the lands of Islam *(Diyār al-Islām*) are –based on the Allah's word "*[A]ll Believers are but brothers*"[37] and the *Ḥadīth* "*Muslim is brother of Muslim*"[38] –one single land because *wilāyah* of every Muslim is for Islam and their mutual support is for, and based on, Islam.

Thus, a Muslim –irrespective of his birthplace or nationality – is by birth citizen of *Dār al-Islām* whenever he enters into the territory of Muslims or when any non-Muslim embraces Islam in *Dār al-Islām,* he becomes citizen and ceases to remain *Dhimmī* or *Musta'min*, whatever he may has been previously.[39]

3.2. Dhimmī:

A *Dhimmī* is the non-Muslim citizen in *Dār al-Islām,* who has contract with the government according to which he pays a

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[35] Muslim jurists did not apply the rules applicable to Muslims – particularly in Muslim personal law and conflict of laws – on the Muslims of Spain in Baghdad and vice versa. For details see, Mushtaq, *Jihad Muzaḥamat Awr Baghāwat,* 126-133.

[36]Wazārah al-Awqāf, *al-Mawsū'ah*, 3:28. Professor Muḥammad Salām Madkūr has also given the same opinion in his book on Islamic law on wills. See, Muḥammad Salām Madkūr, *al-Waṣayā fī 'l-Fiqh al-Islāmī,* (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1962) 54.

[37]*Al-Qur'ān*, 49:10.

[38] The *Ḥadīth* has been narrated by many *Muḥadithūn* including al-Ḥākim, see, Abū 'Abdullah al-Ḥākim Muḥammad b. 'Abdillah b. Muḥammad al-Nīshāpūrī, *al-Mustadrak 'Ala 'l-Ṣaḥīḥayn,* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1990) 2:10 and Imam Ibn. Mājah, see, Ibn. Mājah Abū 'Abdillah Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn. Mājah,* Bāb Man Warā fī Yamīnihī, (Beirut: Dār Iḥyā' al-Kutub al-'Arabiyyah, n.d) 1:685 and al-Bazzār, see, al-Bazzār Abū Bakr Aḥmad b. 'Amr b. 'Abdilkhāliq b. Khallād al-'Atakī, *Masnadal-Bazzīr al-Baḥral-Zakhkhār,* (Madīnah: Maktabah al- 'Ulūm Wa 'l-Hikam, 2009) 15:255.

[39] Ibid.

certain amount of tax and in return enjoys protection and certain rights and immunities.[40]

[40]The term *Dhimmī* has been defined in different words, for example, the Kuwayti Incyclopedia of Fiqh defined it in words that read; "والذمي في الاصطلاح هو المعاهد من الكفار لأنه أومن على ماله ودمه ودينه بالجزية" "*Dhimmī is the contracting person among non-Muslims who got protection of his life, property and religion by paying Jizyah*" See, *Mausū'ah al-Fiqhiyyah al-Kuwaitiyyah*, 37:168. Dr. Sa'dī Abū Ḥabīb defined it as "الذمي: هوالمعاهدالذي أعطي عهدايأمن به على ماله وعرضه ودينه" "*Dhimmī is the person who concluded a contract [with Muslim government] by virtue of which he secures his property, honor and religion*". See, *al-Qīmūs al-Fiqhī,* 138. The basic essentials, from all the definitions, appear to be a contract between Muslim government and non-Muslim individual according to which the non-Muslim pays *Jizyah* (tax) and becomes permanent citizen of *Dār al-Islām.* The basic purpose of the contract of *Dhimmah* is firstly to facilitate the non-Muslims to observe the Islamic way of life and realize the beauty of Islam and secondly to bring the war with the non-Muslims to an end as the *Dhimmah* contract binds them to abbey the laws of Islamic state and be a peaceful person in the Islamic society. See, Al-Kāsanī, *Badai',* 7:111. As far as the non-Muslims, who are eligible for the contract of *Dhimmah*, are concerned the people of book (*Ahlal-Kitāb*) i.e. Christians and Jews are allowed to be brought under the *Dhimmah* contract by the verse of the *Qur'ān* that reads; "وَلَايُحَرِّمُونَ مَاحَرَّمَ اللهُ وَرَسُولُهُ وَلَايَدِينُونَ دِينَ الْحَقِّ مِنَ الَّذِينَ قَاتِلُواالَّذِين لَايُؤْمِنُونَ بِاللهِ وَلَابِالْيَوْمِ الْآخِر أُوتُواالْكِتَابَ حَتَّى يُعْطُواالْجِزْيَةَعَنْ يَدٍوَهُمْ صَاغِرُونَ" [9:29] "*Fight those people of the book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared unlawful, and do not profess the Faith of Truth; (fight them) until they pay Jizyah with their hands while they are subdued* [Translation by Mufti TaqiUsmani]". Apart from them, the Zoroastrians are made eligible for the *Dhimmah* contract by the *Ḥadith* of the Holy Prophet –Peace and blessings of Allah Almighty be upon him – which reads; "سنوابهم سنة أهل الكتاب". "*Do with them [Zoroastrians] the way you do with the people of book*" See, Mālik b. Anas b. Mālik al-Aṣbaḥī, *Muwaṭṭā al-Imām Mālik*, Bāb Mā Jā'a Fī Jizyati Ahl al-Kitāb (Beirut: Mu'assasah al-Risālah, 1412AH). In some other versions of the *Ḥadith* the marriage with Zoroastrians and legality of their *Zabīḥah* are specifically excluded and Muslims are prohibited from these by the words "غير ناكحي نسائهم و لا آكلي ذبائحهم". See, Abū Bakr b. Abī Shībah 'Abdullah b. Muḥammad b. Ibrīhīm al- 'Abasī, *al-Muṣannaf fi'l Aḥādīth Wa'l Āthār*, (Riyadh: Maktabah al-Rushd, 1409AH), 3:488. The polytheists of Arabia and apostates are not eligible for *Dhimmah.* The former because of the verse of Qur'an "*You will have to fight them until they submit* [48:16]" and the latter for the reason that apostate is supposed to be killed, if he does not repent, and *Dhimmah* is meant to protect. See, Abū Muḥammad Mawfaqal-Dīn 'Abdullah b. Aḥmad b. Qudāmah al- Maqdisī, *al-Mughnī,* (Cairo:

3.3. Musta'min: A *Musta'min* is a person who enters into the territory of Muslims with permission for specific purpose –such as trade– and has intention to return to his country of citizenship. The concept of *Amān* by acquiring which a person becomes *musta'min* is quite similar to what we now know as visa.[41]

3.3. Immigration and Citizenship in Islam

Islamic law is quite generous with respect to the immigration and citizenship. *Dār al-Islām*, according to the teachings of *Qur'ān* and the *Sunnah*, is bound to open its doors for the immigrants irrespective of their religion. There are dozens of Quranic verses and the traditions of the Holy Prophet –peace and blessings of Allah be upon him– which show the liberal and generous nature of Islam in this regard. In the following we shall explore some precedents from the teachings of *Qur'ān* and the *Sunnah* with respect to all of the above classes of people.

As for as Muslims concern, Islamic law encourages them to migrate to *Dār al-Islām* so that they will be able to order their lives in accordance with Islamic teachings without any hindrance and all their affairs will be administered in an atmosphere of Islam. But, if Muslims citizens of a non-Muslim state do not migrate to the territory of Islam and wish to live there, they, on the one hand, shall be excluded from the jurisdiction of Muslim government and, on the other hand, the Muslim government shall not be responsible to protect their rights and they will not have any rights in the *Bait al-Māl*. The Holy Prophet –peace and blessings of Allah be upon him– has been reported to command;

> *"When you confront your enemy from polytheists, offer them three options and approve if they accept any of these and hold your hand from them. Then invite them to embrace Islam and if they accept it refrain from them and encourage them to migrate from their territory to the land of Muslims by informing them that they shall enjoy all the rights of the Muslim citizens and they will be responsible for all such duties. If they denied migrating, inform them that they shall be like Muslim villagers and the rules of Allah regarding other Muslims shall*

Maktabahal-Qāhirah, n.d) 9:3. There is no disagreement among the jurists about the above mentioned rules. The jurists differ whether or not the polytheists of *'Ajam* are eligible for the *Dhimmah* contract. According to *Ḥanafī* School of law they are eligible for *Dhimmah* on the basis of analogy with Zoroastrians. Imam al-Shafi'ī is, however, of the other opinion that these people are not eligible for *Dhimmah*. See, Kamāluddīn Muḥammad b. 'Abdul Wāḥid al-Sīwāsī, *Fatḥ al-Qadīr,* (Beirut: Dār al-Fikr, n.d) 6:48.

[41] Ibid.

> *apply to them and they shall not be entitled for financial benefits from Bait al-Māl."*[42]

As far as the *Dhimmī* is concerned, Islam binds the government to accept the application of citizenship made by any non-Muslim.[43] The rationale behind this obligation is that, Islam does not want to be in a state of war with non-Muslims and the contract of *Dhimmah* is a clear indication of the end of war from the part of a non-Muslim and as an obligation the Muslim government is made bound to accept such application. Furthermore, as the *Dhimmah* contract is binding on the Muslim government, the government does not have right to renounce the citizenship of a non-Muslim however, certain acts from the *Dhimmī* –such as the *Dhimmī* flees to *Dār al-Ḥarb*– lead to the termination of the contract.[44] The contract is not only binding as normal contracts it also bears some sort of sacredness which is why the ʿUmar b. al-Khattāb, the second caliph of Islam –may Allah be pleased with him– said, when he was asked to give some advice, "*I advise you to fulfill Allah's convention –which He made with the Dhimmīs– because that is the convention of your Prophet and the source of the food for your dependents (referring to the taxes collected from them)*."[45]

Lastly, Islam allows the government to give *Amān* to non-Muslims to enter to the territory of Islam. *Qurʻān* says "*And if any one of the polytheists seeks your protection, give him protection until he listens to the Word of Allah, and then let him reach his place of safety. That is because they are a people who do not know."*[46] The basic purpose of the *Amān* is to facilitate Muslims of *Dār al-Islām* and non-Muslims of *Dār al Kufr* in the international trade. The rules of *Amān*, under the Shari'a, are quite flexible. According to Islamic law –as a matter of general principle–, every competent Muslim citizen can provide *Amān* (issue visa) for an alien national[47] however under the concept of public interest the ruler can restrict general public from issuing *Amān* and delegate this authority to particular department.[48] There are certain procedures by which a *Must'amin*

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[42]Muslim b. al Ḥujjaj al Qushayrī (d. 875), *Sahīh Muslim*, (Riyadh: Bait al-Afkar al-Duwaliyyah, 1998), P. 720, Number 1731.

[43]Abdul Karīm Zīdān, *Ahkām al Dhimmiyyīn wa al-Mustʻaminīn fī Dār al-Islām*, (Beirut: Muʻassassah al Risālah, 1982) P. 30.

[44]MuḥammadAmīn b. ʻĀbidīn (d. 1836), *Radd al Muḥtār ʻalā al Durr al Mukhtār*, (Beriut: Dār al Fikr, 2000) V. 4 P. 212.

[45]Muḥammad b. Ismāʻīl al Bukhārī (d. 870), *Sahīh al Bukhārī* (Beirut: DārTuq al Najāt, 1422 AH), V. 4 P. 98 Number 3162.

[46]Al Qur'ān, 9:6.

[47]AbūYūsufYa'qūb b. Ibrahīm (d. 798), *al Khirāj* (Cairo: al Matba'ah al Salafiyyah, 1382 AH) P. 205.

[48]Zīdān, *Ahkām al Dhimmiyyīnwa al Mustʻaminīnfī Dār al Islām*, P. 30.

can avail the status of *Dhimmī*. These procedures include, the application extended by the *Must'amin* and overstay from the prescribed time period fixed by the government.[49] Thus, a *Must'amin* can become citizen of *Dār al-Islām* by application at any time and by continuous stay there for a period, generally, more than one year.[50]

4. Immigration and Citizenship in Saudi Arabia

4.1 Citizenship of Saudi Arabia

Kingdom of Saudi Arabia has codified its citizenship laws in the *Nizām al-Jinsiyyah al-Arabiyyah al-Sa'ūdiyyah*, or Saudi Arabian Citizenship System (the system hereinafter), which was adopted on September 23, 1954 and it came into force in the same year. The section 2 of the system says that the system does not have retrospective effect thus all the citizenship granted according to the previous system are valid.[51] There are various modes by which the Saudi citizenship is either determined or granted. These modes are the following;

1. Original Saudi Arabian—.The section 4 of the system prescribes the original citizens of Saudi Arabia. These are (a) the people who acquired the Ottoman citizenship before, or in, 1332 AH -1914 CE, (b) the Ottoman citizens born inside the Saudi territory, or resided there, between 1332 and 1345 and did not avail any other nationality and (c) the non-Ottoman citizens who resided inside Saudi Arabian territory from 1332 AH until 1345 and did not acquire any other nationality.

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[49]This is when, while granting amɴ n to the individual, if the Muslim ruler stipulates that if the *Musta'min*stays more than a certain period – generally one year – the *Jizyah* will be imposed on him and he will be *Dhimmī* in the *Dār al-Islām*. Overstaying by *Musta'min* in that case will be an implied contract of *Dhimmah* on his behalf and he will become *Dhimmī.* Imam al-Zayla'ī says; " إذا دخل الحربي دار الإسلام بأمان لا يمكن أن يقيم فيها سنة ويقول له الإمام إن أقمت سنة كاملة وضعت عليك الجزية" which means "*[W]hen a Ḥarbī enters into the territory of Islam with protection, it would not be allowed to him to stay more than one year and the Muslim ruler will stipulate that if he stays one year, the Jizyah would be imposed on him.*". See, 'Uthmān b. 'Alī b. Miḥjan Fakhruddīn al-Zayla'ī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq*, (Cairo: al-Maṭba'ah al-Kubrā al-Amīriyyah, 1313AH) 3:268.

[50]Shams al Dīn Abū Bakr Muḥammad b. Abī Sahl al Sarakhsī (d. 1096), *Al Mabsūt Lil Sarakhsī* (Beirut: Dar al Fikr, 2000) V. 23 P. 212.

[51]S 2, *Saudi Citizenship System.*

2. Saudi Arabian by Birth—.There are a number of people who have, or may have Saudi citizenship by birth. According to the system a person, born –inside or outside Saudi Arabia– to Saudi father or Saudi mother and unknown father or born inside Saudi Arabia to unknown parents is regarded to be Saudi citizen by birth. Further, a foundling in the Saudi territory is considered to be born inside Saudi Arabia unless proven otherwise.[52] Apart from that, any person born inside Saudi Arabia to non-Saudi father and Saudi mother can be granted Saudi citizenship if he (a) has permanent residence i.e. *Iqāmah* in Saudi Arabia, (b) is known for good behavior, (c) has command and is fluent in Arabic language and (d) applies for Saudi citizenship after one year of reaching to the age of majority.[53]

3. Saudi Citizenship by Marriage—.Any foreigner woman marrying to a Saudi man can apply for the Saudi citizenship on the basis of her marriage however, a foreigner man marrying to a Saudi lady does not have this right. Thus, he cannot apply for Saudi citizenship on the basis of marriage.[54]

4. Saudi Citizenship by Naturalization—.Legally speaking, any foreigner can apply for Saudi citizenship if he (a) is of legal age, (b) is fluent in Arabic language, (c) is of sound mind, (d) lives in Saudi Arabia for a period of minimum five years with permanent residence i.e. *Iqāmah* (e) does not have any criminal record, (e) has legal income and (f) is known for good behavior.[55] Further, the wife of naturalized Saudi citizen also has the right to acquire Saudi citizenship and the dependents of that person residing in Saudi will automatically become Saudi citizens.[56]

This was the legal position but in reality Saudi Arabia is known for not granting citizenship for any foreigner. The reasons behind this perception about Saudi Arabia is (a) the very conditions required for the application are quite tough and it is near to impossible for a person to fulfill these (b) and then the Saudi minister of interior has right to reject the application of citizenship without assigning any reason and (c) the common practice which has been observed for a long period is that Saudi Arabia very rarely accepts any citizenship applications and the destiny of the most applications, despite fulfillment of these conditions, is none other than rejection.

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[52]S 6, *Saudi Citizenship System.*
[53]S 8, *Saudi Citizenship System.*
[54]S 16, *Saudi Citizenship System.*
[55]S *9, Saudi Citizenship System.*
[56]S 9, *Saudi Citizenship System.*

5. Immigration and Citizenship in the Islamic Republic of Pakistan

5.1. Citizenship in Pakistan

Pakistan has codified its citizenship law in the *Pakistan Citizenship Act 1951* (hereinafter the act) which was adopted on April 13, 1951 and it came into effect on the same date. Keeping the space limit in mind, the citizenship law of Pakistan is explained briefly in the following.

1 Citizens at the time of the act—.The section 3 of the act says that any person whose parents or grandparents were born in Pakistan, or any person who was naturalized as British subject in Pakistan or any person who migrated to Pakistan before commencement of the act is regarded to be Pakistani citizen.[57]

2 Citizenship by birth—.According to the section 4 of the act, any person born in Pakistan, provided that his father is not an enemy of Pakistan and/or not enjoys immunity from Pakistani laws, is Pakistani citizen by birth.

3 Citizenship by descent—.According to the section 5, if one of the parents of the person is Pakistani citizen then the person has the right to get Pakistani citizenship.

4 Citizenship by migration—.According to the section 6 of the act any person who migrated from Indian Territory before 1st January 1952 with the intention to reside permanently in Pakistan, will be regarded Pakistani citizen by migration.

5 Citizenship by marriage—.The section 10 of the act provides to the woman who gets married to a Pakistani citizen the right to acquire Pakistani citizenship on the ground of her marriage. Like the Kingdom of Saudi Arabia Pakistan does not provide to foreigner male spouse of the Pakistani women the right of citizenship on the bases of marriage.

6 Citizenship by Naturalization—.The section 9 of the act authorizes the federal government to naturalize any person to become Pakistani citizen in accordance with *the Naturalization Act, 1926*. The section 3 of *the Naturalization Act, 1926* authorizes the federal government to issue the certificate of naturalization to a foreigner if he (a) is of the age of majority, (b) is neither a Pakistani citizen nor is citizen to any state of which a citizen is according to

[57]S 3, *The Pakistan Citizenship Act, 1951.*

Pakistani law is prevented from naturalization, (c) has lived in Pakistan for a period of 12 months after his application of naturalization, (d) is of good character and (e) has adequate knowledge of the language which has been declared by the government to the language spoken by the ordinary Pakistani people.[58]

6. IHRL and Pakistani and Saudi Citizenship Laws

There are several international human rights conventions –to which Saudi Arabia and Pakistan are party– which insure the equal rights of man and woman. These international human rights instruments include the Universal Declaration of Human Rights (UDHR) 1948[59] and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which was adopted by the United Nations General Assembly in 1979, of the latter is specifically intended to ensure gender equality and eliminate discrimination against women. The article one of CEDAW defines discrimination to be "*any distinction, exclusion or restriction made on the bases of sex which has the effect of purpose of impairing or nullifying the recognition, enjoyment or exercise by women*"[60]. Furthermore the article 2 of the International Covenant on Civil and Political Rights (ICCPR), 1966 is also devoted to ensure the gender equality.[61] Despite the fact these two countries are party to all these international human rights treaties; the citizenship system of the countries is discriminatory as only female spouse of a Saudi and Pakistani citizen can apply for citizenship on the basis of marriage which means that marriage with women citizen of these countries does not give rise to any right of citizenship.

In Pakistan, however, the Federal Shariat Court sensed this contradiction and in a *suo motu* judgment in 2006 declared the section 10 of the act to be in contradiction with Islamic law –for being discriminatory-, the article 2A and 25 of *the Constitution of Pakistan 1973* and international human rights law as well.[62]

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[58]S 3, *the Naturalization Act 1926.*

[59]Article 2, *Universal Declaration of Human Rights, 1948.*

[60]Article 1, *Convention on the Elimination of all forms of Discrimination Against Women, 1979.*

[61]Article 2, *International Covenant on Civil and Political Rights, 1966.*

[62]*FSC (2006) 1/K.*

7. Compliance with Islamic Law

From what we have discussed we can point out two major inconsistencies which these laws have with the principles of Islamic law. These inconsistencies are;

1. As we have discussed earlier, every Muslim is *de jure* citizen of any state which claims to be Islamic. This is because *Dār al-Islām* cannot close its doors to anyone who wants to be its citizen particularly Muslims as they are regarded to be citizens by default and they do not need any application to acquire citizenship.
2. We have also discussed earlier that citizenship, once awarded, cannot be renounced by the government under Islamic law but both the Saudi system[63] and Pakistani act[64] authorize the respective governments to renounce the citizenship on certain grounds.

8. The *Dār al-Islām* and Nation-State; the Root of the Problem

Keeping in the view the war crises in Syria which claimed lives of thousands of people, the role of Muslim countries in general and Saudi Arabia in particular is not satisfactory. Saudi Arabia, on one hand did not ratify the Refugee Convention 1951 and on the other hand did not open its borders fully[65]for the refugees who would flee Syrian war which left them vulnerable to choose the form of death by the burning bombs of Russian jets, drowning in the deep sea while attempting to flee to the safe –but far– lands and starvation[66].

The root of the crises is the so called nation state system. The notion of nation state system, which has its roots in the treaty of

[63]S 13, *Saudi Citizenship System.*

[64]S 16, *the Pakistan Citizenship Act, 1951.*

[65]According to the data provided by UNHCR there are around only 500000 Syrian refugees in Saudi Arabia and the number of refugees is in hundreds in other gulf states. See http://www.dw.com/en/arab-monarchies-turn-down-syrian-refugees-over-security-threat/a-19002873 last accessed on 14 June, 2019.

[66] In january 2015 the ministry of social in Suadi Arabia imposed ban on the adoption of the Syrian and other foreign orphans by Saudi nationals. The ministry decided not to provide any financial assistance for the parents who adopted any such foreign orphans. See for details; http://www.arabnews.com/saudi-arabia/news/693726 last accessed on 14 June, 2019.

Westphalia which was concluded in 1648 and in which the territorial integrity of the European states was acknowledged and a long war came to end.[67] Ismā'īl al-Rājī discussed the foundations on which the concept of nation state system is based i.e. biological, geographical, psychological, historical and political bases which in a combination constitute an identification of all the members of one nationality having these five aspects in common. On the other hand, the notion of *Dār al-Islām* believes in universal brotherhood which invites all the members of human kind irrespective of nationality, race, color, religion and historical backgrounds to become its citizens. Ismā'īl al-Rājī, diagnosed the problem with nationalism which has become disturbing for vulnerable humanity in our time as he wrote "*nationalism seeks to shut itself from the humanity by setting for itself a temple, or holy ground, out of a piece of real estate it cuts of from the earth, and girds itself against human kind by restrictive citizenship and immigration laws.*"[68]

9. Conclusion and Recommendations

From what we have discussed earlier it can be concluded that the principles of Islamic law regarding immigration and citizenship has been compromised in Pakistani and Saudi citizenship laws. Furthermore, the laws are inconsistent with certain aspect of IHRL. Therefore, it is suggested that both countries should bring their laws in conformity with IHRL and incorporate the generous and humanitarian principles of Islamic law in their citizenship laws. In addition, both countries should ratify the Refugee Convention 1951 and bring the provisions of the convention into practice in letter and spirit. That is the only way; these countries can on the one hand comply with Islamic law and on the other hand get out of the embarrassment in front of the international community when their Muslim brothers cannot find protection in Arab lands and Western countries have opened their hearts to accept them.[69]

After complying with the principles of Islamic law and standards of international human rights law, these two countries can

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[67]Farr, Jason, "*Point: the Westphalia legacy and the modern nation-state,* (International Social Science Review 80, no. 3/4 2005) 156-159.

[68]Ismā'īl al-Rājī, *Trialogue of the Abrahamic Faiths*, p. 56.

[69] According to an Amnesty International report Germany and Serbia together have received 57% Syrian assylum applications from 2011 to 2015. The report can be seen at: :https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/. Last accessed October 2 2019.

successfully persuade other Islamic countries to follow them and bring flexibility in their immigration and citizenship laws. This will enable the entire Muslim world to deal with the crisis of refugees of the war hit regions like Syria, Iraq and Afghanistan. This answers the counter argumentation as well which suggests that the large number of refugees in these two counties will create much disturbance and problem for the counties. Because, if all Muslim countries do comply with the above mentioned recommendations, the refugees will disperse in various countries and by this the crisis would be dealt with in a more efficient manner.

Islamization or de-islamization? Deviations of the Higher Courts from Muslim Family law in Pakistan

Mudasra Sabreen*

Abstract

According to the constitution of 1973, Pakistan is an Islamic Republic in which any law against the Qur'ān *and* Sunnah *is void. In Pakistan, family law to a large extent is based on Islamic law but the law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. According to authors like Martin Lau, in Pakistan islamization has been a judiciary lead process. It is noticed that while interpreting the law and exercising discretion Pakistani courts have sometimes deviated from Islamic law, have exercised ijtihād and have occasionally extended or modified Islamic law.* Khul' *cases can be cited as example where khul' is granted without consent of the husband although it is against the views of mainstream Islam. There have been cases where children are granted legitimacy despite the fact that conditions of legitimacy according to Islamic law had not been fulfilled. (*Hamida Begum v. Murad Begum*, PLD 1975 SC 624). Other examples are to award custody to the mother despite her remarriage (*Muhammad Bashir v. Ghulam Fatima*, PLD 1953 Lahore 73) and extension of the rule of disqualification of the mother upon remarriage to father (*Feroze Begum v. Muhammad Hussain*, 1983 SCMR 606). Court decisions in Pakistan have been pro women rights and human rights. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. A detailed study of case law will help to understand approach of Pakistan i judiciary regarding interpretation and application of Muslim family law. Deviations from Muslim family law have been criticised by scholars as courts are considered incapable to exercise ijtihad. The main issue is that the contribution of judiciary has been towards islamization or de-islamization? Study of the deviations of higher courts from Muslim family law in Pakistan is needed to take forward the debate of 'islamization as a judiciary lead processes. This paper will analyse the approach of Pakistan's judiciary in application of Muslim family law along with analysis of deviations.*

Keywords: *Islamization, De-Islamization, Khul', law, Islamic law, Pakistan*

1. Introduction

The Pakistan i legal system is based on English common law and Islamic law. English common law is more influential in

* The Author serves as Chairperson Department of Shari'ah, Faculty of Shari'ah and Law, International Islamic University, Islamabad and can be accessed at: mdsabreen@yahoo.com

commercial law whereas Islamic law is more influential in the area of personal law. Pakistan initiated a process of slamization to bring its laws into conformity with Islamic law. In this process not only were amendments made to laws by the legislature but the judiciary also played an important role. Islamization of laws is considered a judge led process by some scholars.[1]

According to the constitution of Pakistan 1973 Pakistan is an Islamic republic in which any law against the *Quran* and *sunnah* is void.[2] Family law to a large extent is based on Islamic law but the law is not detailed so the courts have to exercise discretion. While interpreting the law and exercising discretion Pakistan i courts have sometimes deviated from Islamic law, have exercised *ijtihād* and have occasionally extended or modified Islamic law. This paper will analyse the approach of Pakistan's judiciary in application of Islamic law along with analysis of deviations.

This research will be a qualitative study. Primarily precedents of higher courts will be analysed. As Pakistan is a common law country so precedents of higher courts are binding upon lower courts to follow so these decisions become law. This study will highlight the approach of the judiciary regarding Islamization. A study of the deviations of judiciary from Islamic law shows the way courts have used their discretion in several matters.

2. 'Religiously inspired judicial activism'[3]

Javaid Rehman, an eminent scholar, while discussing the nature and development of Islamic family law has said in his paper '*sharīah, Islamic family laws and international human rights law*' that while the *Quran* and *sunnah* remain the principal foundations of the *sharīah*, the formulation of a legally binding code from primarily ethical and religious sources has not been an

[1]Martin Lau, *The Role of Islam in the Legal System of Pakistan*, (Leiden; Boston: M. Nijhoff, 2006), 211.

[2] The Constitution of Pakistan 1973, Article 1, 227.

[3] This term is used by Charles H. Kennedy in his "Repugnancy to Islam: Who Decides? Islam and Legal Reforms in Pakistan," *The International and Comparative Law Quarterly*, Vol. 41(4), (Oct. 1992), 188.

uncontested matter.[4] Family laws emerged in 2nd and 3rd centuries were influenced by the socioeconomic, political and indigenous tribal values of the time. A constant review and reinterpretation of the *sharīah* is therefore of utmost significance.

In Pakistan family law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. In some cases judges have applied Islamic law, in others they have deviated. Occasionally they have done *ijtihād* and have extended or modified Islamic law. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. In family matters detailed codification based on Islamic law is needed to curb discretion.

If we look at the history, under the Umayyad dynasty, when schools of law were not fully established, judges enjoyed more independence with regards to *ijtihād* and would resort to caliph only if they face any kind of difficulty. In the early period of the Abbasids limitations were imposed upon authority of independent *ijtihād* of the judges due to development of schools of law as judges were expected to follow established views of these schools.[5] To make judges bound to follow a particular school has always been a contested matter. According to al- Māwardī a judge is not bound to follow any particular school and he must exercise his own *ijtihād*. Al-Māwardī permits appointment of a judge from a different school than the appointing authority. According to him a judge has authority to follow any other school than his own if he considers it a sound opinion based on his own *ijtihād*. Strict adherence to the judge's own school is not required. A condition binding the judge to follow a particular school is invalid according to al-Māwardī whether it is a general condition or relates to some specific case or category of decisions. A judge is supposed to

[4] For a detailed discussion see Javaid Rehman, Shariah, "Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq", *International Journal of Law, Policy and Family,* Vol. 21(1), (2007).

[5] Muhammad Hashim Kamali, "The Limits of Powers in an Islamic State", *Islamic Studies,* Vol. 28(4), (1989), p. 331.

exercise his reason and to decide about the right solution of the case so he is not bound by such conditions.[6]

There is difference of opinion among scholars whether a *qādī* should be a *mujtahid*? According to al-Shāf'ī a *qādi* must be a *mujtahid* and should be able to exercise his reason/opinion in legal questions. Abu Hanīfa considers capability of *ijtihād* of a *qādī* recommended but not necessary.[7] In the case of difference of opinion the judge must take the best view and if he is not capable to form an opinion regarding Islamic law, he must seek a *fatwā* and then should decide accordingly.[8] in current judicial setup where mostly judges are not well versed in *sharīah* they are more prone to commit mistakes. *Fuqahā* have authority to derive and formulate rules in Islamic law. Judges are there to interpret and apply these rules. Every judge is not capable to do *ijtihād* which in itself is a very daunting task. They must possess qualifications of a *mujtahid* for it.

In Pakistan Federal Shariat Court (hereafter FSC) is one of the institutions which has contributed in the process of islamization. The FSC has resorted to *ijtihād* at several occasions in cases related to women and family law. *Ijtihād* of Federal Shariat Court has been pro women's rights, and family rights. These *ijtihād* have been gender sensitive. The FSC does not favour *taqlīd* it resorts to *ijtihād* wherever needed.[9] The FSC has said in *Huzoor Bakhsh v. Federation of Pakistan* that

> 'the expression 'injunctions of Islam' is a comprehensive one which will include all injunctions of Islam of every

[6] Abū al Hasan 'Alī b. Muhammad b. Habīb Al-Basrī Al-Māwardī, *Al-Ahkām-al-Sultānīyah,* Translated as The Laws of Islamic Governance, Asadullah Yate (Translator), (London: Ta-ha Publishers Ltd., 1996), 102-103.

[7] Tanzil-ur-Rehman, "Adab Al-Qadi", *Islamic Studies,* Vol. 5(2), (1996), 204; Al-Merghinani, *Hedaya,* English Translation by Charles Hamilton, (Lahore: 1957), 334.

[8] Ibid., 202.

[9] Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective Ijtihad on Gender Equality, Women's Rights and the Right to Family Life," *Islam and Christian-Muslim Relations*, Vol. 25(2), (2014), 124.

> school of thought and sect etc; but article 203-d of the constitution has restricted its meaning and application and confined it to only two sources for which no Muslim can have any valid objection. These sources ... Are (a) the holy Quran (b) the *sunnah* of the holy prophet'.[10]

In *Muhammad Riaz v. Federal government of Pakistan* the following *ijtihad* methodology was decided by FSC for future decisions: first of all to look for relevant verses and then *ahādīth*; to discover intent of Quranic verse with help of *ahādīth*, to examine opinions of jurists and their reasoning for determining their harmony and compatibility with contemporary needs, if needed modulate them to the demand of the age, to discover and apply as a last resort any other opinion which is compatible with Quran and *sunnah*. According to the FSC the judges should not strictly adhere to literal meaning of the verse rather should consider spirit of the verse by considering the Qur'an as a whole.[11] Qur'an and *sunnah* should be interpreted in the light of evolution of human society but this process should not negate intent and purpose of the *qurān*.[12] While claiming their right for resorting to *ijtihād* the superior courts have asserted their right to independently interpret Qur'an and *sunnah* and while doing so they can disagree with established opinions in Islamic law.[13] in *Abdul Majid v. Government of Pakistan* the Shariat Appellate bench of the supreme court said that where *ijtihād* has already been done matters should not directly to be referred to *Qur'an* and *sunnah*. If direct evidence has been quoted in *Qur'an* and *sunnah* that can be referred to as *Qur'an* and *sunnah* but for implied and indirect evidence this should not be termed so and should be termed as *ijtihād*. If *Qur'an* and *sunnah* are silent about some issue the state can make *ijtihād* about it. Silence of *Qur'an* and *sunnah* does not mean that that thing is *harām*.[14] Here a very important question is regarding capability of these judges to exercise *ijtihād* but it is outside the scope of this paper.

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[10] PLD 1983 FSC 255.

[11] PLD 1980 FSC 1.

[12] *Muhammad Riaz v. Federal Govt. Of Pakistan*, PLD 1980 FSC 1.

[13] See *Rashida Begum v. Shahab Din*, PLD 1960 Lahore 1142; *Zohra Begum v. Sh. Latif Ahmed Munawwar*, PLD 1965 Lahore 695.

[14] PLD 2009 SC 861

In *b. Z. Kaikaus v. President of Pakistan*, PLD 1980 SC 160 the supreme court held that islamization is a task of government and not of judiciary. The state has authority to enact and implement laws. Islamization of laws, *ijtihād* and to decide which school of law should be followed is a matter to be decided by the legislature and not by the judiciary.[15] This was the approach of the court in 1980 but in 1990s a shift in approach of the judiciary regarding islamization and *ijtihād* has been noticed. The development of public interest litigation in 1990s in Pakistan has been linked with judiciary's thirst for islamization. It is noticed that in 1990s there was a trend in the judiciary to refer to Islamic law in cases of interpretation of fundamental rights.[16] During this period an increase in use of arguments based on Islamic law was noticed not only by the *sharīah* courts (Federal Shariat Court and shariat appellate bench of the Supreme Court) but by high courts as well. Quite often Islamic law arguments in these cases were not core legal arguments but were given to show legitimacy of court's position and as a moral consideration.[17] This was a shift of islamization stimulus from executive to the judiciary. In a large number of cases the high courts have referred to un-codified principles of Islamic law and quite often tried to interpret statutory provisions n the light of *sharīah*. It has been observed that the high courts have been more enthusiastic regarding islamization as compared to *sharīah* courts. *Ulamā* judges have been proved more flexible in issues related to Islamic law probably due to their deep rooted knowledge of Islamic law.[18]

One of the reasons of this shift of Islamization stimulus was promulgation of section 2 of the enforcement of *Sharī'ah* Act 1991 which defines S*harīah* as meaning 'the injunctions of Islam as laid

[15] Also see Keith Hodkinson, "Islamicisation of Law in Pakistan: Ways, Means and the Constitution," *The Cambridge Law Journal*, Vol. 40, No. 2, (Nov. 1981), 248-249.

[16] Ibid.

[17] *M. D. Tahir v. Provincial Govt.* 1995 CLC 1730; *Muhammad Shabbir Ahmed Khan v. Federation of Pakistan*, PLD 2001 SC 18; *Mrs. Anjum Irfan v. LDA*, PLD 2002 Lahore 555; *Hasan Bakhsh Khan v. Deputy Commissioner, DG Khan*, 1999 CLC 88.

[18] Elisa Giunchi, "Islamization and Judicial Activism in Pakistan: What Shariah?," *Oriente Moderno,* Anno 93, Nr. 1, (2013), 197.

down in the holy *Qur'an and sunnah'*. This section says that while interpreting s*harī'ah* opinions of Muslim jurists may be taken into consideration. According to section 4 of the act if more than one interpretations of a statute are possible it is a duty of the judge to adopt that interpretation which is closer to *sharīah*. Probably the trend towards islamization among the judiciary was a result of promulgation of this act. It was also noticed that the regular appellate courts were considered moderate by petitioners so they raised questions related to Islamic law in cases to be heard by such courts.[19] Occasionally the courts themselves took up questions related to Islamic law but regular courts took Islamic law as morality of an Islamic Republic.[20]

As the *Qur'an* and *sunnah* do not give detailed account of every case and every rule, an Islamic state and its judiciary has to either depend on *fiqh* or has to adopt a semi-legislative role by interpreting and extending the law itself. In *fiqh* manuals different opinions and interpretations have been given and each opinion is considered equally legitimate. Review of case law shows that Qur'anic verses, *ahādīth,* the *fiqh* treatise mostly the *hedāya* and *fatāwā alamgīrī* have been used. It shows influence of Hanafī School on the judgements as well.[21] In *Sher Muhammad and others v. Mst. Fatima* and others the court noted that all Muslims were governed to be by Hanafī law unless proved to the contrary.[22]

In the presence of western procedures and systems it is quite difficult to implement Islamic law. The judges are not experts in *sharīah*. Quiet often *ulamā* have been involved along with lay judges as lay judges do not have deep knowledge of Islamic law. The FSC is an example of such a compromise. In Pakistan state made laws, Islamic law, codified and un-codified, and custom run together.[23] in such a scenario the attempt to interpret, deviate from

[19] *Haq Nawaz v. State*, 2001 SCMR 1135; *Fayyaz Ahmed v. Lahore Stock Exchange (Guarantee) Ltd.* 1996 CLC 1469.

[20] Moeen H. Cheema, "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law", *The American Journal of Comparative Law*, Vol. 60(4), (Fall 2012), 882, 902-903.

[21] Giunchi, Islamization, 189, 200.

[22] 2016 MLD 185; also see *Mst. Rashidan Bibi through Legal Heirs and 2 others, 2005 MLD 1202*, PLD 1954 Lah 480, PLD 1965 SC 134.

[23] Ibid., 189, 190.

or modify muslim family law becomes controversial but is of utmost significance as it determines the course of future of judicial islamization or de-islamization in Pakistan .

3. Analysis of case law

Where the courts enjoy discretion they get a chance to show their inclinations and preferences. As Pakistan has *sharīah* courts as well as regular courts in its judicial system it is interesting to have a look into their decisions and to analyse whether it will be a contribution towards islamization or de-islamization. Following is a detailed analysis of case law regarding deviations of judiciary from Muslim family law.

It is interesting to note that high court judges have been more inclined towards interpretation of statutes in the light of the principles of Islamic law even occasionally they have replaced codified principles of statutes with un-codified principles of Islamic law.[24] in *nizam khan v. Additional district judge* the Lahore High Court stated that if the statute has not dealt with any issue it should be decided in the light of *sharīah*.[25] In *Muhammad Naseer v. The state* the Federal Shariat Court said that reference will be made to the principles of Islamic law if the statute is silent about some issue.[26]

If we look at the case law we notice that Qur'anic verses and *ahādīth* are referred to by the courts. Various treatise of *fiqh* especially *Hidāya* and *Fatāwā 'Ālamgīrī* has been relied on which belong to the *Ḥanafī* school. In 1960's a new trend was noticed which was use of the methodology of *takhayyur*.[27] eclectism or *takhayyur* denotes choosing opinions from different schools of thought with in Islamic law. This process sparked difference of opinion among jurists in Islamic law and there is a huge debate over legitimacy of this practice. *Takhayyur* (eclecticism) is defined as a process in Islamic law of *'crossing the boundaries of the various schools in an effort to find juristic opinions that*

[24] Giunchi, Islamization, 189-190.
[25] PLD 1976 Lahore 930.
[26] PLD 1988 FSC 58.
[27] Giunchi, Islamization, 200.

support reform in many aspects of the law of personal status'.[28] As far as methodology of reform is concerned there is no consistency in Pakistan 's approach as it has practiced *takhayyur* as well as *ijtihād* in the past. There have been instances when Pakistan actually practiced *takhayyur* but claimed it to be *ijtihād*.[29] Section 4 of the Muslim family laws ordinance 1961 is a good example here. In this section the legislature adopted the *shī'ah* law of inheritance to give relief to an orphan child.[30] According to section 2 of the shariat application act 1991 in interpretation of the *qur'an* and *sunnah* to follow one school is not necessary and opinions from different schools can be used for this purpose.[31] In Pakistan *takhayyur* is used not only by the state in the process of islamization but also by the courts. There are certain rules in Pakistan i family law which are borrowed from other schools despite the fact that the majority in Pakistan belongs to the *hanafī* school. In the Indian subcontinent the device of *takhayyur* was for the first time used in drafting of the dissolution of Muslim marriages act 1939. This act was based on the *Mālikī School.*[32] Pakistan i courts also follow this approach. In 1967 in *khurshid bibi v muhammad amin* the supreme court of Pakistan said:

> '…it is permissible to refer to those opinions [of other *sunnī* sects other than *hanafis*] which are consistent with the Qur'ānic injunctions. A certain amount of fluidity exists, even among orthodox *hanafis* in certain matters. In the case of a husband who has become *mafqūd-ul-khabar,* for instance, *Mālikī* opinion can be resorted to by a *hanafi qāzī* as is mentioned in *raddul mukhtār*. … the learned *imāms* never claimed finality for their opinions, but due to various historical causes, their followers in subsequent ages invented the doctrine of *taqlīd* under which a *sunnī* Muslim follows the opinion of only one of their *imams*, exclusively,

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[28] *The Oxford Encyclopedia of Islamic World* at:
www.oxfordislamicstudies.com/article/opr/t125/e2323?_hi=0&_pos=16, Last visited 16th February 2010.

[29] Coulson, 1957, 136.

[30] Lau, 138.

[31] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan," *Islamic Studies*, Vol. 47(4), (2008), 452, 458.

[32] Anees Ahmed, "Reforming Muslim Personal Law," *Economic and Political Weekly,* Vol. 36(8), (2001), 618.

irrespective of whether reason be in favour of another opinion.'[33]

As the doctrine of precedent prevails in Pakistan the decision of the Supreme Court is binding on lower courts. In *Mst. Khurshid Jan v. Fazal Dad*[34] the Lahore High Court clearly said that in the case of conflicting views of earlier jurists the court is free to adopt any opinion. In *Fida Hussain v Naseem Akhtar*[35] where admissibility of testimony of close relatives was in question the Lahore High Court held that testimony of close relatives will be admissible if it is corroborated by some other evidence. The court said that there is difference of opinion among schools regarding this issue. The *Hanafī School* does not accept the testimony of close relatives but according to other three *sunnī* schools such testimony is admissible. The court was of the view that it is not bound to follow any particular school on a particular issue and can adopt opinions from other schools.

It is evident from these cases that Pakistan i courts do not consider it mandatory to follow a particular school and so they have made use of the wealth of juristic opinions available in Islamic law. In *Allah Rakha v. Federation of Pakistan*, the FSC has declared the requirement of registration of marriage in accordance with islam.[36] the Federal Shariat Court held that the provisions of section 6 of the Muslim family laws ordinance, which is related to obtaining permission from the first wife for contracting second marriage, is not against injunctions of Islam. The Federal Shariat Court observed that the Qur'ānic verse (4: 3) which permits polygamy itself prescribes the precondition of *'adal* (justice or just treatment) along with emphasis on the difficulty of fulfilment of this condition. Section 6 does not prohibit polygamy it only requires that the condition of *'adal* should be met by the husband if he wants to have more than one wives.[37] This was an example of deviation of the court from traditional Muslim family law but the approach of the court was pro women rights.

[33] PLD 1967 SC 97.
[34] PLD 1964 Lahore 558-612.
[35] PLD 1977 Lahore 328.
[36] PLD 2000 FSC 1 at 48-51.
[37] Also *see Ishtiaq Ahmed v. The state,* PLD 2017 SC 187.

There have been several cases in which the courts have decided that consent of *walī* is not required for validity of *nikāh.* In the case of a marriage without consent of *walī,* opinion of the Hanafī School has been followed. The courts have been consistent that an adult Muslim woman does not need consent of her *walī* to contract marriage.[38] The most important case regarding this issue is *Abdul Waheed v. Asma Jahangir,* PLD 2004 SC 219. In this case the Supreme Court laid the rule that an adult Muslim woman can contract her marriage without consent of her *walī*.[39] Opinion of the Hanafī School has been followed regarding right of an adult Muslim woman to contract her marriage but interestingly the conditions which the Hanafī School has attached to this right were ignored by the court. The Hanafī School gives the guardian right to go to the court to annul the marriage contracted without his consent if the husband is not the wife's social equal or dower is less than the dower of equivalence. Pakistan i courts seem not interested in giving such authority to the guardian.

It has been approach of the courts in several cases that in Islamic law *khul'* is a right of the wife and she can exercise it without consent of the husband.[40] if she satisfies the court that to ask her to live with her husband will be tantamount to force her to live in hateful union she can claim *khul'* the courts distinguish *khul'* from *ṭalāq* stating the former right of the wife in which the husband has

[38] *Muhammad Imtiaz v. The state*, PLD 1981 FSC 308; *Arif Hussain and Azra Perveen v. the state,* PLD 1982 FSC 42; *Muhammad Ramzan v. The state*, PLD 1984 FSC 93; *Mumtaz Imtiaz and others v. The state,* PLD 1981 FSC 308; *Muhammad Basher v. The State and another*, PLD 1981 Lahore 41.

[39] Also see *Muhammad Imtiaz v. The State,* PLD 1981 FSC 308; *Arif Hussain and Azra Parveen v. The State*, PLD 1982 FSC 42; *Muhammad Yaqoob v. The State*, 1985 PCr.LJ 1064e; *Muhammad Ramzan v. The State,* PLD 1984 FSC 93.

[40] According to the majority of Muslim jurists namely Hanafis, Shaf'is and Hanbalis khula can only be obtained with consent of the husband. The Maliki School of thought disagrees and give the arbitrators authority to effect separation between spouses in the case of irretrievable breakdown of the marriage. Approach of Pakistani courts regarding khula is partially in conformity with the Maliki School. For a detailed discussion see Muhammad Munir, The Law of *Khul'* in Islamic Law and the Legal System of Pakistan, available at http://ssrn.com/abstract=2441564. Last visited on 10th January, 2019.

no right of *ruju'*, and latter right of the husband.[41] in 1959 the Lahore High Court in *Balqis Fatima v. Najm-ul-Ikram Qureshi* revisited the law related to *khul'* and interpreted verse 2:229 of the Qur'an giving authority to the state or the court to dissolve the marriage if it considers the parties incapable to keep in the limits of allah.[42] This decision was endorsed in *khurshid bibi v. Muhammad Amin*, PLD 1967 sc 97. For interpretation of verse 2:229 the court did not rely on interpretation of jurists rather it came up with its own *ijtihād*. In *Syed muhammad ali v. Musarrat Jabeen* the petitioner argued that the court has no authority to grant *khul'* without consent of the husband. The court said that although according to muslim jurists *khul'* should be granted with consent of the husband but in *khurshid bibi v. Muhammad Amin*[43] the supreme court has drawn a different conclusion from verses of Qur'an and *ahādīth* while exercising its powers to do *ijtihād*. The said case declared the law related to *khul'* so husband's contention was rejected/dismissed.[44] In 2014 the quetta high court decided in *bibi Feroze v. Abdul Hadi*[45] that divorce is the husband's initiative and *khul'* is wife's initiative. The court said that consent of the husband is not required for *khul'. Khul'* does not depend on his consent but depends on the court reaching at the conclusion that the husband and wife could not live within the limits of allah. Return of gifts is not a condition precedent to *khul'*.[46] In most of such cases women apply for dissolution under the dissolution of muslim marriages act 1939 and apply for *khul'* as an alternative remedy. There have been cases where the judges have granted *khul'* despite the wife having a ground for dissolution of marriage.[47] This shows failure of courts to distinguish between

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[41] *Khursheed Bibi v. Muhammad Amin*, PLD 1967 SC 97; *Mst. Bilqis Fatima v. Najm ul Ikram Qureshi,* PLD 1959 Lahore 566; *Syed Muhammad Ali v. Musarrat Jabeen* 2003 MLD 1077.

[42] PLD 1959 Lahore 566.

[43] PLD 1967 SC 97.

[44] *Syed Muhammad Ali v. Musarrat Jabee*n 2003 MLD 1077.

[45] 2014 CLC 60; Also see *Muhammad Faisal Khan v. Mst. Sadia*, PLD 2013 Peshawar 12.

[46] Also see *Muhammad Arshad v. Judge Family Court, Kot Addu*, 2014 YLR Lahore 1686.

[47] Mst. *Hakimzadi v. Nawaz Ali*, PLD 1972 Karachi 540; *Bashiran Bibi v Bashir Ahmed*, PLD 1987 Lahore 376; *Bibi Anwar v. Gulab Shah*, PLD 1988

judicial dissolution and *khul'*. Judicial dissolution is awarded on establishing a valid ground whereas there is no such requirement for grant of *khul'*.

Section 10(4) of the family courts act 1964 was amended in 2002 to give the court authority to pass decree of dissolution of marriage by way of *khul'* if there was no possibility of reconciliation. The wife will have to return her dower in this case. The provision was challenged in front of the FSC in *Saleem Ahmed v. The Govt. of Pakistan* . The court declared that a law cannot be declared invalid on the basis of opinions, views and *fatwās* of scholars. The court held that the said provision is not against any verse of *Qur'an* or *sunnah* so is a valid piece of legislation.[48]

The only protection which a child has in a child marriage is the right to exercise the option of puberty. The dissolution of Muslim marriages act 1939 gives the right to exercise the option of puberty to a girl who is contracted in marriage by her guardian before the age of sixteen years. In this case she can repudiate the marriage before reaching the age of eighteen years.[49] in the case of the exercise of the option of puberty Pakistan i courts do not consider the intervention of the court necessary for repudiation of marriage. The Lahore High Court in *Noor Muhammad v. The State*[50] and the Federal Shariat Court in *Sajid Mehmood v. The state*[51] decided that if a woman has contracted a second marriage after attaining puberty her first marriage will get automatically dissolved. The courts were of the view that if the option is

Karachi 602. There are also cases where the courts have corrected these misconceptions: *Mst. Zahida Bibi v. Muhammad Maqsood*, 1987 CLC 57; *Khalid Mehmood v. Anees Bibi,* PLD 2007 Lahore 626; *Munshi Abdul Aziz v. Noor Mai*, 1985 CLC 2546; *Anees Ahmed v. Uzma*, PLD 1998 Lahore 52; *Karim Ullah v. Shabana*, PLD 2003 Peshawar 146.

[48] PLD 2014 FSC 43.

[49] The Dissolution of Muslim Marriages Act 1939, Section 2(vii). Also see *M Amin v. Surayya Begum*, PLD 1970 Lahore 475; *Ghulam Qadir v. Judge Family Court, Murree*, 1988 CLC 113. For a discussion on laws related to child marriage in South Asia see Lucy Carrol, 'Marriage – Guardianship and Minor's Marriage at Islamic Law', *Studies in Islamic Law, Religion and Society,* Ed. H. S. Bhatia, (New Delhi: Deep and Deep Publications, 1996, 379-384.

[50] PLD 1976 Lahore 516.

[51] PLD 1995 FSC 1.

exercised and the marriage is repudiated there is no requirement to communicate this decision to the court. Judicial approval is not a requirement for exercise of the option of puberty. If the decision is communicated and the court issues a decree such decree will be just a confirmation of the decision.[52] In *Mst. Irfana Tasneem v. Station House Officer and others*[53] and *Mst. Sardar Bano v. Saifullah khan*[54] the Lahore High Court decided that second *nikāh* itself is a valid repudiation of the first *nikāh.* The court observed that the law only requires the repudiation to be made before the girl attains eighteen years of age and no specific age, time or mode of exercise of the option of puberty is required by the law. According to the courts the institution of the suit itself annuls the marriage if the conditions for the option of puberty are fulfilled.[55] In Islamic law the exercise of the option of puberty is a two-step procedure which means that after repudiation the decision must be communicated to the court and then the court declares the child marriage null and void. The courts have deviated from this approach for protection of the woman who has contracted second marriage, to save her from accusation of *zinā* and her children (from second marriage) from stigma of illegitimacy.

It is noticed that when girls after puberty file suits for dissolution of marriage by exercise of the option of puberty they also ask for dissolution of marriage on the basis of *khul'* as an alternative prayer. There have been cases where a girl has exercised the option of puberty before attaining the age of eighteen years but the court dissolved the marriage by *khul'* and not by the option of puberty. In 2004 in *Tasawar Abbas v. Judge, family court and others* the girl was married off by her father during minority. The father gave an undertaking to the bridegroom that if he will not be able to give his daughter's hand to him after majority he will pay Rs.

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[52] Also see *Mst. Farangeza v. the State*, 1995 MLD 1439; *Mst. Jannat v. Additional District Judge,* PLD 1981 Lahore 68; *Mst. Aslam Khatoon v. Muhammad Azeem Khan and others,* 1991 CLC 177; *Mulazim Hussain v. Mst. Amina Bibi and another*, 1994 CLC 1046.

[53] PLD 1999 Lahore 479.

[54] PLD 1969 Lahore 108.

[55] *Mst. Farangeza v. the State*, 1995 MLD Peshawar 1439; *Abdul Sattar v. Mst. Wakila Bibi*, PLD Peshawar 1965 1.

100,000. The girl repudiated her marriage after puberty and filed a case for dissolution of marriage on the basis of the option of puberty. The family court considered the undertaking to pay Rs. 100,000 as a consideration and awarded her *khul'*. The Lahore High Court did not declare the marriage void as a result of exercise of the option of puberty but said that the undertaking cannot be a consideration for *khul'* rather benefits received by the girl were considered consideration for *khul'*.[56] In 1988 in *manzoor ahmed v. Addition District Judge III, Rahimyar khan* the Lahore High Court said that where a marriage was performed during minority and the marriage was not consummated the marriage should be dissolved by the exercise of the option of puberty as the rule of *khul'* is not applicable here.[57] In the case of *khul'* the wife has to return her dower or to pay compensation whereas in the case of exercise of the option of puberty she does not need to pay compensation. To dissolve a marriage on the basis of *khul'* where it can be dissolved on the basis of the option of puberty is against the interests of the wife. If the wife could not prove that her marriage was contracted during minority the court may grant *khul'* as in such a case the wife cannot exercise the option of puberty. There have been cases where the wife demanded dissolution of marriage on the basis of the option of puberty and not on the basis of *khul'* but could not prove that the marriage was repudiated before attaining the age of eighteen years so the court granted *khul'*.[58]

As far as child law is concerned according to the guardians and wards act 1890 the primary consideration in matters related to custody and guardianship is welfare of the minor. According to the case law the welfare of a child means a child's health, education, physical, mental and psychological development. The minor's comfort and spiritual and moral wellbeing along with his/her religion is also considered.[59] The courts while applying

[56] 2004 YLR Lahore 1415. Also see *Liaquat Hussain v. Zil-e-Huma,* 2012 CLC SC AJK 1386.

[57] 1988 CLC Lahore 436.

[58] *Muhammad Akram v. Shakeela Bibi*, 2003 CLC Lahore 1787; *Muhammad Rashid v. Judge, Family Court, Chishtian*, 2001 CLC Lahore 477.

[59] *Feroz Begum v. Muhammad Hussain*, 1979 SCMR 299; *Ms. Christine Brass v. Javed Iqbal*, PLD 1981 Peshawar 110; *Mrs. Marina Pushong v. Derick Noel Pushong*, PLJ 1974 Lahore 385; *Aisha v. Manzoor Hussain,* PLD

welfare principle quite often deviate from the principles set down by the majority of jurists in Islamic law. If there is a contradiction between the interests of the minor and the rules of Islamic law preference is given to the interests of the minor. While following interests of the minor the courts have quite often deviated from Islamic law. David pearl observed that in these deviations *'stress is always laid from a Muslim point of view'*.[60] The presumption is that to award custody according to the rules of personal law of the minor is in the minor's welfare but this presumption is rebuttable. In *Atia Waris v. Sultan Ahmad khan,* PLD 1959 Lahore 205 and *Munawar Jan v. Muhammad Afsar khan*, PLD 1962 Lahore 142 the Lahore High Court said that if it is evident from the circumstances of the case that to follow personal law is not in the interests of the child the decision will be in accordance with his/her interests. It means that the best interests of the minor will be decided after considering circumstances and facts of each case. Personal law of the minor will not be a primary consideration.

In 1975 in *Hamida Begum v. Murad Begum*, PLD 1975 SC 624 the supreme court of Pakistan recognised the principle of the conjugal bed and considered it a conclusive proof unless evidence to prove the contrary is produced. Pakistani courts are very lenient in application of the rules of legitimacy to avoid the stigma of illegitimacy. In this case the Supreme Court declared that a child born within 6 months is legitimate if acknowledged by the husband. This approach is against Islamic law as in Islamic law a child born after 6 months and not within 6 months is considered legitimate. In this case the judge awarded status of legitimacy to the child probably because of social stigma attached the concept of illegitimacy. Illegitimate children in Pakistan i society not only lose respect and dignity but quite often lose their life too.

In *Mst. Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800 the Lahore High Court said that if the mother refuses to suckle the

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1985 SC 436; *Abdul Razzaque v. Dr. Rehana Shaheen*, PLD 2005 Karachi 610.

[60] David Pearl, *A Note on Children's Rights in Islamic Law, Children's Rights and Traditional Values*, Ed. Gillian Douglas and Leslie Sebba, (Aldershot: Ashgate PublishingLtd., 1998), 90.

child she will lose her right to custody. The court considered the right of *raḍā'ah* and the right of custody interdependent. In this case the Lahore High Court was probably considering breastfeeding a reason for awarding custody to the mother. This approach is against Islamic law as in Islamic law if a mother after divorce refuses to suckle the child the father is obliged to hire a wet nurse and the mother cannot be deprived of the right of custody on this basis. To provide maintenance is a duty of the father and not of the mother. The father is obliged to pay for the wet nurse in this case and the mother shall retain custody. In the same case while deciding the dispute of custody the Lahore High Court allowed the mother to keep the child after the period of fosterage till the child attained the age at which it is ready to receive formal education. According to the court this age would be determined according to the custom of the area of the parent's residence. The court said that to set the age at seven or nine is not a requirement of Islamic law.[61] In Islamic law the age at which custody is transferred from the mother to the father is seven for a boy and puberty for a girl. If the age at which a child starts its school is made the standard for termination of custody a mother will be allowed to keep the child till the child becomes three and a half years old as that is the age at which a child starts going to school in the most of Pakistan i cities. In a village probably this age will be around five years which is far less than the age fixed by the jurists. Mostly the courts have not followed this approach in later cases and have considered the mother entitled to custody of a boy till seven years and a girl till puberty.[62]

In Islamic law a mother disqualifies to become a custodian if she remarries with a person who is non-*mahram* (not related in prohibited degree) to the child. This rule is based on the presumption that the mother after her remarriage with a non-*mahram* of the child will not be able to give complete love, affection and care to the child. The stepfather not being related to

[61] *Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800.

[62] *Ali Akhtar v. Mst. Kaniz Maryam*, PLD 1956 Lahore 484. In *Sardar Hussain and others v Mst. Parveen Umer*, PLD 2004 SC 357; *Mian Muhammad Sabir v. Mst. Uzma Parveen*, PLD 2012 Lahore 154; *Muhammad Zaman v. Ameer Hamza*, 2009 CLC Shariat Court Azad Kashmir 230; *Muhammad Faraz v. Mehfeez* PLD 2012 Islamabad 61; *Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v. Sohail Butt,* PLD 1995 Lahore 151.

the child will not be concerned with the child's welfare and may preclude the mother from looking after the child.[63] This rule is based on a *hadīth*.[64] In *Mhammad Bashir v. Ghulam Fatima,* PLD 1953 Lahore 73 the Lahore High Court gave custody of a child to her mother who had remarried to a stranger. The court justified this deviation by stating that in Islamic law consideration of the welfare of the child is paramount and all rules of personal law are subject to the application of welfare of the minor.[65] If in any case there are contradictions between welfare of the minor and the rules of personal law the former prevails. The court observed that the rule of disqualification of the mother upon remarriage is not based on Qur'an but the court ignored the fact that this rule is based on a *hadīth.* The court observed that according to Islamic law the order of custodians is subject to the welfare of the minor. There have been cases where custody of even a female child is given to the mother despite her remarriage.[66]

Sometimes remarriage of the father and his having children from such marriage is considered an impediment to custody and courts consider it against the welfare of the child to award custody to the father even after lapse of the period of custody with the mother. The Supreme Court in *Feroze Begum v. Muhammad Hussain* gave custody of the minor to the mother as it was considered against the welfare of the child to live with step mother and her

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[63] Burhan-ul-Din Abi Al-Hasan, *The Hedaya: Commentary on the Islamic Laws,* Charles Hamilton (Translator), New Delhi: Kitab Bhawan, 1870), 138.

[64] According to a tradition a woman came to the Prophet Muhammad (Peace be upon him) and said: O Prophet of God! This is my son, the fruit of my womb, cherished in my bossom and suckled at my breast and his father is desirous of taking him away from me into his own care;' to which the Prophet replied, 'thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger.' Abi Daud Sulaiman b. Al-Ash'ath b. Ishaq Al-Uzri Al-Sajistani, *Mukhtasar Sunan Abi Daud*, (Beirut: Dar-al-Ma'rafah, 1980), Vol. 3, 185.

[65] Also see *Mst. Rukhsana Begum v. Additional District Judge Multan*, 2011 YLR 2796; *Mst. Yasmin Bibi v. Mehmood Akhter*, 2004 YLR 641.

[66] *Rashida Begum v. Shahabuddin*, PLD 1960 Lahore 1142; *Mst. Nazir Begum v. Abdul Sattar*, PLD 1963 Karachi 465; *Jannat Bibi v. District Judge*, 1989 MLD Lahore 2231.

children.[67] The rule of forfeiture of the right of custody of the mother upon remarriage is an Islamic law rule but Pakistan i courts have extended this rule to the remarriage of the father. In *fiqh* literature we do not find mention of disqualification of the father upon remarriage. Pakistan i courts have tried to bring parity between genders regarding child custody rules.

In *Zohra begum v. Latif Ahmad Munawwar*[68] the Lahore High Court gave custody of a minor son aged seven years to the mother and said that as the rules of custody are not given by the *Qur'an* or the *sunnah* it is permissible for the courts to differ from the text books on Muslim law. The courts can come to their own conclusions by the way of *ijtihād*. The rules given by the books are not uniform so the courts may depart from the rules stated therein if their application is against the welfare of the minor. This approach of the court was criticized on the ground that the courts are incapable to do *ijtihād*.[69] Tanzil-ur-Rahman while criticizing this approach of the Lahore High Court suggested that although the courts are incapable to do *ijtihād* but where there is a very strong ground the court may substitute one rule of Islamic law by adopting another rule, for instance, the rule '*the mother shall lose her right if she remarries with a stranger*' can be substituted by the rule '*the paramount consideration is welfare of the child*'. In the case of contradiction between these two rules Pakistan i courts follow the second rule.[70] The practice to claim *ijtihād* by courts is discouraged by the scholars of Islamic law.

The reason for claim to do *ijtihād* in such cases is the extensive discretion on the part of the courts in the child law. The reason is that when detailed legislation is not there, the courts have to rely

[67] *Feroze Begum v. Muhammad Hussain*, 1983 SCMR 606. Also see: *Muhammad Jameel v. Azmat Naveed*, 2010 MLD Lahore 1388; *Humayun Gohar Khan v. the Guardian Judge Okarah*, 2010 MLD Lahore 1313; *Muhammad Zulqarnain Satti v. Mst. Ismat Farooq*, 2010 CLC 1281 Lahore; *Abdul Razzaque v. Pari Jaan*, 1989 MLD Karachi 1285; *Mansoor Hussain v. Additional District Judge Islamabad*, 2011 CLC Islamabad 851.

[68] PLD 1965 Lahore 695.

[69] Rahman, 1978, 744-745; Abdul Ghafur Muslim, "Islamisation of Laws in Pakistan: Problems and Prospects," *Studies in Islamic Law, Religion and Society,* Ed. H. S. Bhatia, (New Delhi: Deep and Deep Publications, 1996), 146.

[70] Rahman, 744-745.

on case law or to use their discretion. *'ali* and *a'zam* rightly observed that *'the lack of clarity and uniformity of rules relating to custody and guardianship is perhaps the single most important factor used to justify deviation from the general principles of personal law regulating this area.'*[71] Although the guardians and wards act 1890 is based on English law the courts interpret sections of this act in the light of Islamic law. There are conflicting decisions of courts in the matters of custody. In some decisions Islamic principles and jurisprudence have been adopted by the courts while interpreting statutory provisions[72] whereas in others the courts referred to the Anglo-Indian concept of justice, equity and good conscience. The welfare of the child is a paramount consideration and is given preference in case of a clash with personal law.[73]

It is evident from the above mentioned cases that Pakistan i courts do not consider it mandatory to follow a particular school and so they have made use of the wealth of opinions available in Islamic law. On several occasions the courts have claimed to do *ijtihād*. As mentioned above, in Pakistan family law is based on Islamic law but as the law is not detailed the courts enjoy huge discretion. It results in deviations from Islamic law and contradictory decisions. Overall courts' approach has been pro women rights and family values. Courts keep into consideration social needs as well while deciding such cases. Another reason for deviation from the rules of personal law in custody cases is that most of these rules are not divine and these are presumptions which can be rebutted in specific circumstances of a case, for instance it is a presumption that it is in the interests of the child to live with the mother during tender years of her age but this presumption can be rebutted by proving bad character of the mother. As most of the judges are not well versed in *sharīah* they sometimes make mistakes while interpreting and applying Islamic law.

[71] Ali and Azam, 158.
[72] *Mst. Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800.
[73] Ali and Azam, 161.

4. Conclusion

In Pakistan, family law to a large extent is based on Islamic law but the law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. According to authors like martin Lau, in Pakistan islamization has been a judiciary lead process. It is noticed that while interpreting the law and exercising discretion Pakistan i courts have sometimes deviated from Islamic law, have exercised *ijtihād* and have occasionally extended or modified Islamic law. Court decisions in Pakistan have been pro women rights and family rights. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. The courts have been indulged in gender sensitive interpretative methodology which has served the purpose of protection of women rights and family values. Analysis of case law shows that deviations of courts from Islamic law in these cases have always been justified on the basis of general principles of Islamic law and the concept of welfare *(maslaha).* This is judicial islamization which is done by assuming the authority to exercise *ijtihād.* From methodological perspective it has always been controversial but it shows judiciary's thirst for islamization. While doing so the judiciary has challenged the authority of established schools and traditional Muslim family law.

Islamization of Family Laws in Pakistan

Maryam Mukhtar*

Abstract

Islam was not born on of 14th of August 1947 in the Subcontinent. It was very much the part of Muslim life even during the colonial period of more than a century, though reduced to a private affair of a Muslim's life. The leadership believed that Islamization is an 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 family Laws in Pakistan. It provides a brief analysis of the Islamized laws. The study concludes with indication that supreme law, the Constitution of Islamic republic of Pakistan and family laws are Islamized by the legislative bodies of the Islamic Republic of Pakistan by questioning its implementation. On 23 March 1956, nearly 9 years after independence, Pakistan gave itself a new constitution proclaiming itself an "Islamic Republic".

Keywords: *Islamic law, Pakistan, Kul', Federal Shariat Court, Talaq*

1. Objectives' Resolution Of 1949

An Important Milestone in Policy Formulation It would be pertinent to incorporate the views of Sharif al Mujahid, who is considered as a scholar, who is well conversant with the ideological debates in Pakistan. He says "over the decades, the Objectives' Resolution has continued to be relevant to Pakistan's

* The author serves as Advocate High Court and teaches as Visiting Faculty Member of Federal Urdu University, Islamabad, and can be accessed at: maryammukhtar888@gmail.com.

body politics. It has been included, with minor adaptations, as Preamble to three constitutions[1]. It means, despite political upheavals and convulsions, despite periodic shifts in the political, social and economic orientation of those in power, the Resolution has continued to remain the primary source of inspiration on the ideological front to all shades of opinion on the political spectrum. Its importance has been affirmed and attested to by political theorists, jurists, and scholars. The constitution could be amended in conformity with the procedure laid down therein, without, however, tampering with the salient features of the Objectives' Resolution, and he listed federalism, parliamentary democracy blended with Islamic provisions, including independence of the judiciary' among its 'salient features'.[2]

2. The Constitution of Islamic Republic of Pakistan, 1973

Article: 2

This designates Islam as the state religion.

Article: 2-A

It promulgated by General Zia on 2 March 1985, makes 'the principles and provisions set out in the Objectives' Resolution are substantive parts of the constitution which shall have effect accordingly. This makes, the Preamble an integral part of the constitution, enforceable in a court of law. It has been included as an annexure, so that if the constitution is abrogated, the Objectives Resolution is not automatically suspended, diluted, or abrogated.

Article-6, 9, and 12

These Articles also have a bearing on Islam.

[1] Constitution of Islamic Republic of Pakistan (1956, 1962 and 1973).

[2] Manzoor Ahmed Abbasi, *The Problem of Islamization in Pakistan: A Policy Perspective,*available at < http:// ssrn.com/ abstract/ 2218436> (last accessed: 27 November 2018), 56.

Article: 3

Article 3 which concerns the Islamic way of life is a constitutional command. It reads as follows: "Steps shall be taken to enable the Muslims of Pakistan, individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam and provide facilities whereby they may be enabled to understand the meanings of life according to the Holy Quran and Sunnah.".

> "The State shall endeavor, as respects the Muslims of Pakistan: (a) to make the teachings of the Holy Quran and Islamite compulsory, to encourage and facilitate the learning of Arabic language and secure correct and exact printing and publishing of the Holy Quran; (b) to promote unity and the observance of the Islamic moral standards; and (c) to secure the proper organization of Zakat, (usher), auqaf and mosques.[3]"

3. Muslim Family Laws in Pakistan Since 1947

The Pakistan's legal system is based on English common law and Islamic *sharī'ah* law. Most of Pakistani law is still Anglo- Indian, although Islamic law (Qur'ān and *sunnah*) has also become a source of law. The first constitution was applicable in 1956, and included a provision known as the "repugnancy clause", affirming that no law repugnant to injunctions of Islam would be enacted and that all existing laws would be considered and amended with the injunctions of Islam. The Constitution of Islamic Republic of Pakistan came into force on 12 April 1973, and was suspended in 1977, and reinstituted in 1985. It has undergone several amendments over time. It was again suspended in 1999.

Nevertheless, the repugnancy clause has been retained and strengthened in these subsequent constitutions and amendments. Article (1) of 1973 constitution of Pakistan declares that Pakistan's official name shall be Islamic republic of Pakistan, and article (2) clearly mentioned that Islam is the state religion. The objectives resolution of the preamble of the constitution was made a part of

[3] Article 3, The Constitution of Islamic Republic of Pakistan, 1973.

its substantive provisions by the insertion of article 2(A) in 1985,[4] there by requiring all laws to be brought into consonance with the Qur'ān and *sunnah*.[5]All Muslims shall be enabled to order their lives in collective and individual spheres in accordance with the teachings and requirements of Islam set out in the Qur'ān and *Sunnah*.

After Independence, Pakistan continued to apply The Child Marriage Restraint Act, 1929, Muslim Personal Law (Shariat) Application Act 1937, and The Dissolution of Muslim Marriage Act 1939. This was followed by codification of family laws through the Muslim Family Laws Ordinance in 1961. Zia al-Haq's Islamization did not touch the issues related to the family law, but it extended Islamic laws to criminal and, in some cases, revenue matters.

Muslim family laws were codified on the basis of recommendations made by the Commission on the status of Women in Pakistan (the Rashid Commission) in 1956. The All Pakistan Women's Association (APWA), a body which claimed to represent the women point of view was in the forefront in claiming legislation to protect their rights and had in fact started agitation. To alleviate the situation, then Government constituted a Commission to consider the various aspects of the demands and make recommendations in relation to the family system.[6]

The commission expressed an incontrovertible fact about Islamic provisions in the Qur'an and *Sunnah*, i.e. that these provisions are open to interpretation. Since the death of Prophet (peace be upon him), Islamic scholars have filled this interpretative space with the Islamic concept of *ijma* and *ijtihad*.[7]

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[4] Article 2A was inserted by P.O. No. 14 of 1985, art.2 and sch. Item 2 (w.e.f. March 2, 1985).

[5]Ihsan Yilmaz, *Good Governance in Action: Pakistani Muslim Law on Human Rights and Gender- Equality,* available at < http:// ssrn.com/ abstract/ 281568> (last accessed: 27 November 2018), 156.

[6]Muhammad Abdul Basit, *Muslim Family Laws* (Lahore: federal law house, 2013), 5.

[7] Elisa Giunchi, *Adjudicating Family Law in Muslim Courts (*London and New York: Rout ledge, 2014), 71.

The Commission relied on the Hanafi School of interpretation, which was widely used in the sub-continent because it had been the basis of Islamic law administered by the colonial courts. This report was criticized by religious scholars and was not implemented until 1961, when a military government adopted certain sections of the report and enacted the Muslim Family Laws Ordinance, 1961.[8]

4. The Punjab Family Courts Act, 1964

Section 10 (4) of The Family Courts Act, 1964 deals with the suit for dissolution of marriage: if no compromise or reconciliation is possible the court shall frame the issues in the case and fix a date for (the recording of the) evidence. (Provided that notwithstanding any decision or the judgment of any court or tribunal, the family court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the*Mahr* received by the wife in consideration of marriage at the time of marriage).[9]

The proviso in question was inserted by ordinance LV of 2002, it provides that in a suit for dissolution of marriage instituted by the wife on any ground available to her under the law, if reconciliation fails the family court shall pass decree of dissolution of marriage forthwith, on return of benefits attained by her under the marriage, so as release the wife of the matrimonial obligations ensuring from the marriage under challenging pending issues. A family court will have to frame issues in respect of other controversies as alleged in the pleading of the parties and disputes of the same accordance with the law[10]. According to the injunction of Islam, a sound mind, which has attained puberty, without assigning any cause, may even

[8] Ibid.

[9] This proviso was added to section 10(4) of The Family Courts Act, 1964 by an amendment made through The Family Courts(Amendment) Ordinance, 2002 (No.LV of 2002) dated 1 October 2002.

[10] Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women Of South Asia* (Karachi: Oxford University Press, 2011), 13-15.

arbitrarily divorce his wife whenever he desires.[11] Such absolute right in Islam has not been so conferred upon the wife. In order to secure her right as well, to move about of unhappy union, a wife can seek dissolution of marriage on the basis of *khul'*, but she has to pay to the husband in form of return of benefits attained by her under the marriage. Return of such benefit may include the return of dower or any other amount which is already received by her.[12]

Section 10(5) of The Family Courts Act, 1964 deals with the suits for dissolution of marriage: in a suit for dissolution of marriage, if reconciliation fails, the family court shall immediately pass a decree for dissolution of marriage and, in case of dissolution of marriage through *khul'*, may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.[13]

5. Validity of *Khul' In* Qur'ān

The Holy Qur'ān provides basis and legality of *khul'*. In Holy Qur'ān, Allah Almighty iterates:

> Divorce may be (pronounced) twice, then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within the limits of Allah, there is no blame on either of them if she gives something for her freedom.[14]

Under this verse the following conditions must be fulfilled:

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[11] Mahmood, *the Code of Muslim Family Laws,* 298.

[12]Ibid, 299.

[13] This proviso was added to section 10 (5) of The Family Courts Act, 1964 by an amendment made through The Punjab Family Courts (Amendment) Bill 2015 (Bill No. 14 of 2015)

[14] Abdullah Yusuf Ali, the Holy Qur'ān: Text, *Translation and Commentary* (Al-Rajhi Company, 1983).

i. They (husband and wife) cannot live within the limits of Allah.
ii. Woman (wife) who seeks separation from the husband.
iii. It must be she who pays the compensation.

The verse means, the basic purpose of the marriage is love and mutual understanding, if there is no love and mutual understanding between the husband and wife that it becomes difficult to lead their life in mutual happiness and mutual understanding, the woman (wife) pay consideration to the husband and obtain *khul*' from the husband.[15]

This verse addresses the couple. The above-stated verse of The Holy Qur'ān means that the ground of effecting *khul*' is that the spouses (husband & wife) shall not be able to maintain the limits of Allah. The both of spouses search their hearts, if wife cannot maintain the limits ordained by Allah, and not able to fulfill her obligations to husband, then wife has right to pay consideration to her husband and husband has right to accept the consideration for *khul*' from wife.[16] All the afore mentioned orders, rules of divorce, revocation and *khul*' are limited by Allah. Regulations and obedience of these rules are obligatory on Muslims.[17] The following points can be inferred from this verse:

khul'is useful in a situation where there is well-founded fear that the limits set by Allah may get violated. Meaning thereby that *khul*' is undesirable like a divorce is, yet when there is fear that the limits of Allah might get violated, there is no harm for a Muslim wife to obtain *khul*'.

When a woman wants to repudiate the marriage contract, she should be willing and ready to lift the financial burden just as a man has to forgo the dower when he chooses to divorce the wife. The rule is that in case of divorce by the husband he has to give up all he gave the wife. The process of *khul*' gets completed

[15]Tanzil Ur Rahman, *A Code of Muslim personal Law, 525*.

[16] Imam Abū Abdullah Muhammad Bin Ahmed Bin Abu Bakar Qurtubī, *TafseerQurtubī Al- Jami' li- Ahkām Al- Qur'ān* (Lahore: Zia Al-Qur'ān Publications, 2012), vol.2, 178-179.

[17]Allama Shabbir Ahmed Usmani, *TafseerUsmani "The NobleQur'ān"* (Lahore: Alameen Publications) vol.1, 128.

when the wife demands separation and expresses willingness to do the payment, and husband accepts the payment and divorces her. In case the wife offers to buy freedom from the marriage tie, and the husbands turn down the offer, she has the right to ask *Qadi* for help.

It has been held by various scholars, and the case laws in Pakistan including in *Khurshid Bibi*,[18] *Naseem Akhtar*,[19]*Syeeda Khanam*,[20]*Bilqis Fatima*[21] cases that the words of the verse "then if you fear that the spouses cannot keep within the limits of Allah" clearly indicate that the pronoun "you" refers to the men of authority among Muslims. It is their foremost duty to keep attentive watch on the limits set by Allah. Another verse of The Holy Qur'ān regarding the *Mahr* is stated that, **"**But if you decide to take one wife in place of another even if you had given the latter a whole treasure for dower, take not the least bit of it back**."**[22] The Holy Qur'ān indicated the significance of Dower as a token of a proper marriage relationship.

6. Precedents For *Khul'* In The Era Of The Prophet (Peace Be Upon Him) And Companions

There are two[23]well-known traditions in *Sunnah*. The first relates to the case of Jamilah, wife of Thābit Ibn Qais. It is narrated by Ibn 'Abbās that wife of Thābit Ibn Qais came to the Holy Prophet (peace be upon him) and said: "O Muhammad (peace be upon him) I don't find any fault in*Thābit Ibn Qais* regarding his moral or faith but I can't bear him". The Holy Prophet (peace be upon him) said: "will you return him his orchard which he had given you as

[18] (PLD 1967 Supreme Court 67)

[19] (PLJ 2005 SC 293)

[20] (PLD 1952 Lahore 113)

[21] (PLD 1959 Lahore 566)

[22]*Al- Qur'ān* 4:20.

[23]Thābit's second wife was Habibah, one morning the prophet (peace be upon him) stepped out of his house, he found Habibah standing by the door. He asked what she wanted. She burst out "messenger of Allah! Thābit and I can't pull on together". Thābit was summoned. Habibah was repeated her petition. "Messenger of Allah, I have with me all that Thābit gave me. The prophet (PBUH) told Thābit to take back what he was given and divorce her". (Malik, Abu Dawood).

a dower?" yes she said, and The Holy Prophet (peace be upon him) ordered Thābit Ibn Qais to take back his orchard and give her a single divorce.[24]This event is recorded in these words, by various collections of *sunnah* including *Bukhari*, Abu Dawud, and Al-Nasai and have declared this to be a sound and reliable account of the event. The majority of jurists said that it is not permitted to the husband to take anything from his wife, but it is permitted with her consent.[25]

During the era of the second caliph 'Umar (Allah be pleased with him), a woman were brought before him and prayed for *khul'*. 'Umar (Allah be pleased with him) put her in a small room for one night, on the morning she appeared before 'Umar (Allah be pleased with him), he 'Umar (Allah be pleased with him) asked her how she felt? She said that she had real peace of mind in only that night. There upon '*Umar* ordered the husband to leave (divorce) his wife.[26] Amongst the companion of prophet (peace be upon him), Abū Bakr (Allah be pleased with him) considers that it is not lawful for the husband to take more than what he has given to his wife.[27] The daughter of Mu'awwidh Bin 'Afrā obtained *khul'* from her husband in return of all her property. When the matter was appearing before caliph 'Uthmān Ibn 'Affān (Allah be pleased with him), he held the same to be lawful.[28]The following rules for *khul'a* can be inferred from the above-quoted precedents:

[24]Imām M. Bin Yazeed Ibn Majah Al- Qazwinī, *Sunan Ibn Mājah,* Hadith no. 2056 (Lahore: Dar Us Salam, 2007), vol.3, 174.

[25] Ibn Rushd, *Bidāyah al- Mujtahid waNihāyah al- Muqtaṣid*, translated by Imran Ahsan Khan Nyazee (United Kingdom: Garent Publishing Limited, 1996), 79-80.

[26] C.M Shafqat, *The Muslim Marriage, Dower and Divorce* (Lahore: Law Publishing Company, 1979), 134.

[27]Tanzilur Rahman, *A Code of Muslim personal Law,* 518.

[28] Translated by Professor Muhammad Rahimuddin, *Muwatta' ImāmMālik,* hadith No.1153 (Lahore: Ashraf printing press), 252.

7. Muslim Family Law Ordinance 1961

Section.4 Succession

"In the event of death of any son or daughter of the porosities before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share equivalent to the share which such son or daughter would have received if alive[29]".

Islamic Concept of Succession

Direct succession out of grandfather's heritage is provided for inheritance to an orphan. This clause is repugnant to the injunctions of the Islam as direct inheritance is not provided. Federal Shariat Court asked the president Rafiq Tarar to amend the said clause. Prior to the Muslim Family Law Ordinance grand children had no shares in the property left by the grandfather but now the Section 4 of the Ordinance creates an entitlement to succession in favor of the children of predeceased son or daughter. Heirs referred to as primary heirs are always entitled to a share of the inheritance, they are never totally excluded[30]. These primary heirs consist of the spouse relict, parents, the son and the daughter. All remaining heirs can be totally excluded by the presence of other heirs[31]. But under certain circumstances, other heirs can also inherit as residuary, namely the father, paternal grandfather, daughter, agnatic granddaughter, full sister, consanguine sister and mother[32]. Those who inherit are usually confined to three groups:

1. Sharers (dhawu-al-farāʾḍ), usually include daughters, parents, grandparents, husband and wife/ wives, brothers and sisters, and others. This group usually takes a designated share[33].

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[29] Section 4 of Muslim Family Law Ordinance, 1961.

[30] Altaf Hussain Langrial*, A Critical Review of Pakistani Muslim Family Laws Ordinance 1961 In the Light of Islamic Family Laws*, Available On < http:// Ssrn.Com/ 2218455> (Last Accessed: 20 November, 2018), 98.

[31] A.W.M Abdul Huq, Section 4 of the Muslim Family Laws Ordinance, 1961: A Critic,< http:// Jstore.com/ 1108945> (Last Accessed: 20 November 2018), 9.

[32] Ibid, 99.

[33] Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law (*Lahore: Federal Law House 2012), 89.

2. Members of the ʿaṣaba (residuary), usually a combination of male (and sometimes female) relatives that inherit as residuary after the shares of the Quota-heirs is distributed[34].
3. In case a person leaves no direct relatives and there is no ʿ *usaba*, his property transfers to the state treasury, Bait ul Mal.

"And for his parents for each of them there is one-sixth of the inheritance if he has a child, but if he does not have a child and the parents are the heirs then for the mother one-third[35]".

Section 5: Registration of Marriage

Every marriage solemnized under Muslim Law shall be registered. For registration, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than on Nikah Registrar be licensed for any one Ward[36].

8. Islamic Law and Registration of Marriage

Under Islamic law, the validity of a marriage contract does not in any way depend on the performance of any recorded ceremony or documentation: mutual consent, capacity to enter into the contract, and witnesses on the occasion being the only requisites necessary to make the contract valid and binding. Clearly when dealing with marriages celebrated abroad, and in the absence of any documentation, proof of marriage can be difficult, particularly when seeking to prove that there was such a marriage. It has been argued under Islamic law, in the absence of anything in writing to prove the marriage, or a *Qadi*'s evidence of the marriage being celebrated or witnesses who can give relevant evidence of the marriage, a marriage can be proven by presumption. For instance, where the parties have lived together for a long time as husband and wife or where either party has acknowledged the marriage and that is not disputed by the other party, a valid marriage may be presumed unless there is a legal dispute against the alliance. However, where there is no legal presumption of the existence of marriage, if it were challenged, it would have to be proven by

[34] Ibid, 91.
[35] Al-Qur'ān 4:11.
[36] Section 5 of Muslim Family Law Ordinance, 1961.

satisfactory evidence in the normal way and any written documentation in these circumstances would prove invaluable. In Pakistan the Muslim Family Law Ordinance 1961, Art 5(1) states: 'every marriage solemnized under Muslim law shall be registered in accordance with the provisions of this Ordinance'.

The Muslim Family Law Ordinance, 1961 introduced reforms regarding registration of marriages, and in default of such registration, penalties of fine and imprisonment have been prescribed. Nevertheless, Muslim marriages are still legal and valid if they are performed according to the requisites of Islam.

Section 6: Polygamy

Every marriage solemnized under Muslim Law shall be registered and husband should seek permission from the wives before second marriage. On receipt of the application, Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council if satisfied that the proposed marriage is necessary and just, grant, the permission applied for marriage[37].

9. Islamic Concept of Polygamy

The Muslim scripture, the Quran, is the only known world scripture to explicitly limit polygamy and place strict restrictions upon its practice:

> "… marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one." [38]

The Quran limited the maximum number of wives to four. In the early days of Islam, those who had more than four wives at the time of embracing Islam were required to divorce the extra wives. Islam further reformed the institution of polygamy by requiring equal treatment to all wives[39]. The Muslim is not

[37] Section 6 of Muslim Family Law Ordinance, 1961.

[38] Al-Qur'ān 4:3.

[39] Whabah al Zuḥaylī, Al-*Fiqh al -Islāmī Wa Adillatuhū* (Beirut: Dār al-Fikr, 1989), vol.5, 341.

permitted to differentiate between his wives regarding sustenance and expenditures, time, and other obligations of husbands[40]. Islam does not allow a man to marry another woman if he will not be fair in his treatment. Marriage and polygamy in Islam is a matter of mutual consent. No one can force a woman to marry a married man. Islam simply permits polygamy[41]; it neither forces nor requires it. Besides, a woman may stipulate that her husband must not marry any other woman as a second wife in her prenuptial contract. Even though we see the clear permissibility of polygamy in Islam, its actual practice is quite rare in many Muslim societies. Some researchers estimate no more than 2% of the married males practice polygamy. Most Muslim men feel they cannot afford the expense of maintaining more than one family. Even those who are financially capable of looking after additional families are often reluctant due to the psychological burdens of handling more than one wife. One can safely say that the number of polygamous marriages in the Muslim world is much less than the number of extramarital affairs in the West. In other words, contrary to prevalent notion, men in the Muslim world today are more strictly monogamous than men in the Western world.

10. Seeking Permission from the First Wife in Islam

Polygamy is within the injunctions of Islam. Seeking of permission by the husband from the arbitration council before marrying another woman is criticized. Allah says:

> "Then marry (other) women of your choice, two or three, or four."[42]

The first wife's consent is not a prerequisite for a man to take another wife. The Standing Committee for Issuing Fatwas was asked about this and replied as follows: "It is not obligatory for the husband, if he wants to take a second wife, to have the consent

[40]Dr.Muhammad Tahir Mansooori, *Family Law in Islam* (Islamabad: Sharīʿah Academy, 2006), 133.

[41] Maulana Muhammad Ahsan Siddiqi Nanatvi, *Al- Durr al mukḥtār*(Lahore: law publishing company), vol.2, 179.

[42]Al-Qur'ān 4:3.

of his first wife, but it is good manners and kindness to deal with her in such a manner that will minimize the hurt feelings such thing might produce. So, it's incumbent on the husband to be kind to his wife, discuss the matter with her in a gentle and pleasant manner, and this should be coupled with spending whatever money may be necessary in order to gain her acceptance of the situation."

Muslim Family Law Ordinance, 1961 has also introduced some reforms in the law relating to polygamy. Now, a husband must submit an application and pay a prescribed fee to the local union council in order to obtain permission for contracting a polygamous marriage. Thereafter, the chairman of the union council forms an arbitration council with representatives of both husband and wife/wives to determine the necessity of the proposed marriage. The application must state whether the husband has obtained consent of the existing wife or wives. Contracting a polygamous marriage without prior consent is subject to penalties of fine and or imprisonment and the husband becomes bound to make immediate payment of dowry to the existing wife or wives.

Section 7: Divorce (*Ṭalāq*)

Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *Ṭalāq* in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife. A person fails to do so shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both. If the *Ṭalāq*, is not revoked expressly or otherwise, it shall not be effective until the expiration of ninety days from day on which notice is delivered to the Chairman. If the wife be pregnant at the time *Ṭalāq* is pronounced, *Ṭalāq* shall not be effective until the period of 90 days or the pregnancy, whichever later, ends[43].

[43] Section 7 of Muslim Family Law Ordinance, 1961.

11. Islamic Law of Divorce (*Ṭalāq*) and Its Effectiveness

Divorce is operative from the announcement. Hence pending it for 90 days is repugnant to Islamic teachings. Under Muslim Family Law Ordinance, 1961 limited reforms have also been introduced in relation to *Ṭalāq*. Under Muslim Family Law Ordinance, 1961 a divorcing husband shall, as soon as possible after *Ṭalāq* has been pronounced, in whatever form, give a notice in writing to the chairman of the Union Council. The chairman must then supply a copy of the notice of *Ṭalāq* to the wife. Non-compliance is punishable by imprisonment and/or a fine. Within thirty days of receipt of the notice of *Ṭalāq*, the chairman must constitute an Arbitration Council to take steps to bring about reconciliation between the husband and the wife. When such attempts to negotiate reconciliation fail, a *Ṭalāq* that are not revoked in the meantime, either expressly or implicitly takes effect after the expiry of ninety days from the day on which the notice of repudiation was first delivered to the chairman. If, however, the wife is pregnant at the time of the pronouncement of *Ṭalāq*, the *Ṭalāq* does not take effect until ninety days have elapsed or the end of the pregnancy, whichever is later. Failure to notify, in the above stated manner, invalidated *Ṭalāq* until the late 1970s and early 1980s, but introduction of the *Zina* Ordinance allowed scope for abuse as repudiated wives were left open to charges of *Zina* if their husbands had not followed the MFLO's notification procedure. Since early 1980s, the practice of the Courts in Pakistan is that they validate a *Ṭalāq* despite a failure to notify as provided under the Muslim Family Law Ordinance. As far as the Islamic concept of effectiveness of the *Ṭalāq* is concerned, *Ṭalāq* is effective from the time of utterance of the word *Ṭalāq* by the husband. Registration is only subjected to the country law and it has nothing to do with Islamic law of *Ṭalāq*.

Section 8: Dissolution of Marriage Otherwise Than By *Ṭalāq*

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by

Ṭalāq the provisions of section 7 shall, mutatis mutandis and so far, as applicable, apply[44].

12. Islamic Concept of Dissolution of Marriage Otherwise Than By *Ṭalāq*

We have so far dealt with the natural right of divorce which belongs exclusively to the husband. But he can confer the power of divorce on the wife. This delegation of power can either be general or limited to certain specified circumstances. To make it irrevocable it is included in the marriage contract as a binding clause, according to which the wife is empowered to dissolve the marriage in the specified circumstances already agreed upon. It has been customary since the olden days that the women, who feel, in any way, apprehensive of the conduct of their husbands, insist on the inclusion of such a clause in the marriage contract and exercise the power delegated to them, if necessary. Thus, according to the Islamic law, though woman does not have the natural right of divorce, she can have the contractual right of the dissolution of marriage. Hence, it is not correct to say that the right of divorce is unilateral, and Islam has given it only to man.

Section 9: Maintenance

> (1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.
>
> (2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

[44] Section 8 of Muslim Family Law Ordinance, 1961.

(3) Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue[45].

Punjab Amendment in Section 9:

In sub-section (2), the full-stop occurring at the end shall be replaced by a colon and thereafter the following proviso shall be added, namely: Provided that the Commissioner of a Division may, on an application made in this behalf and for reasons to be recorded, transfer an application for revision of the certificate from a Collector to any other Collector, or to a Director, Local Government, or to an Additional Commissioner in his Division.[46]

13. Islamic Concept of Maintenance

Islamic Concept of Maintenance is given below: -

Injunctions of the Qur'an

Injunctions of the Holy Qur'an regarding the rights of woman in respect of maintenance are contained in the following verses: -

1. "The mothers shall give suck to their offspring for two whole years, if the father desires, to complete the term. But he shall bear the cost of their food and clothing on equitable terms"[47].
2. "There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means, - a gift of a reasonable amount is due from those who wish to do the right things."[48]
3. "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous"[49]
4. "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means[50]".

[45] Section. 9 of Muslim Family Law Ordinance, 1961.
[46] [Ord. II of 1975, Section 2].
[47] Al-Qur'ān 2: 233.
[48] Al-Qur'ān 2: 236.
[49] Al-Qur'ān 2: 241.
[50] Al-Qur'ān 4: 34.

Islamic Law and *Fiqh*

Islamic law and *Fiqh* regarding maintenance of the women lay down the following principles: -

1. The meaning of "*Nafqah*", which is the Arabic equivalent of "maintenance", is what a person spends on his family. Maintenance includes food, clothing and lodging.
2. The husband is bound to maintain his wife. Her right to receive maintenance is absolute even if she is very rich and owns a lot of property.
3. If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance. The Muslim Family Laws Ordinance, 1961 permits the wife to apply to the chairman who will constitute an Arbitration Council to determine the matter. She can also apply for an order of maintenance under section 488 of Code of Criminal Procedure, 1908.
4. After divorce, the woman is entitled to maintenance from her husband during the period of *Iddah*. However, a widow is not entitled to maintenance during the period of *Iddah*. If the divorcee is pregnant she is entitled to maintenance till delivery and if she suckles the child, her entitlement would be up to the expiry of suckling period. In case the custody of the children is with her, the husband would be bound to provide maintenance for the children.

Conclusion

To conclude the whole discussion, it can be stated that there are many controversies surrounding the interpretations of various issues in Muslim Family Laws Ordinance 1961. Instability is another aspect of MLFO. It could be amended any time; it is not thought to be in accordance of injunction of Islam. The study shows that sections 4, 5, 6, 7, 9, and 10 of the ordinance are contradictory to Islam. The issue of Islamization in Pakistan needs to be seen dispassionately.

Islamization of Restitution of Conjugal Rights by Federal Shariat Court of Pakistan: A Critique

Shahbaz Ahmad Cheema*

Abstract:

In Pakistan's constitutional dispensation, the Federal Shariat Court (FSC) is empowered to declare those laws invalid which are found to be repugnant with Islamic injunctions. By the same constitutional provision, it endows Islamic sanctity or sacredness to laws which are held to be in conformity to Islamic injunctions. The paper problematizes the constitutional authority of the FSC by exploring the process of Islamization of the suit for restitution of conjugal rights (RCR). The suit for RCR was engrafted into Anglo-Muhammadan law during British colonial era through various patchworks which has recently been held by the FSC to be in consonance with the injunctions of Islam. In this background, the paper raises some questions as to the jurisdiction of the court and how that jurisdiction/authority is exercised. It posits that 'default legal infrastructure' is placed at a privileged position and its Islamicity is presumed to be well-rooted, unless it is questioned from an extremely narrow window available to aspirants of judicial Islamization of laws in Pakistan.

1. Introduction:

Ever since her independence, Pakistan has been struggling to enroot its ideological foundation as purportedly envisioned by its forefathers. Though the claim, that her forefathers were of the view that she would be converted into a laboratory for experimenting Islamization in all walks of lives, have its own dissidents. They controvert the above claim from various perspectives and some of them argue that the main motivation behind the struggle for freedom was based merely on protecting and safeguarding the economic interests of Muslims. Further the fear that in one unified democratic country, it would be hard for Muslims to protect their interests/rights from the majority rule of

* The author serves as Assistant Professor, University Law College, P.U. Lahore and can be accessed at: cheemasa@yahoo.co.in.

Hindus. Anyhow, the politics of the independent country, religious sentiments of masses and religio-political parties pushed her to reinvigorate its ideological foundation on Islam.

This journey towards Islamization, to the dismay of minority members, started quite early when the 'Objectives Resolution' was passed by the first Constituent Assembly in 1949. Thereafter, one may notice a number of provisions in successive constitutions of the country which reinforced its religious identity and established numerous institutions/bodies tasked with Islamization of laws. But whatever was the nature of such provisions and institutions, the key role always remained with the parliament to pronounce which law is considered to be Islamic or UnIslamic. However, this position drastically changed after martial law was imposed by General Zia-ul-Haq in 1977. He usurped power with a solemn promise to introduce rigorous process of Islamization with utmost vigor and determination. Since he dislodged the so-called existing democratic setup, he came up with an innate idea to further squeeze, not just temporarily but on permanent footings, the authority of elected representatives by establishing an autonomous institution of the Federal Shariat Court (FSC). It was assigned the task to ascertain Islamicity and adjudicate upon Islamicity of existing and future legislative instruments, which hitherto was a domain of the parliament in all constitutional dispensations. The Shariat Courts were initially established as special benches in High Courts of each province, which were later converted into the FSC as an autonomous constitutional institution, independent of the main stream judiciary. In addition to the constitutional establishment of FSC, wide powers to the martial law administrator were granted, which included his prerogative to man the FSC with the personnel of his own choice and bring changes into its procedures according to the exigencies best known to the incumbent regime. Since, neither the political aspects of establishing the FSC nor its maneuvering through various modes, is at issue in the present paper, therefore it would suffice to start with the premise that the FSC was established with authority to adjudicate upon and to declare legislative instruments and legally enforceable customs as repugnant to Islamic injunctions. This authority could be exercised by FSC while hearing the petitions filed by individuals,

as well as on its own motion, vide *suo motu* powers of the court. The jurisdiction conferred upon the FSC, in the Constitution of 1973, was subject to various restrictions, which included its limitation to ascertain Islamic validity of Constitution, Muslim personal law, procedural and financial laws.

The paper intends to problematize the jurisdiction of FSC by primarily focusing on its recent two decisions which have conferred Islamic sanctity to the suits for RCR. To reach at this conclusion, the paper will explore some landmark decisions pronounced during the British colonial era, which eventually formed the bases for the RCR in Indian subcontinent. The purpose of this analysis is to establish that how an apparently normal suit of contemporary times, whose Islamic authenticity was difficult for the FSC to doubt, had troubled and shaky foundations. Additionally, in an independent section, the paper points out that restitution is different from reconciliation, and how the coercive jurisdiction of any outside institution is likely to destabilize, rather than strengthen, a marital relationship.

Since the analytical ambit of the paper is limited solely to the issue of RCR, therefore jurisdictional analysis of the FSC has been conducted in this context exclusively, and one may argue that some broad generalizations as articulated in the conclusion may not prove accurate when some different analytical factors are taken into account. Without assuming absoluteness of the analysis conducted and the conclusion provided, this paper primarily focuses on bringing to light anomalies in the jurisdiction of FSC and problematizing the claim, often peddled ahead by aspirants of judicial Islamization, that this process could usher an authentic and viable Islamic legal system in Pakistan.

2. British Era Important Cases on the RCR:

This section aims to examine historical traces of RCR in the Indian subcontinent, with particular reference to land mark cases. The analysis of these cases highlights the theoretical foundations of RCR and dilates upon how this remedy was initially perceived in the legal system of subcontinent and how such perception

underwent a paradigmatic shift within a short span of time by its judicial engineering at various levels/forums.

Before the advent of the British Raj, it is argued that no comparable remedy like the RCR was available in either Muslim or Hindu religious laws.[1] Haj Mahomed Ullah ibn S. Jung, after discussing some aspects related to the RCR, concludes that "[t]his part of Anglo-Muslim Law is absolutely the product of legislative and judicial development…."[2] The same author further argues that "they [i.e. cases] conclusively show that the Courts in British India [with reference to the RCR] have been more guided by the principles of the English Law."[3]

The first case in this context is *Ardaseer Curestjee v Perozeboye*.[4] The parties to the suit were 'Parsee' married couple living in Bombay, which was a presidential town then under British Raj. The husband contracted second marriage and left her first wife - respondent in the present case- unattended. She filed a suit against her husband to take her back to nuptial abode. The suit was tried in the Ecclesiastical side of Supreme Court of Bombay which passed the decree against husband. During the course of the proceedings, the husband challenged the jurisdiction of the court as to maintainability of such suits, but his objections did not convince the Chief Justice whose opinion according to the charter of the court had to prevail. Hence, he filed appeal against the Supreme Court's decision to the Privy Council. This was the first case, decided by the Privy Council, dealing with maintainability of the RCR suits in Indian subcontinent. At that time, the judicial system under British Raj was bifurcated into Ecclesiastical side and civil side of the courts. The suits in the Ecclesiastical side were decided according to Ecclesiastical law which was based on doctrines of Christian church. According to Ecclesiastical law, polygamy was not allowed and was treated as adultery. In case of

[1] Preet Singh, *Restitution of Conjugal Rights: A Comparative Study* (PhD Thesis, Maharshi Dayanand University
1995) 98-99.

[2] Al-Haj Muhomed Ullah ibn S. Jung, *A Dissertation on the Development of Anglo-Muslim Law in British India*
(The Juvenile Press: Allahabad 1932) 27.

[3] Ibid, 28.

[4] 1856 IA (Privy Council) 265

adultery, a Christian wife was entitled to have separation from bed and board along with alimony. But in no case a decree for RCR could have been pronounced on Ecclesiastical side of courts. However, in the present case, the husband contracted another marriage without dissolving the first one, which was lawful under Parsee law according to the Privy Council. The Husband was happily living with the second wife and the first wife was claiming to have conjugal unity enforced in the Ecclesiastical jurisdiction of the court. If such jurisdiction was exercised, it would have amounted to enforcing and recognizing polygamy which according to doctrines of Christian church was nothing other than adultery. The Privy Council ruled that "change in essential character" through enforcing the RCR and recognizing polygamy, albeit indirectly, would denude its sanctity as Ecclesiastical law. Hence, the apex court in categorical terms said that "… a suit for the restitution of conjugal rights -strictly an Ecclesiastical proceeding- could not consistently with the principles and rules of Ecclesiastical Law, be applied to the parties who profess the Parsee religion,…".[5] In such uncharacteristic situation, where Privy Council was hesitant to indirectly recognize polygamy under Ecclesiastical law, it found a tactical way to pronounce a possibility that such remedy could be availed on civil side of the Supreme Court's jurisdiction that had more flexibility and adaptability to accommodate various religions and local customs.[6]

The significance of this decision lies in the fact that on the one hand it asserted Christian roots of the RCR in absolute and categorical terms as a tool to enforce monogamy, and on the other it opened window for the natives, having different religions and customs, to seek this remedy from civil jurisdiction of British courts. Hence, along with reassuring the religious and sacred nature of the RCR, Privy Council left open its secular use through civil jurisdiction for all people not professing Christianity.

Anyhow, this decision initiated the process of 'indigenization' of the RCR and gradually masked its complex

[5] Ibid, 267-8
[6] Ibid, 267

religious and historical baggage.[7] It further laid the foundations for various religious communities, inhabited in Indian subcontinent, to construct their own justifications for resorting to RCR.[8] From the perspective of Muslim Personal law the most important case on the RCR is *Moonshee Buzloor Ruheem v Shumsoonissa Begum*.[9] In this case, the court overemphasized the contractual nature of marriage under Islamic law and expressed astonishment as to how a marital contract could be envisioned without the prospect of 'specific performance'. The Privy Council, while addressing the question of whether a Muslim husband could force his wife, without the latter's consent, to return to cohabitation through civil courts of India, observed that, "[i]f a law which regulates the relations of the parties gives to one of them a right, and that be denied, the denial is wrong; it must be presumed that for that wrong there must be a remedy in a Court of Justice."[10] The Council concluded that, "their Lordship have no doubt that the Mussulman Husband may institute a suit [for the RCR] in the Civil Courts of India, for declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation; and that suit must be determined according to the principles of the Mahomedan law."[11] While providing reasoning behind the judgment, the Privy Council acknowledged that it did not discover any comparable remedy to the RCR in *Hedaya*, which only stated that the disobedient wife or the wife going abroad without her husband's consent would be deprived of maintenance until she returns to submission. The council held that "it seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent."[12] This case confirmed the possibility of pursuing the

[7] Rebecca R. Grapevine, 'Family Matters: Citizen and Marriage in India, 1939-1972' (PhD Thesis, University of Michigan 2015) 110.

[8] Shahbaz Ahmad Cheema 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition' 2018 (5)1 LUMS Law Journal 1-18

[9] (1867) 11 Moore's Indian Appeals 551

[10] Asaf A. A. Fyzee, Cases In The Muhammadan Law of India and Pakistan (Oxford University Press 1965) 294.

[11] Ibid, 296.

[12] Ibid, 296.

RCR through civil jurisdiction of British courts as articulated in *Ardaseer Curestjee v Perozeboye* with an additional proclamation that the parties to the RCR might raise defenses under the personal law based on their religion, which they were supposed to follow.

The third important case in this domain is *Abdul Kadir v Salima*[13] which was decided by Allahabad High Court. It provided the much-needed religious sanctity to the RCR, by equating it with the spouses' right of cohabitation, under Islamic law. Justice Syed Mahmood, in is judgment, reproduced extracts from legal texts to conclude that the incidents of a Muslim marriage, such as husband's obligation of dower and mutual rights of cohabitation, flow simultaneously. His analytical discourse, based on authoritative books, gave an unflinching impression as if the spouses' mutual rights of cohabitation were an equivalent to the RCR.[14]

The distance travelled by the RCR within three decades was nonetheless amazing from the first decision of Privy Council to the last-mentioned decision of Allahabad High Court. Three decades ago, the Privy Council was hesitant to extend the RCR under Ecclesiastical jurisdiction to natives due to its distinctive Christian roots. About a decade later, the same council candidly acknowledged that such remedy was not found in *Hedaya*. And lastly, the first Muslim Judge of any High Court in British India portrayed it as comparable to spouses' mutual rights of cohabitation under Islamic law. There is no marital system in which spouses do not have rights of cohabitation and sailing on the logic of Justice Mahmood, the RCR then became an indispensable corollary to all of them. It is interesting that this 'Christianization' of Islamic family law took place under the authority of a Muslim judge, albeit he himself was Anglicized

[13] (1886) 8 All 149

[14] Shahbaz Ahmad Cheema 'Revisiting *Abdul Kadir v Salima*: *Locus Classicus* on Civil Nature of Marriage?'
(2018) XXXIII (XLIX) *Al-Adwa* 63-78.

through his education in England as a student at Cambridge University and later as a barrister of Inns of Courts.[15]

3. Judgments of FSC on the RCR:

In 2015, the FSC pronounced two judgments relating to the RCR. Both are titled as *Nadeem Siddiqui v Islamic Republic of Pakistan*.[16] The first judgment relates to Section 5 (along with its schedule) of the Family Courts Act 1964 which empowers the family courts to grant the decree for the RCR, whereas the second pertains to the procedure for enforcement of such decrees as laid down in Civil Procedure Code 1908. In the first reported judgment, the petitioner challenged the provision, which empowered the family courts for granting the relief of RCR, as unconstitutional and against the injunctions of Islam. While relying on Quranic precept contained in 4:35, related to reconciliation between spouses in cases of discord, it was contended that the family courts could not grant decrees for the RCR nor could "force an unwilling wife to live with her husband against her wishes."[17] The court did not have any objection as to the importance of reconciliation between spouses, and to this extent, both the court and the petitioner were on the same page. But the thorny issue before the court was to determine the length of time, to which the court should wait before granting the decree for RCR. The petitioner maintained his stance resolutely that the court was not authorized to issue such decrees in the first instance, hence, the question of ascertaining time for this purpose was of no consequence. On this response, the court noted that "[t]he learned counsel, however, could not cite any Verse or Hadith to support his contention. Obviously, the stance taken by the learned counsel is neither logical nor judicious."[18] The court further observed that if the spouses were allowed to live separately for some time, it would have severe emotional and moral consequences for both, in addition to

[15] Alan M. Guenther (2004) Syed Mahmood and the Transformation of Muslim Law in British India (PhD Thesis) McGill University, Canada.

[16] PLD 2016 FSC 01 and PLD 2016 FSC 04

[17] PLD 2016 FSC 01 at 02

[18] PLD 2016 FSC 01 at 03

adversely affecting the wife, who does not have any other source of income than her husband's. The best course in this situation according to the court would be to resolve the marital controversy in either way -restituting conjugal rights or petitioning for khula. After such analysis of the issue, the court concluded that "[t]he learned counsel could not satisfy the Court as to how the impugned section which authorizes the family courts to issue decree for restitution of conjugal rights is repugnant to injunctions of Islam. As mentioned above, he could cite no specific Verse or Hadith which puts an embargo on the Family Court and restraint it from passing an order for restitution of conjugal rights if the wife is not ready for dissolution of marriage on the basis of Khula."[19]

This judgment does not engage in an elaborate qualitative analysis of the Islamicity of RCR on its own, rather assumes inherent Islamic authenticity of RCR and thereupon requires the petitioner to prove otherwise. This judicial approach demonstrates how 'defaults legal system' enjoys a distinguished position.

The second judgment of the FSC on the RCR distinctively pertained to the procedure for enforcement of the decree of RCR. The relevant provisions of the Civil Procedure Code, i.e. rules 32 and 33 of Order XXI, empower the courts to attach and sell the property of willfully defaulting spouse along with legally obliging the husband to pay periodic amount for non-compliance of such decree. The petitioner was of the view that the RCR and its enforcement procedure were potent enough to compel an unwilling wife to seek dissolution. He explained that a husband, after securing a decree for the RCR, might initiate a coercive procedure for enforcement of the decree exposing his wife to unbearable economic crises. This situation did not leave any opening for the defaulting wife except to file proceedings for dissolution.[20] Hence, according to the petitioner, there was a direct nexus between the coercive procedure for enforcement of decree for RCR and dissolution proceedings, and declaring the former as against Islamic injunctions might reduce the frequency of the

[19] PLD 2016 FSC 01 at 03-04
[20] PLD 2016 FSC 04 at 07

dissolution suits. While highlighting the significance of the procedure for enforcement of judicial decrees, the court said that "… if after the whole exercise, a decree passed, a judgment delivered is not complied with or not taken to its logical end, the whole exercise becomes meaningless."[21] A wife once entering into a marital bond was bound to follow its conditions and if she wanted to get rid of the bond/tie, it was not appropriate to stay away in contravention of the RCR decree, rather to initiate dissolution proceedings as per the court.[22]

Since the petitioner attempted to forge a nexus between the frequency of dissolution proceedings initiated by wives and the coercive procedure laid down for execution of RCR decree, he referred divine precepts in this context and based his arguments on them. But the court found such precepts as unrelated to the matter under inquiry and concluded that "… even on merits, the learned counsel has not been able to refer to any specific provision in the Holy Quran, Hadith or even Fiqh which could support his contentions."[23] Additionally, the court, while relying on its constitutional mandate,[24] held that it could not evaluate any legal provision falling within the domain of Muslim Personal Law and Procedural Law.[25]

There are some points to be highlighted that the court kept on emphasizing that the petitioner was unable to specify any Quranic verse or saying of the Prophet which would have pointed out that the RCR was inconsistent with the injunctions of Islam. Hence, the burden to problematize the religious sanctity from Islamic perspective was exclusively put on the petitioner. It means that the court succumbed to the adversarial method of inquiry, to which the judges in our country are accustomed to. The court unconsciously overlooked the constitutional mandate[26] empowering it to assume *suo motu* jurisdiction which is difficult to be exercised without resorting to inquisitorial manner of inquiry.

[21] PLD 2016 FSC 04 at 08
[22] PLD 2016 FSC 04 at 08
[23] PLD 2016 FSC 04 at 09
[24] Art. 203-B(c)
[25] PLD 2016 FSC 04 at 09
[26] Art 203DD???

Though the jurisdictional provisions of the FSC could be read otherwise and the court could have been held to have inquisitorial jurisdiction, but the manner in which the court has exercised it over the years give impression as if it would exercise its jurisdiction preferably and generally through adversarial method of proof. This approach puts the burden on the petitioners to bring convincing evidence before the court and if they could not produce that quality of evidence, their petitions are destined to be dismissed. The standard of quality of such evidence has been raised to such a degree that it is difficult to meet without bringing before the court some definitive verses of the Quran and sayings of the Prophet. In absence of such definitive evidence, Islamicity of any existing legislative instrument is presumed to be well-founded and secured. Furthermore, such judicial approach of the FSC implies that whenever any verse is capable of reading in more than one way, that interpretation would be given judicial sanctity that favors the 'default legal system'.

4. Restitution vs. Reconciliation:

The FSC in the first case on the RCR made a reference to verse 4:35 of the Quran[27] and highlighted that reconciliation is always a preferred option.[28] And thereafter it assumed as the RCR is the most appropriate way to make spouses reconcile. This Quranic verse has a specific reference to carry out reconciliatory efforts with the assistance of arbitrators from both spouses before dissolution, when that remains to be the only option. Even if this verse is read as a general command for resorting to reconciliation between spouses, it does not support the conclusion drawn by the FSC as to rule Islamicity of the RCR. Rather the verse makes the opposite clearer, that reconciliation would not be affected unless both the spouses have submitted to it voluntarily.

Restitution in its most mild and softest form implies some sort of compulsion and coercion which could never be watered

[27] "And if you fear a breach between the two (husband and wife) then appoint an arbitrator his people and an arbitrator from her people. If both desire peace Allah will make of one mind. Certainly Allah knows all, Aware about all things." (4:35)

[28] PLD 2016 FSC 01 at 2-3

down to the level of reconciliatory efforts by any judicial or legislative gimmickry. It would not be out of place to mention that when Justice Mahmood pronounced his aforementioned decision[29] at that time imprisonment of the defaulting spouse was one of the options for execution of the RCR decrees. This option was obliterated in the first quarter of 20th century from the Civil Procedure Code 1908 while leaving other options intact such as attachment of property.[30] Assuming in such a situation that restitution is not different from reconciliation is not less than self imposed fantasy.

Syed Maududi in his small treatise on rights and duties of spouses has regarded mutual blissfulness and affection as one of the prime objectives of marriage under Islamic law.[31] There are many verses in the Holy Quran which portray a married life as an epitome of harmonious and affectionate relationship.[32] There are a number of other verses which make a point that if married relationship could not be maintained with affection and friendliness, then it is better to dissolve it politely and courteously.[33] It is a fact that there is no specific verse and hadith which affirm unambiguously the Islamic validity of the RCR, but there are plenty to show repugnance that married life can never be carried on under Islamic law through compulsion and coercion.

In my analysis of the cases of the RCR in another article,[34] I have pointed out how this remedy is a readymade ply, in the hands of unscrupulous husbands, which does not give a remotest semblance to any iota of harmony, affection and serenity of married life. It is not tactical use which makes the RCR as objectionable, rather state's complicity, by retaining it as a legal remedy, makes it more obnoxious and intolerable. And the recent decisions of the FSC conferring Islamic authenticity on the RCR

[29] Abdul Kadir v Salima (1886) 8 All 149

[30] Rule 32 of the Civil Procedure Code, 1908.

[31] Syed A. A. Maududi, *Haqooq uz Zojjain*, Adara Tarjman ul Quran, Lahore, Pakistan at 21.

[32] Ibid, 21-22

[33] Ibid, 23-24.

[34] Shahbaz Ahmad Cheema 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition' 2018 (5)1 LUMS Law Journal, 1-18.

have added more sludge to the muddy situation. Though every case has its own specific context, but sometimes cross case comparisons make imperceptible absurdities and contradictions more appreciable and evident. The FSC[35] led the Supreme Court[36] to articulate that an adult virgin cannot be married without her consent and there was no legal necessity to procure the consent of her *wali*/guardian. It is astonishing that the same FSC ruled that what was necessary for contracting marriage, i.e. consent of bride, was not so essential for continuing marriage, and some sort of compulsion and coercion by the state was legitimate in the RCR.

The FSC in its famous case titled *Saleem Ahmad v Government of Pakistan*[37] dealing with the case of dissolution of marriage, even before adducing evidence by spouses, held that such legislative provision could not be declared as repugnant to Islamic dictates. Here what the FSC was assuming that when reconciliation was not possible, dissolution should have been resorted to, without wasting further time and energies. But when it is compared with the rationale in the decisions under examination on the RCR, the FSC appears to put its weight for maintaining the option of compulsion and coercion for continuity of married life. Lack of reconciliation made the FSC to dissolve without pursuing the long-drawn procedure of suits in *Saleem Ahmad v Government of Pakistan*, the same situation of irreconcilability guided the FSC to compel the defaulting spouse into nuptial abode once again. In Saleem Ahmad the FSC poised the question that "Should she be pushed back to her husband to remain tongue tied, tight lipped, depressed and dejected, having a miserable survival throughout her whole life?"[38] In the present petitions, she was actually pushed to that situation and that too with coercive machinery of the state reinforcing her husband's decree.

[35] Muhammad Imtiaz v State PLD 1981 FSC 308; Arif Hussain & Azra Parveen v State PLD 1982 FSC 42; Muhammad Ramzan v State PLD 1984 FSC 93; Muhammad Yaqoob v State 1985 PCr.LJ 1064.

[36] Abdul Waheed v Asma Jehangir PLD 2004 SC 219.

[37] PLD 2014 FSC 43

[38] PLD 2014 FSC 43 at 58

This contradictory and absurd logic can only be brought home when it is examined in light of the jurisdictional approach evolved by the FSC over the years; that it has to protect rather stamp with Islamic authenticity upon that stance which has already found favor of the parliament. It means that default legal system/infrastructure is always considered a blued eyed child of FSC and the aspirants of rigorous Islamization have to explore other options, and that other option is not other than the parliament to which they always feel difficulty to get in. Eventually, the court's jurisdictional approach makes it unequivocal that though it was constituted to grab the authority of the parliament as to determine Islamicity or otherwise of legislative instruments, however it has ended up reassuring the exclusive legitimacy and competency of the parliament except for a very narrow domain directly in conflict with definitive Islamic precepts.

5. Conclusions:

The paper explains the influential nature of our socio-political context in which we, as institutions, operate and function. That context limits our opinions in a particular way and prevents us to recognize the alien-ness of those things to which we have become accustomed to, over the years. Interpretive and constructive efforts are not carried out in vacuum; rather they are carried out in structures which have both cognitive as well as corporeal existence, hence they are bound to be influenced by such factors. Sometimes piece meal semblances and isolated normative sources join together to formulate a picture under the influence of existing circumstances, which without such context would have been difficult, if not impossible, to achieve or had never been constructed in the past. This is how Anglo-Muhammadan law developed a theological foundation of the RCR which has ultimately been upheld by the FSC in its decisions. The paper further illustrates the illusive nature of boundaries amidst 'secular' and 'sacred'. The RCR was once recognized as sacred in the context of Christianity, however later on it was stripped of its sacredness and transformed into secular/civil nature in order to make it accessible for people of other religions inhabited in Indian subcontinent. The final turn, in the form of the FSC's recent

decisions on the RCR, impinged it once again sacredness, however this time it was not from the perspective of that religion (i.e. Christianity) which initially espoused it but under the emblem of Islamic law. It is interesting to note that British Raj once denuded the sacred and religious aspect of the RCR for its smooth application to non-Christians in Indian subcontinent; however the FSC adorned it with religious sanctity for maintaining its application to Muslims in Pakistan.

In addition thereto, the jurisprudence developed by the FSC over the years lean in favor of 'default legal system' and puts burden on petitioners for bringing 'invalidity argument' into play, lacking which their petitions are to be dismissed. This judicial attitude of the court is against the constitutional mandate which specifically empowered the court to resort to *suo motu* jurisdiction. This jurisdiction is difficult to be exercised without resorting to inquisitorial mode of inquiry. The question here could be raised for contemplation: why inquisitorial mode of inquiry has been confined to *suo motu* proceedings by the FSC and the relatively less cumbersome adversarial manner is generally adopted in all other kinds of petitions!

By presuming the religious validity of default legal system/infrastructure, the FSC has basically jeopardized that very perspective with which it was initially established by General Zia's regime, viz. to create a parallel yet more effective institution than the parliament to carry out the mission of Islamization of laws. Apparently the FSC takes cognizance of such cases with a staunch presumption that the laws made by the parliament are Islamically valid unless their religious authenticity is definitively disputed by aspirants of judicial Islamization. Consequently, the FSC, through its jurisdictional maneuvering, has rendered ineffective the spirit behind shifting such authority from sole prerogative of the parliament to that of a non-elected judicial body, i.e., FSC. What was envisioned to be achieved with the establishment of FSC that cause has been lost by the very institution itself.

Post 18th Amendment Health related Legislation at Federal Level: A Constitutionalism Perspective

Aftab Ahmed Rana*

Abstract.

This Article will analyse the structural changes made in the health sector with focus on health legislation after the 18th amendment. Health system needs comprehensive review due to new challenges of changing population density, disease patterns and emerging diseases coupled with high costs of health. Many issues like governance in health, access and quality of health services etc. affect the ability of health system to deliver. Under Pakistan's Constitution, there exists no specific provision in the chapter on fundamental rights relating to health. The Constitution contains a Chapter on the Principles of Policy of the state of Pakistan. Eighteenth (18) Constitutional amendment introduced amendments approximately in 102 articles of the Constitution. These amendments gave long-promised autonomy to the provinces under a devolution plan due to which role of federation in health sector was undermined as ministry of health was abolished and there was a space of leadership in health sector at federal level. There arose lot of problems in implementing the 18th amendment as the provinces claimed financial constraints and insufficient funds allocation as well as also opposed the creation of Federal Drug Regulatory Authority. Though, Ministry of Health at federal level was abolished under the Constitutional 18th amendment, which redefined health related mandates at federal, inter-provincial and provincial level but after the passage of one year, it was re-established in April 2012, in the shape of Ministry of National Health Services, Regulations & Co-ordination, which reinvigorated the federal role in health care sector because it dealt with enforcement of drug laws and regulations as well as medicine in Pakistan.

Keywords: *Health, constitutionalism, legislation, federal, eighteenth Amendment.*

1. Introduction

Health is the fundamental human right and necessary for individual well-being at micro level, and indispensable pre-requisite for economic growth and development in a country at the macro level. Like water and sanitation sector, and other social

* The author serves as Civil Judge/Research Officer Lahore High Court, Rawalpindi Bench, Rawalpindi and can be accessed at: aftabranaclm@gmail.com.

sectors, health is not a priority area of the government of Pakistan. Pakistan was ranked as the fifth most populous nation in the world, with a population of over 200 million (as of 2017). Pakistan has been under military rule for 33 years. The devolution of power from Federal Government to Provincial Government under the 18th Constitutional amendment has given autonomy to provincial government to some extent but the federal role in the formulation of policies remained a dominating factor. Pakistan has a mix health system that includes government infrastructure, private sector, civil society and philanthropic contributors. There has been a lack of consensus of national vision after July 2011, which depicts the combined aspiration for better health of the people of the country. A national vision document on health keeping in view the international health priorities and provincial realities is required, which should be within the framework of post 18th amendment constitutional role and responsibilities.

In Pakistan, health system includes both public and private sector.[1] The role of Federal Ministry of Health is to formulate national policies and strategies for the whole population of country. Under the Constitution, the health sector is a provincial subject despite the fact that at federal level, the role of Ministry of Health (MOH) is to develop national policies and strategies for the entire population of country.[2] The health care delivery is jointly administered by both the Federal & Provincial Governments. The District Government is mainly responsible for its implementation. The public health delivery system is also managed at a district level administratively. [3]

Pre-18th amendment scenario is that the Constitution contained two legislative lists i.e Federal Legislative List (FLL) and the Concurrent Legislative Lists (CLL). The Parliament had powers to make legislation pertaining to matters contained in "FLL". Whereas the matters placed in the "CLL", both the parliament and provincial assemblies had powers to make laws.

[1] Fazli Hakim, "Role of health system research in policy, planning management and decision making with reference to Pakistan," *Eastern Mediterranean Health Journal,* 3: 3 (1997), p. 556-566.

[2] Health System Profile-Pakistan, Regional Health System Observatory-EMRO, 2007, p. 7.

[3] Ibid., p. 8.

Moreover, the Provincial assemblies had also jurisdiction to make laws regarding any matter not falling under any two of the above lists. The Federal Government has exclusive jurisdiction over the subject falling in Part-1 of the FLL. The Council of Common

Interests (CCI) has been created under Article 153 of the Constitution, which is appointed by the President and includes, the Prime Minister who shall be the Chairman of the Council, the Chief Ministers of the Provinces and three members from the Federal Government to be nominated by the Prime Minister from time to time. According to Article 153(4) of the Constitution, "CCI" is responsible to Parliament and is required to submit an Annual Report to both Houses (of Parliament). Article 154(6) of the Constitution provides that Parliament may, from time to time, by resolution, issue directions through the Federal Government to CCI generally or in a particular matter to take action as Parliament may deem just and proper and such directions shall be binding on "CCI". Furthermore, as per Article 154(7) of the Constitution, if the Federal or a Provincial Government is dissatisfied with a decision of "CCI", it may refer the matter to Parliament in a joint sitting whose decision in this regard shall be final. Thus, as per the foregoing provision of the Constitution, "CCI" is subservient, and not superior to Parliament.

Entry no.11 inserted in Part-II of Federal Legislative List (FLL), Fourth Schedule is about Legal, medical and other professions. Under Article 70 of the Constitution, Parliament has been mandated to make laws with respect to any matter in the Federal Legislative List. Article 154(1) of the Constitution, CCI has been given power to formulate and regulate policies in relation to matters in Part-II of the Federal Legislative List (FLL) and to exercise supervision and control over related institutions. Therefore, it is clear from this provision that "CCI" has no role in the legislative process with respect to the matters enumerated in the "FLL", rather it is restricted to formulation and regulation of policies in relation to the said matters, and that too contained only in Part-II of such List. Once policies are finalized, "CCI" cannot interfere in the legislative process, nor can any legislation be struck down for the reason that "CCI" was not involved in the relevant legislative process.

2. Post-18th Amendment Delegation of Powers

As stated above, the concurrent legislative list (CLL) has been omitted in its entirety through constitutional 18th amendment. Many important subjects like drug regulation (entry 20) previously inserted in "CLL" have been deleted due to which certain issues arose regarding the federal mandate for the purpose of policy formulation. Some of the subjects like entry no.22 of the "CLL" have been entered in Part-1 of the FLL for the purpose of keeping national co-ordination and conformity together. Previously in the "CLL", the subjects relevant to health were inserted through entry no.20 to 26 and entry no. 43 & 45 and the said entries except entry no. 22 & 43, were entirely omitted. Some changes have also been introduced in the "FLL". Entry no.43, dealing with legal medicine & other professions, of the defunct "CLL" has been shifted to Part-II of the "FLL" through entry no.11. New entry relating to international treaties, conventions, agreements and international arbitration etc. has been entered in Part-1 of the "FLL". Another entry of a subject dealing with National Planning and Economic Coordination has been moved from Part-1 to Part-II of the "FLL", thereby empowering the provinces to play a pro-active role in the area previously not falling in their domain. Likewise, other relevant entries regarding health system were also inserted in the "FLL". For instance, the subject of health financing, human resource, medicines, health information, disease security, research, service delivery, trade in health and all the regulatory authorities established under the federal laws were placed in "FLL".

The preamble to the Constitution and its Principles of Policy refer to socio-economic rights but courts cannot enforce these. However, courts in Pakistan have previously handed down progressive decisions in public interest through the application of an expansive definition of 'right to life.'[4] In a famous case titled Government of Sindh through Secretary Health Department and others-Versus- Dr. Nadeem Rizvi and others, the august Supreme Court of Pakistan held as under:

[4] *Miss Shehla Zia and others v. WAPDA* (PLD 1994 S. C. 693) as well as in the matter of human rights case no. 17599 of 2018, decided on 3rd January, 2019 regarding alarming high population growth rate in the country (2019 SCMR 247).

> *"The right to life undoubtedly entails the right to healthcare, which means that everyone has the right to the highest attainable standard of physical and mental health and this comprises of access to all kinds of medical services including but not limited to hospitals, clinics, medicines and services of medical practitioners, which must not only be readily available and easily accessible to everyone without discrimination, but also of high standard. As the State, the Federal Government has an obligation to carry out all necessary steps to ensure realization of this goal. This right has been recognized by the Supreme Court of India in the context of Article 21 of the Indian Constitution which provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law." In this respect, the Indian Supreme Court has held in the case of "State of Punjab and others v. Mohinder Singh Chawala and others"[(1997) 2 SCC 83] that "It is now settled law that right to health is integral to right to life. Government has a constitutional obligation to provide health facilities."*[5]

In this context, international law also emphasizes the right to health and imposes a duty on Pakistan, as a Member State of various organizations such as the United Nations and World Health Organization (WHO) and has ratified various international covenants including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, to ensure enforcement of such right.

Under the 18th Amendment, the right to education has now been included as a fundamental human right U/S 25-A of the Constitution according to which state shall provide free and compulsory education to all the children at the age of five to sixteen year in such manner as may be determined by law.[6] However, the amendment has not accorded attention to the right to health. Article 24 of the Constitution gives protection to property rights as no person shall be deprived of his property save in accordance with law and the property can compulsorily be acquired only for public purpose, which would be subject to compensation as provided under the authority of law. However, Article 24 (3-a)(e-1) of the Constitution, 1973, provides safeguards to the validity of laws permitting the compulsory acquisition of

[5] 2020 SCMR 1.

[6] Substituted by the Constitution (18th amend) act, 2010(10 of 2010).

any property for preventing danger to life, property or public health and also gives protection to any law providing for the acquisition of property for education and medical aid.

The Constitution of Pakistan, 1973 specifies the subjects that come under the responsibility of the federal and provincial governments, respectively. Constitutionally, the provision of health services is the provincial government's responsibility. The Federal Government's primary responsibilities are policy development and strategy delineating, monitoring and evaluation, health communication, advocacy and information, formulation of technical values and guidelines, and the prevention of communicable diseases. In other words, the federal government is a steward of the system rather than an implementer. The provincial government's primary responsibility is health services, including planning, management and oversight, financing, implementation, medical education and training, monitoring and supervision, and regulation.[7]

Eighteenth Constitutional amendment altered Article 144 of the Constitution to the effect that anyone or more provincial assemblies may by resolution empower the parliament to regulate any matter not enumerated in the "FLL" in the fourth schedule. Prior to 18th amendment, only two or more provincial assemblies could do that. After the passing of an Act by the Parliament concerning any province was to be implemented by provincial assembly through passing of an Act in that assembly. Hence, the legislative authority of the Province under Article 142 of the Constitution can be conferred on the Federation under Article 144. Likewise, Article 270 of the Constitution 1973, was amended with the insertion of Article 270AA(6), which saved all laws and other legal instruments having the force of law with respect to any matter contained in the omitted CLL, which were enacted prior to the 18th Amendment. These laws continued to remain in-force until altered, repealed or amended by a 'competent authority.' Hence, it created an implication for the health sector that existing

[7] Sabeena Jalal and Inam-ul-Haq, "Revisiting the three different tiers of the Health System of Pakistan and their Implications for the Achievement of MDGs by Pakistan," *Journal of the Pakistan Medical Association,* Vol. 64, Issue: 2, p. 195-200.

health-related laws will continue to be in force. However, the 18th Amendment 'saved' laws, it may have transferred the power to alter, repeal or amend laws in favour of the provinces, which may now be the 'competent authorities' as referred to in Article 270AA(6).

3. Post 18th Health related Legislation

Realizing the lack of co-ordination between the federal and provincial governments for monitoring and evaluating the health sector at federal level after the 18th amendment, the federal government felt dire need of a particular federal institutional system coupled with revised laws that could support the provincial department of health so as to provide better health opportunities. Initially, the provinces opposed the creation of Federal Drug Regulatory Authority (FDRA) because the 'drug & medicine' as a subject was removed from the CLL but the mandate to regulate the same was granted to the federal government by virtue of entry no.6 of the FLL. Following the issuance of drug safety alert by World Health Organisation (WHO) due to 'Isotab drug deaths', the provinces concurred to the notion of granting the federal government the prerogative of drug regulation through Article 144 of the Constitution.[8]

In this backdrop, firstly the Ministry of National Regulations and Services was established in April, 2012. Later on, the scope of work of the ministry was expanded and its nomenclature was also changed to Ministry of National Health Services, Regulations and Coordination.[9] The main object of the Ministry of National Health Services, Regulations and Coordination is to help the people of Pakistan to maintain and improve their health and to make the population among the healthier in the region. The other objectives include the provision of an efficient, equitable, accessible & affordable health services system with the purpose to support people and communities to improve their health status so as to develop national and international coordination in the field of public health. It further

[8] Sania Nishtar, *Health and the 18th Amendment: Constructive tensions* by p. 66.

[9] http://www.nhsrc.gov.pk/overview.

aimed to give an oversight to the regulatory bodies in health sector to create population welfare coordination as well as to take steps for the enforcement of Drugs Laws and Regulations.

Prior to the Constitutional 18th amendment, the 'drugs and medicines' was on the concurrent legislative list (CLL). The Federal Government, on the basis of the existence of the concurrent list, had introduced the Drugs Act 1976 (No XXXI); and the Pharmacy Act 1967 (No XI). After the abolition of 'CLL' the Federation had lost jurisdiction relating to both these issues, creating a paralysis for a number of years in the whole country as the drug regulatory authorities were not functioning and the government could not make any modifications in the existing laws.

However, an anomalous situation resulted after the 18th Amendment because the area of drugs and medicine required national uniform legislation. Therefore, the Federal Government relied upon Article 144 of the Constitution, under which one or more provincial assemblies can pass resolutions authorising the federal parliament to regulate by law any matter that is an exclusive provincial subject. On the insistence of Federal Government, the Provincial Assemblies of Khyber Paktunkhwa, Punjab and Sindh passed resolution under Article 144 of the Constitution of the Islamic Republic of Pakistan by authorizing the Majlis-e-Shoora (Parliament) to regulate drugs and medicines as it was a subject that required uniformity throughout the country. Hence, the Drug Regulatory Authority of Pakistan Act, 2012 was enacted in November 2012, which established the Federal Drug Regulatory Authority to provide for effective co-ordination & enforcement of Drug Act, 1976, and to bring harmony in inter-provincial trade and commerce of therapeutic goods so as to regulate, manufacture, import, export, storage, distribution and sale of therapeutic goods.[10] Alternate medicines & health product (enlistment) rules, 2014 were also notified in this regard. Hence, The Federal Government has the regulatory role in

[10] Under S.2 (xxxvi) of the Ac, 2012 "Therapeutic goods" includes drugs or alternative medicine or medical devices or biological or other related products as may be notified by the Authority.

medicines and medical education as well as in human resource and technology.

The Pakistan Health Research Council Act, 2016 was enacted on 22nd March 2016, to provide for the reconstruction and reorganization of the Pakistan Medical Research Council (PMRC) with the name of Pakistan "Health Research Council" (PHRC) by providing administrative and financial autonomy for its efficient functioning.[11] The history of PMRC dates back to 1954, when a Medical Reforms Commission was set up to advise the Government on the organization and structure of the medical services. One of the recommendations of the Commission was to establish a Medical Research Fund, which was created. In 1962, a subsequent Medical Reforms Committee recommended the establishment of the Pakistan Medical Research Council (PMRC), which was created under the Ministry of Health and assigned responsibility for promoting, organizing and coordinating medical research in the country, and for linking medical research to overall national socio-economic planning.[12]

The PMRC was assigned the functions of promoting, organizing and coordinating health research and linking it to national socio-economic development planning. To achieve its objectives, the PMRC adopted the strategy of establishing research centres in medical teaching institutions. The Council has number of research centres located in major public sector undergraduate and postgraduate medical institutions. [13] The notable research centres are the 'Specialized Research Centre For Communicable Diseases National Institute of Health, Islamabad', 'Research Centre National Health Research Complex Shaikh Zayed Hospital, Lahore', Specialized Research Centre for Metabolic Diseases Research Centre Fatima Jinnah Medical University,

11 It was published in the official gazette on 28th March 2016 through Act No.XII of 2016.

12 . Health research capacity in Pakistan: A country report prepared for the WHO and COHRED Regional Consultation on Health Research for Development 24 - 26 June 2000, Cairo, Prepared by: Dr Tasleem Akhtar Director, Provincial Health Academy, Department of Health, Government of Northwest Frontier Province Peshawar Dr Jehangir A. Khan, Chairman, Pakistan Medical Research Council, Islamabad at page no. 03, accessed through http://www.cohred.org/downloads/681.pdf.

13 Ibid at page no.07.

Lahore', TB Research Centre King Edward Medical University, Lahore', 'Research Centre Faisalabad Medical University, Faisalabad', 'Research Centre Nishtar Medical College, Multan', 'Specialized Research Centre For Gastroenterology and Hepatology Jinnah Postgraduate Medical Centre, Karachi', 'Specialized Research Centre For Child Health National Institute of Child Health, Karachi', 'Research Centre Dow University of Health Sciences Karachi', 'Research Centre Liaquat University of Medical and Health Sciences, Jamshoro', 'Specialized Research Centre For Traditional Medicine Khyber Medical College, Peshawar', 'Research Centre Bolan Medical College, Quetta'.[14] ln order to further improve the working of "PHRC" and bring it at par with the international best practices, certain amendments in the existing Act, 2016 have been made through a Bill to be called Pakistan Health Research Council (Amendment) Act, 2020 so as to meet the future challenges and bring forth better performance in public interest.[15]

The National University of Medical Sciences (NUMS) was established through enactment of the National University of Medical Sciences Act, 2015 (Act No. XVII of 2015) on 28th October 2015.[16] The purpose of the university, as mentioned in section 04 of the Act, 2015, is the promotion and dissemination of knowledge and technology and to provide instruction, training, research, demonstration and service in the health sciences. The university shall be a fully autonomous body with autonomy to govern its academic and administrative functions in order to achieve its objectives.

Health services academy (HSA) was primarily established in 2002 through Health Services Academy Ordinance, 2002 (LXII of 2002) in the interest of the medical public health, health services administration and allied professions to establish a centre of excellence to provide a strong base for improvement in health

[14] http://phrc.org.pk/research-centres.html.

[15] This has yet to be passed from both the houses of parliament, which was laid before the Majlis-e- Shoora (Parliament) on 09th March 2020.

[16] It was published in the official Gazette of Pakistan on 31st October, 2015, for general information after receiving the assent of president on 28th October 2015.

status and human resource development. On 18th May, 2018, The Health Services Academy (restructuring) Act, 2018 (ACT No. XXIV of 2018) was enacted to provide for restructuring of health services academy as a degree awarding institute in order to provide it autonomy while improving governance and management thereof so as to enhance quality of higher education in the country.[17]

The Islamabad Healthcare Regulatory Authority (IHRA) was established through enactment of The Islamabad Healthcare Regulation Act, 2018 (ACT No. XXIII of 2018). The objective of "IHRA" is to provide a regulatory framework to ensure provision of quality health care services, by implementing quality standards by the healthcare sector, to residents of the Islamabad Capital Territory and for the said purpose, it was expedient to establish the Islamabad Healthcare Regulatory Authority for the aforesaid purpose.[18]

Another legislative work done at federal level was enactment of the ***Medical and Dental Council (Amendment) Act, 2012 (XIX of 2012)***. The Pakistan Medical and Dental Council (PM&DC) was established by virtue of [Pakistan][19] Medical and Dental Council Ordinance, 1962 (XXXII of 1962) so as to consolidate the law relating to the registration of medical practitioners and dentists and to reconstitute the [20] Medical and Dental Council in Pakistan. To safeguard public interest, PM&DC has been given a mission to establish uniform minimum standard of basic & higher qualifications in Medicine & Dentistry throughout Pakistan. PM&DC is a statutory regulatory authority established under Pakistan Medical & Dental Council Ordinance 1962 as a body corporate. It is known and respected worldwide and is part of International Community of Medical Regulatory Authorities (IAMRA). No Pakistani Doctor can practice in

[17] The Act was published in the official GAZETTE OF PAKISTAN, EXTRA on 24th May, 2018.

[18] The Act was published in the official GAZETTE OF PAKISTAN, EXTRA on 24th May, 2018.

[19] Inserted by the Medical and Dental Council (Amendment) Act, 2012 (XIX of 2012).

[20] Subs. By the Federal Laws (Revision and Declaration) Ordinance, 1981 (27 of 1981), s. 3 and Sch, II, for "Medical Council"

Pakistan or abroad without being registered with PM&DC or without being in good standing with it.

Initially, a Medical Council was established under the Indian Medical Council Act, 1933 (Act of 1933). After partition of the Sub-continent, on the recommendation of the Health Conference held at Lahore in November 1947, a Medical Council (later on called as PM&DC) was constituted by adopting Indian Medical Council Act 1933. The Medical Council was re-organized under the Pakistan Medical Council Act, 1951, which provided for a Medical Council for each Province. In 1957, the West Pakistan Medical Council was created by merging the Sindh and Punjab Medical Councils. Thereafter, the Ordinance of 1962, was promulgated on 05.06.1962 to consolidate the law relating to registration of medical practitioners as well as of dentists and to reconstitute the Council in order to establish a uniform minimum standard of basic and higher qualifications in medicine and dentistry. As per Section 3 of the Ordinance, the Council was to be consisted of approximately 18 members to be supervised by Head of the Council.

Similarly, the said Ordinance also provides the mechanism for election of members of the Council, its nomination and terms of the office in sections 4, 5 and 7. The powers and functions of the Council have been defined as the apex body to deal with the affairs of medical profession in all respects. The PMDC was also authorized to make regulations on subject enumerated in Section 33 of the PMDC Ordinance, 1962 and provides recognized medical qualification as well as institutions and the methodology for the regularization of the medical colleges/universities. The Medical & Dental Council (Amendment) Act 1973 also made some changes in the erstwhile Ordinance, 1962 as the Council constituted under section 3 shall be a body corporate by the name of the "Medical and Dental Council".[21] In the year 2012, the PMDC Ordinance, 1962 was amended through PMDC (Amendment) Act, 2012, as notified on 13.08.2012, whereby the structure of the Council was changed by incorporating the concept of recognition of hospital, institutions, house jobs,

[21] Subs. by the Medical Council (Amdt.) Act, 1973 (10 of 1973), a. 2, for "Medical Council".

internships, terms of office, restriction of nomination of members, mode of election, withdrawal of recognition, penalties, commission of inquiry, etc.[22] The said Act, 2012 brought about lot of amendments in Ordinance, 1962, whereby interests of private colleges for their profits were infused into composition of the Pakistan Medical & Dental Council. These amendments created conflict of interest amongst different segments of regulators and medical professionals, which could not escape the attention of Standing Committee of National Assembly on National Health Services, Regulations & Co-ordination as well as the Hon'ble Chief Justice of Pakistan. When the matter came before the august Supreme Court of Pakistan in three (3) different appeals [23] filed against the decisions of Hon'ble Lahore High Court and Islamabad High Court, the Supreme Court dissolved the PMDC and constituted an Adhoc Council comprising of Justice (Retd) Mian Shakirullah Jaan (Chairman), the Attorney General for Pakistan (Member) or in case of his non-availability, his nominee/representative; Federal Secretary Health, Islamabad (Member); Surgeon General of Pakistan Armed Forces (Member); and Vice Chancellors of Public Sector Universities from each province to run the affairs of PMDC.

On 12.02.2013, ***Medical and Dental Council (Amendment) Ordinance, 2013 (Ordinance No. II of 2013)*** was promulgated whereby the section 36-B was substituted with a new one, which provided that the Council constituted under section 3 of the Ordinance, 1962 would stand dissolved upon the commencement of the Act of 2012, however, the President, Vice-President and Executive Committee of the Council existing before the Act of 2012, would stay intact, and the President and Vice-President would act as members of the said Committee. On 19.03.2014, another amendment was made through PMDC Ordinance (Amendment), 2014 incorporating transitory provision of Section 36-B and also to regulate free and fair election of the Council and to deal with procedure of irregularity of the Management Committee and as such, the role of the Federal Government was

[22] http://www.pmdc.org.pk/AboutUs/tabid/72/Default.aspx.

[23] Pakistan Medical And Dental Council Through President And 3 Others Versus Muhammad Fahad Malik And 10 Others (2018 SCMR 1956)

also highlighted. The Ordinance of 2014 stood repealed in terms of Article 89(2)(a)(ii) of the Constitution as the same was disapproved by the Senate of Pakistan through a Resolution dated 23.04.2014.

On 28 August 2015, by virtue of the ***Pakistan Medical and Dental Council (Amendment) Ordinance, 2015 (Ordinance No. XI of 2015)***, PMDC was again dissolved and structural changes in its constitution and composition were made. Pursuant to the Ordinance of 2015, a fresh Managing Committee was constituted, elections were held and a new Council was elected. The Ordinance of 2015 was not enacted as an Act of Parliament; however, after the expiry of 120 days, it was extended for a period of another 120 days by the National Assembly on 26.12.2015, thereafter the same lapsed on 24.04.2016.[24] So, all the Ordinances of 2013, 2014 and 2015 have lapsed/ expired/repealed and the fate of said Ordinances was settled by the apex Court through case titled as PMDC vs. Muhammad Fahad Malik.[25] For an efficient statutory regulatory and registration authority for medical & dental education and practitioners, the President of Pakistan promulgated Pakistan Medical & Dental Council Ordinance, 2019 on 5th January, 2019.[26] Although the proposed Ordinance has been developed with the inputs of current ad-hoc 'PMDC' council established through the order of Supreme Court of Pakistan and renowned professionals in the field and the matter was placed before the Senate by considering the same as bill, but the same was disapproved on 28.09.2019 after due deliberation, which resulted into promulgation of a new Ordinance on 20.10.2019 i.e. the Pakistan Medical Commission Ordinance, 2019.

The President of Pakistan in exercise of powers under Article 89 (1) of the Constitution, 1973, promulgated "Pakistan Medical Commission Ordinance, 2019" (Ordinance No. XV of 2019) on 20.10.2019,[27] which established the Pakistan Medical

[24] http://www.pmdc.org.pk/OtherPMDCRulesandRegulations/tabid/292/Default.aspx.

[25] 2018 SCMR 1956.

[26] The said Ordinance was published in the Gazette of Pakistan Extraordinary Part-l on 9th January, 2019.

[27] It was published in the Gazette of Pakistan, Extraordinary, Part-1, dated the 21st October, 2019.

Commission (PMC) u/s 03 of the Act to provide for the regulation and control of the medical profession and to establish a uniform minimum standard of basic and higher medical education and training and recognition of qualifications in medicine and dentistry. The "PMC" was the successor of 'PM&DC', and the reconstituted PM&DC worked under the auspices of "PMC".[28] The employees of erstwhile/defunct 'PM&DC' filed writ petitions U/A 199 of the Constitution and challenged the Presidential Ordinance before Islamabad High Court by invoking Articles 8, 9 and 14 read with Articles 2-A, 3, 4, 24, 25 and 37 of the Constitution and the Court restored the PM&DC by declaring the dissolution of the Pakistan Medical and Dental Council (PMDC) as well as the establishment of the Pakistan Medical Commission (PMC) by a Presidential Ordinance as 'illegal, null and void'.[29]

The Federal Government through its Secretary Ministry of National Health Services, Regulations & Coordination, Government of Pakistan, Islamabad, challenged the order dated 07.04.2020 passed by the Islamabad High Court, Islamabad in Criminal Original No.70-W/2020 in Writ Petition No.3800 of 2019 by filing Criminal Misc. Application No.459 of 2020 in Criminal Petition No.350 Of 2020 before the august Supreme Court of Pakistan, which disposed of the application by reconstituting the PM&DC in the following manner;

1. Mr. Justice Ejaz Afzal Khan, (former Judge of the Supreme Court of Pakistan) President.
2. The Attorney General for Pakistan or his nominee (Member).
3. Federal Secretary Health, Islamabad. (Member)
4. Surgeon General of Pakistan Armed Forces (Member).
5. Vice Chancellor, The National University of Medical Sciences (Member).

[28] PMC Ordinance, 2019 has also been laid down before the Parliament as a bill.

[29] Total six writ petitions were filed i.e, (I) Writ Petition No. 3800/2019 titled Saira Rubab Nasir, etc. Vs. President of Pakistan, etc. **(II)** Writ Petition No.3777/2019 titled Brig. (R) Dr. Hafeez-ud-Din Ahmad Siddiqui etc. V. FOP, etc. **(III)** Writ Petition No.3825/2019 titled Dr. Sitara Hassan, etc. vs. President of Pakistan, etc. (IV) Writ Petition No.3837/2019 titled Raja Aftab Ashraf, etc. v. President of Pakistan, etc. (V) Writ Petition No.3901/2019 titled Dr. Saleem Khattak v. PMDC, Islamabad, etc. and (VI) Writ Petition No.3905/2019, Dr. Javaid Akhtar v. Federation of Pakistan, etc.)

6. Vice Chancellor, University of Health Sciences, Lahore (Member).
7. Crl.M.A.459/20 etc 7
8. Vice Chancellor, Jinnah Sindh Medical University, Karachi (Member).
9. Vice Chancellor, Khyber Medical University, Peshawar (Member).
10. Vice Chancellor Bolan University of Medical and Health Sciences, Quetta (Member).
11. Vice Chancellor, Shaheed Zulfiqar Ali Bhutto Medical University, Islamabad (Member).
12. Principal De'Montmorency College of Dentistry, Lahore (Member).

Hence, both the Ordinances i.e PMDC Ordinance 2019, and PMC Ordinance are no more in field and the reconstituted PM&DC will work under the PMDC Ordinance, 1962 amended through the PMDC (Amendment) Act 2012.

The Medical Tribunal Ordinance, 2019 (ORDINANCE NO.XIV OF 2019) was promulgated by the President of Pakistan on 19.10.2019 for the constitution of a Medical Tribunal[30] to efficiently and expeditiously hear and decide disputes arising out of matters pertaining to the medical and health sectors. The main purpose of the Medical Tribunal is to efficiently and expeditiously hear and decide disputes arising out of matter pertaining to the actions of authorities formed to regulate different areas of the medical sector in Pakistan and to provide cost effective adjudication of such disputes. As the actions, orders and decisions taken by the PMC pursuant to promulgation of the PMC Ordinance, 2019 were declared unlawful, which were not allowed to proceed further in any manner, therefore, this Ordinance met the same fate as that of the PMC Ordinance. Unfortunately, the medical tribunals were not constituted in the wake of litigation pending before the Higher & Superior courts of the country.

4. Conclusion

After Constitutional amendment, the role of Federation in health sector was undermined due to the abolition of Ministry of

[30] The Ordinance was published in the Gazette of Pakistan, Extraordinary, Part-I, on the 21st October 2019.

Health. The federal Government soon realized the space created in health sector in the aftermath of 18th amendment and on 1st April, 2012, it re-established the Ministry of Health in the form of Ministry of National Health Services, Regulations & Co-ordination taking upon the functions of enforcement of drug laws, regulations and medicine in Pakistan. Constitutionally, the Health sector is a provincial subject and the role of Ministry of Health is to formulate national policies and strategies for the entire population of country. The CLL has been omitted after 18th constitutional amendment and some of the important subjects were either deleted or shifted to the FLL. After the re-establishment of ministry of health, the Federal Drug Regulatory Authority was established through the enactment of Drug Regulatory Authority Act, 2012. The Federal Government gradually assumed jurisdiction over health sector by promulgating different acts and ordinances. The enactment of PMDC (amendment) Act, 2012, the Pakistan Health Research Council (PHRC) Act, 2016, The National University of Medical Sciences (NUMS) Act, 2015, Health Services Academy (restructuring) Act, 2018, The Islamabad Health Regulation, Act 2018 etc. reinvigorated the role of Federal Government in the health sector. The Federal Government also assumed control of Sheikh Zayed Medical Complex, Lahore, Jinnah Post Graduate Medical Centre Karachi ("JPMC"), National Institute of Cardiovascular Diseases, Karachi ("NICVD), National Institute of Child Health, Karachi ("NICH") and National Museum of Pakistan Karachi ("NMP") in the wake of judgment of Supreme Court in case titled GOVERNMENT OF SINDH through Secretary Health Department and others Versus Dr. NADEEM RIZVI and others[31] whereby the transfer and devolution of medical institution supra was declared unconstitutional and of no legal effect. Hence, gradually, the role of federation in health sector is increasing.

[31] 2020 SCMR 1

Role of Parliament inIslamization of Laws in Pakistan

Syeda Farah Yasin*

Abstract

The adoption of Objectives Resolution was the beginning of the role of parliament in Islamization of laws. It was a milestone which identified key the principles that were to be notified in the future constitution of the country. The later constitutions also paved the way for Islamization. The constitution of 1973 was a major step toward Islamization of laws; however, the process significantly accelerated after 1979. The development in the laws of country did not stop here besides the Parliament comprising of President, Senate and National Assembly passed different Acts and Ordinances to make the laws of country more inclined towards Islam. The laws were not passed very easily and during this process, parliament had to face difficulties such as criticism from ulema or public protests. Sometimes the laws lacked whole hearted support of the members of legislature and the law was passed just for political reasons. Sometimes the issue was solved by campaign on media while sometimes the issue was discussed for many years in order to bring change. The paper aims to review and analyze the difficulties in the process of Islamization of laws in Pakistan and the role of parliament to carry out this process more swiftly. A detailed account of the Islamic principles mentioned in three constitutions, amendments and bills passed by the parliament will be given. I will analyze Hudood ordinance and the amendments in these laws. The paper concludes by describing the limitations in the process of Islamization and by suggesting ways to overcome these restrictions. It can be inferred that for practical application of Islamic laws in the country, it is required that the legislature, judiciary and executive collaborate with each other The present study will be an attempt to scrutinize the role of parliament in process of Islamization of laws and identify the hurdles in the way of Islamization along with suggestions for practical application of the laws.

1. Introduction

Pakistan became an autonomous state under the headship of Quaid-e-Azam Muhammad Ali Jinnah on 14th August 1947. The creation of Pakistan was based on many political, societal, fiscal

* the author is LLM, Family Law Scholar in the Faculty of Shariah and Law, International Islamic University, Islamabad and can be accessed at: asifarah5@gmail.com

and cultural motives but the basic notion behind creation of Pakistan was the separate identity of Muslims, i.e. Islam being the main purpose behind the movement.[1]The famous slogan raised during independence movement was *"Pakistan kaMatlabkia: La' ilaha 'illallah"*. This affirms that Islam was a very important key element in the creation of Pakistan so it was engraved in the minds of people that the future country would be an Islamic state where they will be able to lead their lives according to Islam. In order to fulfill this desire of the people, it was necessary to make laws according to Holy Qur'an and *Sunnah*. The law making powers mainly vested with the Parliament. This research paper aims to analyze the role of parliament in order to Islamize the laws of country along with a detailed analysis of Hudood laws which have always been subject to criticism by different segments of Pakistani society. The paper is comprised of three parts, first part deals with the participation of parliament in law making especially the role in Islamizing these laws while the second part analyzes Hudood laws and their amendments. Last part of the paper comprises of ways to accelerate the process of Islamization of laws in the country.

2. History of Islamization of Law by Parliament

This part of the paper deals with law making process in Pakistan since its inception and the role played by the parliament to Islamize these laws and to bring them in conformity with the teachings of Holy Qur'an and *Sunnah* and to make the country an Islamic country in the real sense. It begins with the independence and the steps taken by first constituent Assembly to pass the Objectives Resolution. The Islamic provisions of constitutions of 1956, 1962 and 1973 are discussed along with all other laws and ordinances passed by Parliament.

2.1 Independence of Pakistan

Indian Independence Act, 1947 declared the creation of two independent dominions namely, India and Pakistan from 15th of

[1]Dr. Fakhr-ul-Islam and Muhammad Iqbal. "Islamizing the Constitution of Pakistan: The Role of MaulanaMaududi," *Al-Idah*27 (Dec 2013): 58.

August 1947.[2]Since the transfer of power took place on 14th August, 1947 so it was declared in the later years as Independence Day of Pakistan by the Government.[3]According to the Act, the dominion legislatures were comprised of the members of existing Constituent Assemblies, established as a result of 1946 elections,[4]exercising all powers of legislature including law-making. The Act also declared that dominions shall be governed by Government of India Act, 1935 till the making of a new constitution.[5] First session of the Constituent Assembly was held on 10th August in Karachi and on 11thAugust, Quaid-e-Azam Muhammad Ali Jinnah was elected as President of the country.[6] After the transfer of power on 14th August, Quaid-e-Azam took oath as first Governor General of Pakistan on 15th of August.[7]

2.2. Objectives Resolution: An Important Milestone

The most important task before the Constituent Assembly was the framing of a new constitution. All the members worked hard and participated in debates during the period till 1949 when Objectives Resolution was passed by the Assembly. The presentation of Objectives Resolution by Prime Minister Nawabzada Liaqat Ali Khan on 7th March, 1949 opened a heated session of debates following criticism and strong opposition by the Hindu members on Islamic provisions.[8]Different amendments were proposed by non-Muslim members but were rejected by the

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[2] Indian Independence Act, 1947, http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdfAccessed January 4, 2019.

[3]Dr. RiazAhmed, "Pakistan's First Constituent Assembly's Efforts for the Making of Constitution 1947-1954", *Pakistan Journal of History & Culture*, 23, no.1 (2002): 1.

[4]MahboobHussain, "Institution of Parliament in Pakistan: Evolution and Building Process (1947-1970)", *Journal of Political Studies*, 18, no.2 (2011): 78.

[5] Parliamentary History, NATIONAL ASSEMBLY OF PAKISTAN, http://www.na.gov.pk/en/content.php?id=75Accessed January 5, 2019.

[6] Ibid.

[7] Ibid.

[8]Riaz Ahmad, Pakistan's first constituent, 2. Also see Constituent Assembly of Pakistan, Debates, Official Report. Vol. V, 5th Session (March 7- 12, 1949), 7.http://www.na.gov.pk/uploads/documents/1434604126_750.pdfAccessed January 5, 2019.

House.[9] The Objectives resolution was passed on 12th March, 1949which clarified the future Islamic status of the country.[10]

The adoption of Objectives Resolution by the first Constituent Assembly of Pakistan was the beginning of the role of parliament in Islamization of laws of the country. It was a milestone in the process of Islamization of laws which identified key principles that were to be notified in the future constitution of the country. The Objectives Resolution acknowledgedthat God Almighty is the only sovereign and the authority given to state through its people is a sacred trust which is to be exercised within limits prescribed by God.[11]The constituent Assembly shall frame constitution according to which the observance of principles of democracy, freedom, equality, tolerance and social justice shall be according to Islam[12]and favorable conditions shall be provided so that Muslims shall be able to live their lives according to teachings of Islam.[13]

The adoption of Objectives Resolution was the first step towards Islamization as it was made the preamble of the future constitutions of Pakistan and later made part of constitution of 1973 by eighth amendment. It elucidated that laws shall be made according to Islamic principles of democracy and justice and not on European model.[14]The passing of Objectives Resolution was triumph of religious segments in the country which were in conflict with the modernists since inception of Pakistan.

2.3. Constitution of 1956

After the passing of Objectives Resolution, the parliament took nine years to frame the constitution of Pakistan. The first step in this regard was the formation of BPC[15]comprising of President

[9]KausarParveen, "The Role of Opposition in Constitution Making: Debate on the Objectives Resolution" *Pakistan Visio*, 11, no. 1, 147.

[10] Constituent Assembly of Pakistan, Debates, 102.

[11]Ibid. 2-3.

[12] Ibid. 3-4.

[13]Ibid. 4.

[14]Dr. Hafiz Muhammad Siddique, "Islamization of Laws in Islamic Republic of Pakistan: An Analysis", *AFKAR (Research Journal of Islamic Studies)* 1, no.1, (Jan-June 2017): 14.

[15] Basic Principles committee

and other 24 members of whom some were members of Constituent Assembly.[16]Different sub-committees including a board of learned Muslim scholars were also established to direct the committee on any issue on which guidance was asked. The work was very slow and the committee presented its report after one and a half year but was postponed by the Assembly.[17]It recommended objectives resolution to be made part of the future constitution and also to make the policies of state following the principles mentioned in the objectives resolution.[18] That was the only Islamic recommendation by the committee. Accompanied by the reaction of other segments of society, ulema also criticized the report and declared it void of any proper recommendation for Islamizing the laws. The report was again presented in 1952 mentioning that the President should be Muslim and laws to be made according to Islam. This report was rejected based on many objections. In the meantime, the cabinet of Khawaja Nazimuddin was dismissed and new Prime Minister presented report which was approved after objections and amendments. Approval of the report accelerated the constitution making process but when the draft of the new constitution was ready to be presented, the constituent Assembly was dismissed in 1954 which proved a great set back in the law making process and also doomed the agreed upon formula for safeguarding the Islamic laws of the country.[19]After elections in 1955, new constituent Assembly continued the task of constitution making and in 1956, new constitution of Pakistan was promulgated.[20]

According to the constitution, Pakistan was declared "Islamic Republic".[21] Objectives resolution was included as preamble of the constitution which declared that sovereignty belongs to Allah

[16] National Assembly Debates, 101.http://www.na.gov.pk/uploads/documents/1434604343_885.pdfAccessed January 2, 2019.

[17]Constituent Assembly Debates, 3.

[18]Ibid. 13.

[19] Parliamentary History, NATIONAL ASSEMBLY OF PAKISTAN, http://www.na.gov.pk/en/content.php?id=75Accessed December 31, 2018. Also see Leonard Binder, *Religion and Politics in Pakistan*, (Berkley and Los Angeles: University of California Press, 1963), 218.

[20]Parliamentary History.

[21] Ibid.

Almighty. President was to be a Muslim according to Article 32 of the constitution but no provisions were made to declare Islam the state religion. The constitution provided that No law was to be passed against Holy Qur'an and *Sunnah* of the Holy Prophet and steps shall be taken to enable the Muslims to lead their lives according to Islam.[22]Article 197 of the constitution required the President to form an organization of Islamic Research and Instructions.[23]

The constitution of 1956 and its Islamic provisions were a good step towards Islamization though not perfect but could have proved to be successful if the constitution would not have been annulled. The constitution was never actually implemented and the selfishness and insincerity of parliamentarians towards law making paved way for the failure of constitution so as a result Martial law was imposed in the country and constitution was abrogated in 1958 by Sikandar Mirza.[24]

2.4. The Constitution of 1962

After three weeks, Sikandar Mirza was deposed by Ayub Khan and declared himself President of the country. He appointed commission for the purpose of making new constitution for the country which presented its report in 1961. After lots of amendments, the final draft was approved and constitution of 1962 was promulgated in the country.[25]In the meantime, MFLO[26], 1961 was issued by the President which proved an important step

[22] Mumtaz Ahmed, "The Muslim Family Laws Ordinance of Pakistan", *International Journal on World Peace*, 10, no. 3, (September, 1993): 38-39.

[23]Dr. Tanzilur Rahman, "Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973 What More is Required?",*The Qur'anic Horizons*, 2, no. 3, (July-September, 1997): 7.

[24]Yasmeen YousifPardesi, "An Analysis of the Constitutional Crisis in Pakistan (1958-1969)", *The Dialogue*, 7, no. 4, 378.

[25]Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2001), 255. Also see Altafullah, "Constitutionalism in Pakistan: A Study of Convergence and Divergence of the Proposals of the Constitution Commission with the Provisions of 1962 Constitution", Pakistan *Journal of History and Culture*, 29, no.2, (2008): 87.

[26] Muslim family law ordinance brought drastic changes in the family laws of the country.

in the islamization and codification of Muslim family laws in the country. MFLO will be discussed after the Islamic provisions of 1962 constitution.

Objectives Resolution was included as preamble to the constitution.[27]The constitution of 1962 did not declare the country as Islamic state. According to Article-10, the President was required to be Muslim. Part-X of the constitution mentioned that Islamic Research Institute and Islamic Advisory Council are to be established to help in the Islamization of laws.Article-8 provided that no law shall be made against Islam. The word Islam was used instead of mentioning Qur'an and *Sunnah*. The Islamic provisions were mentioned in the constitution in a weaker form.[28] Constitution of 1962 vested most of the powers with President so the parliament played a weaker role during Ayub Khan's regime and the only Islamic change brought to the constitution was the restoration of the name of the country to Islamic Republic.[29]

2.5. Muslim Family Law Ordinance, 1961

Muslim Family Law Ordinance was an important step in the islamization of family laws. It is regarded as first statutory reform in family laws after 1947.[30]The ordinance provided laws related to succession, registration of marriage, polygamy, divorce and maintenance. One of the most important provisions was that the husband was required to get consent of first wife before having a second wife. Triple *talaq* was also declared illegal by the ordinance. Maintenance and matters related to inheritance were also reformed to give rights to women. The law was greatly criticized by the religious segments of society although the framers of ordinance had relied heavily on the interpretations of Holy Qur'an and *Sunnah* done by jurists.[31] Many attempts were

[27]Pardesi, An Analysis of the Constitutional Crisis, 384.

[28] M. Rafique Afzal, *Political Parties in Pakistan, 1958-1969*, (Islamabad: National Institute of Historical and Cultural Research, 1998), 53. Also seeAltafullah, Constitutionalism in Pakistan, 93.

[29]Pardesi, An analysis of Constitutional Crisis, 387.

[30] Lucy Carroll, "The Muslim Family Law Ordinance 1961: Provisions and Procedures- A Reference Paper for Current Research", *Contributions to Indian Sociology,* 13, no. 1, (January 1979): 117.

[31] Ahmed, The Muslim Family Laws, 39.

made to repeal the law but not proved fruitful as it had the protection of constitution.[32]

Muslim Family Law Ordinance was a very good example of reforms in the Personal laws of Muslims. It paved way for the parliament to make further changes in the laws of country to facilitate the lives of people in accordance with the teachings of Holy Qur'an and *Sunnah*.

2.6. Constitution of 1973

In 1969, the constitution of 1962 was abrogated and Martial Law was imposed in the country which again interrupted the law making process in the country. After the formation of new government in 1972, the parliament again started the important task of framing a new constitution and at last new constitution was enforced in the country in 1973. This constitution is a very important document in the way of Islamization of laws in the country as it is more Islamic in character than the previous constitutions of 1956 and 1962.[33]

The constitution contained Objectives Resolution as its preamble which was later made an operative part of the constitution and inserted by article 2-A in 1985. Islam was declared as state religion and country to be named as 'Islamic Republic of Pakistan'.[34]Definition of 'Muslim' is also mentioned and any person who does not believe Prophet Muhammad to be last prophet was declared as non-Muslim. The constitution also mentioned availability of opportunities to enable Muslims to lead their lives according to Holy Qur'an and *Sunnah*.[35] Steps shall be taken for prohibition of alcoholic liquor and elimination of *riba*. President is required to be a Muslim according to Article 41(2) of the constitution. Article 62 provides that members of parliament should have knowledge of Islamic teachings and refrains from

[32] Ibid, 44.

[33] Dr. Fazal Rabbi and Dr. Habib Nawaz, "Islamization in the Islamic Republic Pakistan: A Historical Analysis", *Al-Azhar*, 3, no. 2, (July-December 2017), 80.

[34]Rahman, Islamic Provisions, 1-2.

[35] Ibid, 5.

major sins.[36]Part-IX (Article 227-230) of the constitution contained Islamic provisions which stated that all current laws shall be brought in agreement with Holy Qur'an and *Sunnah* and any law which is against Qur'an and *Sunnah* shall be endorsed. This part also stated the rules related to constitution, composition and powers of Council of Islamic Ideology.[37]Preservation of Islamic ideology was made part of oath of office bearers of the federal and provincial governments.

The passing of a constitution having a positive inclination towards Islamization was a great achievement by the parliament in the era of Zulfiqar Ali Bhutto. Despite this, the parliament also passed law and amended the constitution to declare 'Ahmadiyah sect' as non-Muslim minority.[38]In reality, during Bhutto's regime the parliament did not pay much attention to the recommendations of Council of Islamic Ideology and made any law considering these recommendations so the religious segments were not satisfied as they demanded more steps to be taken to Islamize the laws. In order to satisfy the religious segments, the government announced Friday to be an off day, banned dinking and selling of wine by Muslims, nightclubs and horse racing.[39] But these were unsatisfactory measures so the agitation led by PNA[40] got momentum and Bhutto's government was overthrown by General Zia ulHaq who declared Martial Law in the country in 1977 and praised the PNA movement for 'spirit of Islam'.[41]

2.7. Islamization in Zia's Regime (1977-1988)

After one year of the coup de'etat, General Zia declared himself the President and in 1984, he confirmed himself as president by referendum thus empowering him to make laws. From 1977 to 1985, laws were made in the country by presidential ordinances.

[36] Ibid, 6-7.

[37] Ibid, 8-10.

[38]Riaz Hassan, Islamization: An Analysis of Religious, Political and Social Change in Pakistan, Middle Eastern Studies, 21:3, 263-284, 1985, 263.

[39]Rabbi, Islamization in the Islamic Republic, 52.

[40] Pakistan National Alliance comprised of many political parties having great strength of religious parties.

[41]Muhammad Iqbal Chawla et al., "Islamization in Pakistan: An overview", *JRSP*, 52, no. 1, (January-June, 2015): 276-77.

General Zia made eighth amendment in the constitution to validate all the laws previously passed by him.[42]

The process of Islamization of laws accelerated during Zia's regime. In 1979, the government reconstituted the Council of Islamic Ideology to make drafts for Islamic laws in the country. These drafts were not of binding nature but subject to President's discretion. General Zia passed many Islamic laws in the form of presidential orders. These orders passed during Martial law were validated in 1985 by 8th Amendment in the constitution which cannot be challenged in any court of law.[43]Most important of these laws were the amendments made in the criminal laws on the basis of Qur'an and *Sunnah*. A detailed account of the steps taken by General Zia to Islamize the laws is stated below:

Shariah Benches—.Benches of Shariah courts were established in the country by a presidential order on 10th February, 1979. These benches were given powers to declare any law unconstitutional if it was against Islam. Appeals against the decisions of lower and high courts can be brought before Shariah benches.[44]

Federal Shariat Court—.The Sharia benches were disbanded and Federal Shariat Court was established in the country in 1980 by presidential order. Its jurisdiction extended to the whole of country. By this order any citizen, provincial government or federal government was allowed to file a petition, application or request to the High Courts to declare any law or act of Government as null and void which was not in conformity with the Islamic laws.[45]

Islamization of Economic System—.Islam does not allow *riba* or interest so there was a need to bring change in the banking laws of the country. On 1st January, new law was introduced in the

[42]Martin Lau, "Twenty-Five Years of Hudood Ordinances— A Review", *WASH. & LEE L. REV*.64, no.1291 (2007): 1292.

[43] Ibid.

[44]Jamal Shah, "Zia-Ul-Haque and the Proliferation of Religion in Pakistan",*International Journal of Business and Social Science*, 3 no. 21, (November 2012): 314.

[45]Lubna Kanwal, "Zia, Islam and Politics of Legitimacy",*AL-ADWA*, 43, no. 30, 43.

banking system of the country called 'profit and loss sharing system'. According to this new system, loss and profit of the bank was to be shared by the accountholder and the bank was not bound to pay fixed interest to the accountholder. Interest free counters were opened at all 7,000 branches of nationalized commercial banks. By the mid of 1985 all Pakistani banks were switched to this system but the parallel interest bearing schemes were allowed to continue.[46]

Zakat and Ushr Ordinance—.On 20th June 1980, Zakat and *Ushr* Ordinance was promulgated which was applicable only to Islamic organizations, institutions and associations. According to the ordinance, *zakat* was to be deducted from bank accounts of Muslims every year at a rate of 2.5% annually above amount of Rs. 3000.Ushr was imposed at the rate of 10% annually on crops. Complete procedure was prescribed in the ordinance for the collection of both *zakat* and *ushr*[47] this ordinance was criticized by Shia sect which was later exempted by the law.[48]

Hudood Ordinance—.On 10th February1979, Hudood Ordinance (comprised of six laws) was introduced which included Islamic punishments or 'had'. These included fixed punishments prescribed by Holy Qur'an or *Sunnah* for theft, adultery, *qazf* and use of liquor. These laws especially the laws related to *zina* were criticized by different segments of society as most of the time they were used to exploit women as men were set free due to insufficient witness or national or international pressure.[49] The Hudood Ordinance will be discussed in detail in the second part of the paper.

Blasphemy Law, 1986—.Pakistan Penal Code (PPC) and Criminal Procedure Code (CrPC) were amended by ordinances in 1980, 1982 and 1986 to make dishonoring of Holy Prophet or other sacred personalities and sacred places or books a punishable offence. Most important of these amendments is death punishment and fine to the one who dishonors Holy Prophet.

[46]Shah, Zia-ul-Haq, 317.

[47]https://zakat.punjab.gov.pk/system/files/zakatushr1980.pdf, Accessed January 5, 2019.

[48]Shah, Zia-ul-Haq, 317.

[49]Ibid, 315.

Some of these amendments are not agreed upon by all and have been subject to severe criticism but parliament has been unable to bring changes in these laws.[50]

Qanun-e-Shahadat Order—.Law of Evidence, 1872 was replaced Qanun-e-Shahadat Order, 1984. It restated the laws of evidence but some changes were made like minimum gestation period was mentioned as six months and maximum at two years. Most criticized amendment was the law that declared the testimony of two women equal to one man that was later restricted to financial transactions.[51]

Other Islamic Laws—.International Islamic University was established in Islamabad by a presidential ordinance to promote Shariah education. Islamic study was made compulsory at school and college level while prayer break was compulsory. For this purpose Salat Committees were formed to impress upon people to observe prayer. Ramzan Ordinance was promulgated which prohibited eating and drinking at public places during fasting timings and made it punishable with fine. Strict Islamic laws were made for print and electronic media.[52]

Elections were held in the country in 1985 but it had limited powers and the government was dismissed by Zia based on the contention that it failed to play an effective role in islamization of the laws in the country. On 17th August, 1988 General Zia died in a plane crash and new government was formed in the country after general elections.

2.8. Process of Islamization After 1988

In 1988, Benazir Bhutto was elected as prime minister but her tenure did not last long and the government was dismissed in 1990. Then Nawaz Sharif formed government which also did not complete its tenure and was dismissed in 1993 and new government of Benazir was formed till its dismissal in 1996 after which Nawaz Sharif again became the prime minister till a coup d'état in 1999 by Pervez Musharraf. The period during 1988-1999

[50]Ibid.
[51]Ibid.
[52] Ibid. 315-17.

can be termed as an era of weak governments who did a little contribution to islamization process of the laws.[53]

Qisas and Diyat Ordinance—.In September 1990, Qisas and Diyat Ordinance was promulgated by President Ghulam Ishaq Khan which amended the punishments of bodily hurt and murder mentioned in PPC and CrPC. These punishments were declared as repugnant to Qur'an and *Sunnah* by Shariat bench of Supreme Court on 5th July 1989 and asked the government to change these laws till March 1990 on which the government filed a review petition. In the meantime, the government was dismissed and changes were made by a presidential order in 1990.By the order, law of *qisas* (equal punishment) and *diyat* (payment of money in case of compensation) was promulgated according to Holy Qur'an and Sunnah.[54]

Shariah Act, 1991—.On 5th June 1991, an Act was passed for the enforcement of Shari'ah called Shariah Act, 1991 which states that the Supreme law of Pakistan are Holy Qur'an and Sunnah (Shari'ah) and all laws shall be made in the light of Shari'ah. The state shall make effective arrangements for teachings of Islam and Muslim citizens will be bound to follow Shari'ah. Education, economy and mass media shall be Islamized by making laws. rights of women provided by the constitution will not be effected by this Act. This Act was made by the parliament to Islamize different laws of the country.[55]

Criminal Law Amendment Act, 1997—.On 10th April 1997, amendments were made in Offence of Zina (Enforcemnet of Hudood) Ordinance, 1979 by an Act of parliament. Section 53 of PPC was substituted by a list of ten punishments starting in order from Qisas and ending at punishment. It also stated certain changes to be made in the text of the previous law and further

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[5353] Jamal Shah, "Zia-Ul-Haque and the Proliferation of Religion in Pakistan", *International Journal of Business and Social Science*, 3 no. 21, (November 2012): 314.

[53]LubnaKanwal, "Zia, Islam and Politics of Legitimacy", *AL-ADWA*, 43, no. 30, 43.

[54]Ibid.

[55]Acts of Parliament, http://www.na.gov.pk/uploads/documents/1335242059_665.pdf Accessed January 5, 2019.

stated definitions of Islamic terminologies and stated in detail the meanings and punishments for each and every type of crime according to Islamic law.[56] On 21st April, 1997 another amendment was made in the Zina Ordinance which stated that when zina-bil-jabr liable to tazir is committed by more than one with common intention, all of them shall be punishable with death.[57]

2.9. Islamization during Military Era (1999-2008)

Nawaz Sharif's government was dismissed by Army Chief General Pervez Musharraf in October, 1999 but Emergency was proclaimed instead of Martial law.[58] Elections were held in the country in 2002 and new government was formed.[59] The most important achievement during this era was **the *Protection of Women (Criminal Law Amendment) Act, 2006***passed by the Assembly which tried to amend the Zina Ordinance.The Act amended two out of five hudood laws which will be discussed in the second part of the paper.

2.10. Islamization After 2008

After 2008, there is political stability in the country and the governments have completed their tenure despite the change of prime minister, Assemblies were not dissolved based on 'charter of democracy' followed by the two most popular parties of the country. They cooperated with each other so the democratic process is running smoothly since 2008.[60]

During the said period, ***Criminal Law (Amendment) (Offences Relating to Rape) Act, 20l6***was passed by the Assembly. The Act

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[56] Acts of Parliament,http://www.na.gov.pk/uploads/documents/1324604341_299.pdfAccessed January 3, 2019.

[57]Acts of Parliament, http://www.na.gov.pk/uploads/documents/1324604707_864.pdf Accessed January 3, 2019.

[58]ZahidMahmoud, "Political Turmoil and Military Era of General Musharraf (1988-2007)", *JPUHS*, 28, no.2, (July - December, 2015): 247.

[59] Ibid. 249.

[60]Muhammad Iqbal Chawla, "Era of Reconciliation in Pakistan, 2006-2017: A Critical Appraisal", *Journal of the Research Society of Pakistan,* 54, no. 2 (July - December 2017): 239-40.

contains amendments in Pakistan penal code, criminal procedure code and Qanun-e-Shahadat in relation to rape offence.[61]

The role of parliament in the Islamization of laws has been at variations since creation of Pakistan. The process of Islamization was at its peak during regime of General Zia but at some places laws were not made with full devotion so lacunas remained in the laws and positive result was not obtained by the laws. The selfishness of political leaders, imposition of Martial laws and non-cooperation of different organs of the state were most important factors due to which we are still unable to give status of a truly Islamic state to the country after seventy years of independence.

3. Hudood Ordinance, 1979

General Zia's regime was the era when the process of islamization accelerated in the country. One the most important step towards islamization of laws in the country was enforcement of Hudood Ordinance. The Ordinance was levied by the President on 10th February, 1979 to bring criminal laws of Pakistan in accordance with Islamic teachings. Different parts of Pakistan Penal Code were amended and new offences were added by the ordinance. Hudood Ordinance comprised of four types of orders which included offences related to property, adultery, *qazf* and use of liquor.[62]The punishments prescribed under these four mentioned orders were amputation of hands for theft, stoning to death for adultery and lashes and strips for different crimes. The ordinance provided liability to two types of punishments: *hadd* and *tazir*. First the punishment of *Hadd* is mentioned and in cases where *hadd*is not applicable punishment of *tazir* is stated.[63] The Hudood Ordinance included:

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[61] Acts of Parliament,http://www.na.gov.pk/uploads/documents/1481353702_249.pdf Accessed January 5, 2019.

[62]AsifaQuraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from Women-Sensitive Perspective", *Michigan Journal of International Law*, 18, 287- 288.

[63]Asma Jahangir and Hina Jilani,*TheHudood Ordinances: A Divine Sanction?*(Sang-e-Meel Publications, Lahore, Pakistan, 2003):23-24.

- Offences against Property(Enforcement of Hudood) Ordinance
- Prohibition Ordinance
- Offence of Qazf Ordinance
- Offence of Zina Ordinance

All these hudood laws were criticized but Zina Ordinance was subject to special severe criticism. Most important criticism was that the Zina Ordinance made no distinction between adultery and rape so the rape victims were treated as offenders and were punished due to lacunas in the procedure of the law.[64] It inflicted great injustice to Pakistani women and was also criticized at international level. It was due to the pressure on international level that punishment of stoning was not practically applied.[65] Many women suffered due to the law. Even ex-husbands accused their wives of having committed adultery in case of second marriage as she had no proof of divorce.

Amendments in Hudood Laws

In 1996, the Whipping order was changed by Abolition of Whipping Act, 1996 and was allowed to be applied only when *hadd* punishment is to be imposed. Hudood laws were greatly criticized by different women organizations but no government took steps to change the law. The government of Pervez Musharraf took steps to change the law and the Assembly passed Protection of Women (Criminal Law Amendment) Act in 2006. The Act has omitted zina-bil-jabr from the ordinance and new offences of rape and punishment for rape have been added under PPC. Many offences of Zina Ordinance were returned to the ambit of Pakistan Penal Code. Adultery is the only offence which is now dealt by Zina Ordinance.

[64]Shahzadi Zamurrud Awan, Impact of Zia-ul-Haq's Gender Policies on Pakistani Society, *Pakistan Journal of History and Culture,* 37, no.1, (2016): 24.

[65]Shah, Zia-ul-Haq, 315.

4. Conclusion and Recommendations

- Pakistan is a state based on two nation theory thus providing a separate identity to Muslims so it is the need of hour to work together to safeguard this identity and to make such laws in the country that would help in safeguarding the Islamic identity.
- The non-seriousness and selfishness on the part of politicians in Pakistan delayed the process of constitution making and also the islamization of laws in the country. If the politicians would have been sincere it would not have been difficult to make a truly Islamic constitution for the country shortly after its inception.
- Since independence, there are two groups in the country, modernists and Islamists who are totally opposed to each other in their attitude towards Islam so in order to accelerate the Islamization process in country both groups are required to sit and find a better solution for Islamizing the laws.
- There were many incidents in the constitutional history of Pakistan when the organs of state did not cooperate with each other. It is required that all the three organs of state: legislature, executive and judiciary join hands with each other to make Pakistan an Islamic country with such laws that enable its citizens to live their lives in a truly Islamic atmosphere.
- If we take a look at *Allah Rakha case*[66] we can infer that there is lack of knowledge on the part of judges so judges should be well equipped with Islamic knowledge before passing any judgment related to Islamic law. Knowledge of Islam is also a necessity for the members of legislature also so that they can make better laws according to correct interpretations of Holy Qur'an and *Sunnah*.
- In conclusion, it should be said that the steps taken by the parliament were done half-heartedly so there is a need to make the country an ideal Islamic welfare state according to the sayings of Quaid-e-Azam Muhammad Ali Jinnah. He wanted Pakistan to be a welfare state based on Islamic

[66]PLD 1981 FSC 145.

rules so the legislature should be comprised of sincere and devoted people who can work whole heartedly to Islamize the laws of country in such a way that it can be called as a country whose laws are based on Islamic laws in such a way to make it a modern Islamic state.

The significance of theories of adjudication for Islamization of Laws

Samia Maqbool Niazi*

Abstract

Islamic law is contained in the Qur'ān *and the* Sunnah. *The legal content of these two sources has been derived by the various schools of law and is recorded in their authentic manuals. The law in these sources is converted into statutes written in English, which may then be translated into Urdu, but the official version remains in English. To interpret these texts and to deal with occasional "hard cases" there is a need for trained judges and lawyers who will finally apply these laws. Realizing this need, a number of educational institutions were set up. The first of these is the Faculty of* Shari'ah *and Law within the International Islamic University. Another institution, also within this University; the* Shari'ah *Academy*[1]*, deals with the specific needs of judges and lawyers. The idea underlying these institutions, along with other courses all over the country, is that the country should have a trained manpower with the ability to settle disputes in the light of Islamic law. In short, true Islamization can take place only when the laws are applied and enforced through judicial decisions; merely changing the laws here and there is not likely to have the proper impact. Instead of referring to principles of the English common law, which the judges at present apply in order to interpret the statutes, the judges will gradually have to apply the Islamic principles. The major reason that has prevented judges from applying the Islamic principles so far is lack of knowledge about how adjudication takes place within the Islamic system. As the judges are trained in the English common Law, as applied in Pakistan, they exhibit a certain hesitation in applying the Islamic principles. This is not due to some legal restriction, but is primarily due to a lack of knowledge about the Islamic methodology. The lack of such knowledge is seen in the superficial*

* Assitant Professor Law Department of law, Faculty of Shariah and Law, International Islamic Islamabad and can be accessed at: juvisf194@hotmail.com.

[1] The Shariah Academy provides training in Islamic Law to judges, police officers and lawyers. It is a constituent of the International Islamic University, Islamabad. It was originally established as the Institute of Training in Shariah and Legal Profession on 17th October, 1981, following the promulgation of the Islamic University Ordinance of 01 Muharram 1401 A.H. i.e. l0th November, 1980, and was later elevated as an Academy after the conferment of international status upon the Islamic University in 1985. For details see the *Nifāz-e-Shari'at* issue of FIKR-O-NAẒAR published by the Islamic Research Institute, IIUI, Islamabad.

manner in which some Islamic principles are discussed in judgments when the judges do choose to refer to Islamic law. Consequently, there is a dire need to show that essentially the two types of methodology, Islamic and Western, are quite similar. It is only the legal materials employed in the legal system that creates a difference. This study is intended to fill this knowledge gap about the methodology and techniques employed, especially the techniques pertaining to the use of analogy, values and the resolution of conflict in principles.

Key Words: Adjudication, Hard cases, Islamization, Shari'ah, Jurisprudence

2. Thesis of the Paper:

The main task of this paper is to show that theories of adjudication have assumed great significance in Pakistan after the general consensus that most of the codified laws of the country have been Islamized through efforts of the Council of Islamic Ideology and the Federal Shariat Court, and the remaining laws have not been found repugnant to the Qur'an and the Sunnah, therefore, the burden of further Islamization has shifted to adjudication by the judiciary. The first task this paper must address is to identify the methods of Islamization that have been used in Pakistan and those that should be used. This is to be followed by an elaboration of the result of the efforts of the Council of Islamic Ideology and of the Federal Shariat Court. The third task is to show how Islamization will be undertaken through adjudication in the courts. It will also be examined whether adjudication is carried out by the judiciary alone or other players are also involved. Finally, it will be indicated how Islamization should be undertaken through this method in a planned manner.

3. An Overview of the Constitutional and Political History of Pakistan

The constitutional history of Pakistan and the creation of the country in 1947 have a detailed history that is well known.[2] Our purpose is not to go into these details. India was given its first comprehensive constitution in the form of the Government of

[2] This history is recorded in many documents and has been discussed and analyzed by writers in many ways. For a comprehensive study see Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, 2001).

India Act, 1935. It created a federal structure and provided for an elaborate system of legislatures and courts. It was a complete written constituion.[3] The demand for the creation of Pakistan was finally expressed in the form of the Pakistan (Lahore) Resolution, 1940 (March 23) passed by the All India Muslim League. The Resolution stated that:

> "No Constitutional Plan would be workable in this country or acceptable to Muslims, unless it is designed on the following basic principle, namely, the geographically contiguous units are demarcated into regions which should be so constituted, with such territorial adjustments as may be necessary, that the areas in which Muslims are in a majority as in the North Western and Eastern Zones of India, should be grouped to constitute "independent states," in which the constituent units shall be autonomous and sovereign."[4]

What followed is history and Pakistan was created in 1947 through the Independence Act, 1947. The Act also created fully sovereign legislatures for the two countries, Pakistan and India, and these constituent assemblies were granted full power to create constitutions for their respective countries. The Act also provided that during the interim period, until constitutions were created, the two countries would continue to be governed by adapting the Government of India Act, 1935. The Pakistan (Provisional Constitution) Order, 1947 established the Federation of Pakistan.

The first step towards framing the constitution was taken by the Constituent Assembly in March 1949. It passed the "Aims and Objects of the Constitution" resolution, which is popularly known as the "Objectives Resolution." One of the statements in the Resolution stated: "Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the *Sunnah.*"[5] The first draft Constitution, prepared by the Basic Principles Committee, was presented to the

[3] The Act was a comprehensive statute running into 321 sections and two schedules.

[4] See the Pakistan (Lahore) Resolution,1940.

[5] See *Objectives Resolution*, which is now part of the present Constitution.

country in 1950. Among other things, it proposed that the Objectives Resolution be made part of the Constitution. A host of controversies ensued including the question of provincial autonomy, Bengal as one unit instead of several provinces, national language issue, fundamental rights and securing the rights of minorities.[6] The draft was sent back to the Assembly for reconsideration. The second draft was presented in 1952. This was followed by the problem of the Ahmadi sect.

Pakistan was plunged into a constitutional crisis in 1954 when the Governor General (Ghulam Muhammad) dissolved the Constituent Assembly as he did not agree to the proposed constitution. This first major subversion of the constitutional process was challenged before the Federal Court, which validated the dissolution of the assembly in the Maulvi Tamizuddin case (1955).[7] After further legal battles and wrangles that shook the administrative structure down to its foundations, the second constituent assembly adopted the first Constitution in 1956 (29th February). Twenty-three days later, Pakistan was declared an "Islamic Republic." The Constitution became effective on March 23, 1956 proclaiming Pakistan as an Islamic Republic. The Constitution contained 234 articles divided into 13 parts. It had 13 schedules. The Constitution dealt at length with the Islamic character of the state in its provisions.

The Constitution lasted only two years until the first President of Pakistan, Major-General Iskander Mirza, abrogated the Constitution, dissolved the national and provincial legislatures and imposed Martial Law, appointing General Ayub Khan as the Chief Martial Law Administrator. In the Dosso case (1958),[8] the Supreme Court of Pakistan validated once again the extra-constitutional actions of the executive and enunciated the doctrine of "revolutionary legality," relying for its decision in part on Hans Kelsen's statements. After passing a new Constitution in 1962 that empowered an autocratic executive, General Ayub Khan ruled until 1969. He was forced to hand over the reins of power to

[6] During this period Liaquat Ali Khan, the Prime Minister was assassinated (1951).

[7] *Federation of Pakistan v. Maulvi Tamizuddin Khan*, PLD 1955 F.C. 240.

[8] *The State v. Dosso*, PLD 1958 S.C. 533.

General Yahya Khan after widespread student protests led by Zulfiqar Ali Bhutto and his newly-founded Pakistan Peoples' Party (PPP). General Yahya Khan presided over a disastrous military campaign in East Pakistan, Pakistan's loss to India in the war of 1971, and ultimately the secession of East Pakistan to form Bangladesh. In 1973 Pakistan adopted its current constitution after thorough deliberation and consensus of all the political parties. This Constitution has seen many ups and downs including several martial laws. It was amended several times. The last amendment was the 18th Amendment (followed by minor amendments in the 19th Amendment).

The underlying idea among the Muslims, although documents like the Pakistan Resolution do not affirm this, while the Objectives Resolution clearly does, was that Pakistan is to be created so that the Muslims could have a separate homeland where they could practice their own way of life. Practising their own way of life essentially meant that an Islamic state was to be created where matters would be settled according to Islamic law.

The Objectives Resolution of 1949 was supposed to be made part of the Constitution according to the first draft presented in 1950. Later developments prevented this, especially the martial law imposed by Ayub Khan, but the 1956 Constitution of Pakistan provided a specific mechanism for the Islamization of laws. The powers of bringing the laws of the land into conformity with Islamic law were granted to the Parliament and an advisory body was created to provide suitable suggestions. The Constitution of 1973 preserved this approach to Islamization. Nevertheless, it was Gen. Zia-ul-Haqq who incorporated the Objectives Resolution as a substantive provision, Art. 2-A, thus placing a permanent stamp of Islamization on the Constitution. Many other Islamic provisions were also incorporated in the Constitution. These were ratified by later parliaments and even the latest amendment to the Constitution (18th), unanimously adopted in 2010, has not altered any of these provisions.

As far as the laws are concerned, the process of Islamization gathered impetus during the period of Zulfiqar Ali Bhutto, who

under pressure from an opposition alliance that included the religious political parties, announced measures such as prohibition on the consumption of alcohol and declaration of Ahmadis to be non-Muslims. It was, however, under the regime of General Zia ul Haq that the landscape changed dramatically and the enforcement of *sharīʻah* became a popular demand. The *ḥudūd* and *zakāt* laws were enforced.

A Federal Shariʻat Court was set up with limited jurisdiction to strike down all those laws that were repugnant to the injunctions of the *sharīʻah*. The jurisdiction of the Court was later widened. Since then the Court has examined many laws and has directed changes in some laws, some of which have been gradually implemented. It is only the case of *ribā*, usury and bank interest that is still pending. In addition to this, the Council of Islamic Ideology has also examined most of the laws and suggested some changes in individual laws. The *ḥudūd* laws have come under severe criticism, both at home and abroad, leading to some amendments during the Musharraf era. The most notable amendment has been in the law of rape.[9]

It has to be acknowledged that occasional voices are raised against the very concept of merging religion and state, but the people of Pakistan, most of whom are poor religious people, will never permit the removal of the Islamic provisions from the law. No parliament, or even dictator, has had the courage to alter these provisions. The only way they can be altered is by referring the matter to the people of Pakistan through a referendum. Such a referendum is not likely to take place. In short, the Islamic provisions are there to stay and the demand for further Islamization can increase any time, depending on the political atmosphere in the country.

[9] The law of rape had been made part of the *ḥudūd* laws. There had been severe criticism right from the start that this was leading to complications in the criminal justice system. Instead of being provided relief the victims of rape were facing severe hardship at the hands of a corrupt police. In 2006, the law of rape was removed from the *Zinā* Ordinance, through an amendment, and the original provisions of rape in the Pakistan Penal Code were restored. A new provision of fornication was also created by repealing the provision relating to *zina* liable to *Taʻzīr*.

4. Adjudication and Corrective Justice

The noblest of all tasks in human affairs is the adjudication of rights. Adjudication means "the legal process of resolving a dispute; the process of judicially deciding a case."[10] Imam al-Sarakhī says: "Know that adjudication based upon justice is one of the strongest of obligations, after belief in Allah (*īmān billāhi*), and is the noblest of all acts of worship. It is because of this that Allah, the Exalted, has called Adam a caliph (vicegerent). Allah, the Majestic, said, 'I am going to appoint a vicegerent upon earth' "[11] After quoting the verse, "*Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee*,"[12] he says that the reason for its importance is that a judgment based on truth is indeed the manifestation of justice, and it is through justice that "heavens and earth are maintained and injustice is removed."[13] Justice, he adds, calls out to the reason of every reasonable man: for the seeking of fairness for the victim of injustice from the oppressor; the securing of the right of one to whom the right belongs; and for the commanding of the good and condemnation of reprehensible.[14] Finally, he asserts that it is for justice that Allah sent His Messengers, and it is with justice that the *Khulafā' Rāshidūn* were occupied.[15] The letter of second caliph Umar (May Allah be Pleased with him) also called "The Directive on Administration of Justice, written to Abu Musa Al- Ash'ri, is basis for recommended Judicial conduct.

The human mind has been occupied with justice from the earliest times, and famous quotations and discussions dating as far as back as 600 B.C. have been recorded. For example, Aristotle (384 B.C.–322 B.C.) maintained throughout his works that it is in justice that the ordering of society is centered. Thus, he said, "But

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[10] *Black's Law Dictionary* 47 (9th ed. 2009), s.v. "Adjudication."

[11] *Al- Sarakhsi, Al Mabsut* (Beirut ed., 2001) [hereinafter referred *Al-Sarakhsi , Al Mabsut*. The verse of the Qur'ān referred to is 2 : 30.

[12] Al -Quran: 49.

[13] *Al –Sarakhsi, Al- Mabsut , supra* note.

[14] *Id.*

[15] *Id.*

justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society."[16] Aristotle discussed different categories of justice including distributive and corrective.[17]

To these noble words we may add that it is through adjudication that justice is delivered, it is adjudication through which the legal system operates, and it is adjudication through which all jurisprudence is applied and tested. Adjudication has, therefore, received a special place in every legal system. Each legal system has developed "theories of adjudication" to assess how the process of resolving disputes really works, how the judge decides cases and how the techniques of jurists are employed by him. Legal philosophers and jurists in every legal system have been occupied with the process of adjudication, either directly or through its association with justice.

5. Adjudication and the Judicial Process

Adjudication and theories of adjudication have always occupied a central position in jurisprudence. In fact, as Roscoe Pound explains, in France the very term "jurisprudence" was applied to mean the "course of decisions in courts."[18] This is also identified by Lloyd, who maintained that the word "jurisprudence" is not generally used in other languages in the English sense. Thus, in French it refers to something like English "case-law."[19] As compared to this, in England the term jurisprudence was applied to mean analytical jurisprudence in its different senses. Roscoe Pound said:

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[16] *Aristotle Politics* (Benjamin Jowett, trans.) in *Aristotle- Works* (W. D. Ross ed.), at 2792 (Available at http://classics.mit.edu/Browse/browse-Aristotle.html).

[17] *See generally*,Aristotle ,*Nicomeacean Ethics* (Roger Crisp trans., 2004). About corrective or rectificatory justice, he says, "This is why, when people are in dispute, they turn to a judge. To appeal to a judge is to appeal to what is just, because a judge is meant to be, as it were, justice personified. They seek the judge also as an intermediary, and some people even call them mediators, on the basis that if they are awarded what is intermediate, they will be awarded what is just. What is just, then, is intermediate, since the judge is so. The judge restores equality."

[18] *Roseco Pound, Jurisprudence*, 7 (St. Paul, MN, 1958).

[19] *Dennis Lloyd, Introduction to Jurisprudence* , 1, fn. 1 (4th ed., 1979).

> "In America the word "jurisprudence" has been used to some extent in the French sense. Thus the phrase "equity jurisprudence," meaning the course of decision in Anglo-American courts of equity, has been fixed in good usage by the classical work of judge Story."[20]

This meaning of jurisprudence throws some light on the nature of American jurisprudence with its emphasis on the nature of the judicial process and theories of adjudication. Law itself has been equated with what the judges do. Accordingly, Oliver Wendell Holmes Jr., one the greatest judges in America, said, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[21]

The emphasis on judicial decisions and the belief that the law was what judges said it was carried to an extreme by the Realist movement in the United States, and even in Scandinavian countries. These views were held by writers like Karl N. Llwellyn (1893–1962) and Jerome Frank (1889–1957) in the United states and Axel Hägerstöm (1868–1939), Vilhelm Lundstedt (1882–1955), Karl Olivecrona, and Alf Ross from the Scandanavian countries. The views have very ably been summarized by Edgar Bodenheimer.[22] Llwellyn, for example, said that research should shift from rules to what the judges do. "What these officials do about disputes is, to my mind, the law itself."[23] Jerome Frank said,

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[20]*Pound, Jurisprudence*

[21] Oliver Wendell Holmes, "The Path of the Law," in 10 Harv. L.R. 457 (1897). The complete statement is as follows: "The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.*

[22]*Edgar Bodenheimer , Jurisprudence*: The Philosophy and method of Law124–33 (2nd ed., 1974) [hereinafter *Bodenheimer, Jurisprudence*].

[23]Lwellyn,The Bramble Bush 3 (New York, 1930)

"No one knows the law about any case or with respect to any given situation, transaction, or event, unless there has been a specific decision (judgment, order, or decree) with regard thereto."[24] These views indicate the importance given to adjudication within American jurisprudence.

The success or truth of everything that is written in jurisprudence depends upon whether the courts actually use those concepts, ideas and theories in this way or whether the practice of the courts is different. Judicial decisions are, therefore, the ultimate test of jurisprudence. This applies irrespective of the discussion being about rights, property, titles, procedure or some other theory. Thus, when the American writer Hohfeld presented his detailed analysis about the nature of rights, writers on jurisprudence raised the issue whether courts actually use the term "right" in this meaning.[25] In fact, jurisprudence is expected to mirror and record what the judges have said. Jurisprudence provides a record of the prophecies about the behaviour of judges, as Holmes indicated. He said, "It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies."[26] Accordingly, almost every topic in jurisprudence—theories, legal concepts, especially rights, the sources of law and so on—ultimately come to rest on the question of how the judge will employ these tools for rendering decision. The central place accorded to adjudication within jurisprudence is, therefore, natural.

In more recent times, the debate about theories of adjudication has been exported to Britain, first through the Hart-Fuller debates and then by Hart-Dworkin debates. Dworkin criticized the model of "the concept of law" presented by Hart and judged it through the theories of adjudication. His well-known books and articles include *Taking Rights Seriously* (1997) and *Law's Empire* (1986). He

[24] Jerome Frank, "Are Judges Human? " 80 U. PA. L. REV. 17, 233 (1931)

[25] *See generally*,*R.W.M . Dias, Jurisprudence* , Ch. on rights (1985).

[26] O. W. Holmes, "The Path of the Law" *supra* note , at 461.

replaced Hart at Oxford and that led to a further discussion of his theories. In his more recent book *Justice in Robes* (2006), he summarizes his views and responds to his critics.[27]

From a more practical perspective, it is essential to point out two important points raised by Melvin Eisenberg.[28] The first point concerns the exact scope of theories of adjudication. He says, "An important question in framing a theory of adjudication is whether the same set of principles governs the interpretation of constitutions, the interpretation of statutes, and the establishment of common law rules. The position taken in this book is that the answer to this question is no."[29] He adds, "In the long run greater understanding will be gained if common law, statutory, and constitutional adjudication are analyzed separately."[30] The second point raised by Eisenberg concerns the significance of theories of adjudication within the system from the perspective of the lawyer. Thus, when we talk about judges in Pakistan, what we mean is that this study is equally important for lawyers. He indicates this importance through the discussion of the principle of "replicability." He indicates first that the bulk of the law, by necessity, is settled by lawyers and not judges:

> "In a complex society in which many legal rules are established in judicial opinions, the law is not readily determinable by laymen. Thus in a vast majority of cases where law becomes important to private actors, as a practical matter the institution that determines the law is not the courts, but the legal profession."[31]

This is true, but the issue is how lawyers determine what the law is when we have been saying that the law is contained in judicial pronouncements. This is where the principle of replicability comes in, and Eisenberg says:

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[27] *Ronald Dworkin , Justice in Robes* (2006).

[28] *See*, Melvin Eisenberg. The Nature of the common Law.(Harvard ed.1988)

[29] *Id.*

[30] *Id.*

[31] *Id.* at 10.

> "Granted that it is desirable for lawyers as well as judges to be able to determine the law, it becomes critical that lawyers should be able to replicate the process of judicial reasoning and, therefore, that the courts utilize a process of reasoning that is replicable by lawyers."[32]

6. Methods of Islamization of Laws

Theories of adjudication, or how the judge decides cases, lie at the core of discussions in modern jurisprudence. The standards that control the judge's legal reasoning, and the methods he adopts, are considered the most complex and difficult area of this discipline. Irrespective of the system, Islamic or Western, jurisprudence comes into action in the mind of the judge when he is deciding cases; the way the mind of the judge works during adjudication to give meanings to the interpreted statutes is then the core issue. The term "adjudication" means "the legal process of resolving a dispute; the process of judicially deciding a case." The word "theory" means an explanation or picture of the process. "Theory of Adjudication" is, therefore, an explanation of how judges decide cases, that is, an explanation of the legal process of deciding cases. In technical terms, a theory of adjudication is supposed to deal with two sub-theories: a theory of jurisdiction and a theory of controversy. The theory of controversy contains standards that judges use to decide cases in which the rules are not clear. It is this theory of controversy and the standards judges use, as well as the meanings they assign to statutes by the use of such standards; we are concerned with for purposes of Islamization of laws in Pakistan. There are two methods of Islamization that are to be followed by any modern Islamic state. The first has been followed in Muslim states to some extent, while the second has not been adopted in any conscious manner.

The first method is obvious and visible with the changes it causes being concrete and noticeable, while the other is silent and invisible, noticed only by the specialist. This method is that of legislation and codification. The method of legislation is visible and organized; it is undertaken at the level of the state as well as at the level of civil society usually under the name of codification.

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[32] *Id.* at 10.

The method at the level of the citizen or civil society, or at the non-state level, is undertaken through private efforts. It has been undertaken in the Muslim world under the title of codification of Islamic law. Here we will not delve into the distinctions drawn by Scholars; however, one may be quoted to indicate what the scholars mean. Enver Emon says: "Codification is a complex term that can denote an entire legal system—as in the civilian legal tradition—or a technique of developing law (i.e. codes of law). It is related to, but distinct, from statutes and legislation, as the latter are often piece-meal and not meant to enact a systematic legal enterprise. There is often slippage in how these terms are used in the literature reviewed below—a slippage that is reflected and addressed in the analysis below."[33]

Suffice it to say that some scholars have opposed codification on the grounds that it is an innovation and is not compatible with the idea of state that has a monopoly on lawmaking.[34] Nevertheless, attempts have been made to codify Islamic law. The *Majallah* may be said to be the first such effort. Major efforts have been made in Egypt during the time of Nasser and also in some other Middle Eastern countries. Suggestions have been made in the resolutions of the Organization of Islamic Conference (OIC), but these have focused on the codification of legal maxims. A few brilliant individuals like the famous Dr. Abd al-Razzaq al-Sanhuri[35] have worked on their own towards such objectives. In general, such codification efforts have had partial or little success.

At the state level, legislation has been undertaken in Pakistan and Sudan, that is, in areas other than personal law. In

[33] Enver M. Emon, "Codification and Islamic Law: The Ideology Behind a Tragic Narrative," *Middle East Law and Governance* 8 (2016) 275-309

[34] Ibid., 277.

[35] **Sanhuri, Abd al-Razzaq al-(d. 1971), Egyptian jurist and legal scholar. French- and Egyptian-educated, al-Sanhuri proposed modernizing Islamic law based on the historical, social, and legal experience of the respective countries. He was involved in the construction of the civil codes of Iraq and Egypt. Legacy also lies in his extensive works on Islamic law.**

Pakistan, legislation has been undertaken through the efforts of the Council of Islamic Ideology (CII)[36] and the Federal Shariat Court (FSC)[37] in the form of amendments to existing legislation or comprehensive legislation dealing with entire statutes. The CII efforts have led to a number of new statutes.

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[36] As per Article 230 of the Constitution)

The functions of the Islamic Council shall be:

1.To make recommendations to Majlis-e-Shoora (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and Sunnah;

a. To advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

b. To make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

c. To compile in a suitable form, for the guidance of Majlis-e-Shoora(Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

2. Where, a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that, in the public interest, the making of the proposed law in relation to which the question arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished: Provided that, where a law is referred for advice to the Islamic Council and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made.

3. The Islamic Council shall submit its final report within seven years of its appointment, and shall submit an annual interim report.The report, whether interim or final, shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt, and [Majlis-e-Shoora (Parliament)] and the Assembly, after considering the report, shall enact laws in respect thereof within a period of two years of the final report.

[37] The Federal Shariat Court (FSC) was established under the Presidential Order No.1 of 1980, incorporated as Chapter 3A of the Constitution of the Islamic Republic of Pakistan, 1973.

The foremost examples are the Qanun-e-Shahadat Order, 1984, the Law of Preemption, and the Qisas and Diyat Ordinance, later incorporated into the Pakistan Penal Code. The Hadood laws may also be said to be the result of such efforts. The CII has submitted its final report, after the examination of all the laws, to the parliament. This implies that all or most of the laws of Pakistan stand Islamized.

The Federal Shariat Court, on its part, has been striking down laws with directions for amendments[38]. The Court has also

[38] The Federal Shariat Court of Pakistan has the power to examine and determine whether the laws of the country comply with Islamic law. It consists of 8 Muslim judges appointed by the President of Pakistan after consulting the Chief Justice of this Court, from amongst the serving or retired judges of the Supreme Court or a High Court or from amongst persons possessing the qualifications of judges of a High Court. The judges hold office for a period of 3 years, which may eventually be extended by the President.

Appeal against its decisions lie to the *Shariah* Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and two Ulema, appointed by the President. If any part of the law is declared to be against Islamic law, the government is required to take necessary steps to amend such law appropriately.

The court also exercises Revisional jurisdiction over the criminal courts. The decisions of the court are binding on the High Courts as well as subordinate judiciary. The court appoints its own staff and frames its own rules of procedure.

Some examples of guidelines formulated by the FSC for the scrutiny of laws:

- Existence of element of Riba in any form.
- Any restriction on the right of an aggrieved person to seek redress.
- Acquisition of property without free consent of the owner.
- Any violation of the Islamic law of inheritance.
- Infringement of human dignity or basic rights in detention or imprisonment.
- Denial of the right of appeal against any decision of Government/judgment; at least one right of appeal to be ensured.
- Discrimination in the implementation of law.
- Violation of the right of privacy.

undertaken the study of entire statutes, for example, the consideration of the Arbitration Act and 18 other Acts including the Contract Act. The Court continues to study provisions of existing Acts, like the provisions of the PPC for example, however, the most important issue of the prohibition of *riba* has been placed on the backburner for decades. Like the FSC, the Council too continues to take up occasional issues, although these are mostly from the branch of personal law.

The efforts of these two institutions have led to the general conclusion that most of the laws of Pakistan have been Islamized, and as far as the statutory law is concerned Pakistan may be said to be an Islamic state. Apparently, it was in this sense that the new Information Minister, in response to a question asked by a reporter in the last week of 2018 said that the laws of Pakistan are all Islamic. For those, then, who think that there is only one method of Islamization of laws, the process of Islamization is more or less complete and very little more needs to be done.

Professor Nyazee, however, has indicated that true Islamization does not come by altering or drafting statutes, but through the judgements of the Superior Courts when they

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- Indemnification of actions on the part of the officials.

Some Important Bills/Draft Laws Prepared by, or on Behest of, the Council

- The Law of Pre-emption.
- The Law of Qisas and Diyat (Sections 229 - 338, P.P.C.).
- The Law of Evidence Order, 1984.
- The Blasphemy Law (Section 295 (C) P.P.C).
- The Offences against Property (Enforcement of Hudood) Ordinance, 1979.
- The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.
- The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979.
- The Prohibition (Enforcement of Hadd) Order 1979.
- The Ihtiram-e- Ramdan Ordinance.
- The Zakat and Ushr Ordinance, 1980.

Two other publications comprising comprehensive reviews (observations and proposed amendments) on the Criminal Procedure Code 1898 were published in May 2000.

interpret statutes[39]. He has written two articles to show how the Constitution will be considered truly Islamic through such interpretation and what type of interpretation of statutes is needed for the process of Islamization. This is the second method of Islamization, and in our view the more important of the two methods. The second method is gradual and deals with the underlying principles and the rationale of the statutes rather than the text of the statutes alone. The second method is the method of adjudication and requires from us to examine the method in a little more detail.

In his article called, "Is Our Constitution Islamic?" Professor Nyazee shows that the Constitution can never be Islamic unless its provisions are interpreted in the light of the principles of Islamic law, especially those that emerge directly from the Qur'an and the Sunnah.[40] In a related article called, "It is the Shari`ah of the Courts, Your Honour"[41], he quotes Justice Cardozo to show that each statute is accompanied by gaps, doubts and ambiguities that need to be taken care of by the judges. In fact, there is a law in Pakistan that requires this. He says: "The law that appears to govern this area, but is somehow not followed, is laid down in section 4 of the Shari`ah Enforcement Act, 1991. The section states the following:

> "Laws to be interpreted in the light of Shari`ah: For the purpose of this Act, (a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court."[42]

After quoting this law, he concludes:

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[39] "Is Our Constitution Islamic, Your Honour?" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409086

[40] Ibid.

[41] "It is the Shari`ah of the Courts, Your Honour" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409105.

[42] Ibid.

> "If statute-law is interpreted in the light of the *Shariah* as required by this Act, the entire law in the country will acquire a flavor that is based on the Islamic form of justice and fairness, and this will take place in a matter of four or five years."[43]

These statements are sufficient for explaining the nature of the second method of Islamization. To this we may add that theories of adjudication do not require efforts only on the part of the judges; there are two more players in this process. The first are lawyers who assist the Superior Courts in interpreting the Constitution as well as the statutes. The Ulama may also be considered in the same category, because they can discuss the meaning of the statutes from the perspective of Islamic principles and rationales before such statutes land up in the Courts. The second are the citizens who should start claiming relief on the basis of the Islamic meanings of the statutes.

7. Conclusion

The process of adjudication is, therefore, completed by the efforts of all these players or stakeholders. If it is undertaken in a planned and conscious way, there is no way that the process of Islamization cannot be completed within a decade or even less. In addition to this, it may be pointed out that Islamization carried out through the process of adjudication will be more thorough and refined as compared to the method of legislation alone. All that is needed in the will to do so on the part of the judges, lawyers, lawmakers, *ulama* and the citizens. The burden of this paper was to point out that efforts must shift towards adjudication of regular cases on the basis of Islamic law in addition to the process of Islamization through legislation.

[43] Ibid

اردو مقالات

فہرست

مقالہ نگار

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مراد علی

ایم ایس آئی آر اسکالر، بین الاقوامی اسلامی یونی ورسٹی، اسلام آباد۔ murad7779@gmail.com

پاکستان کے پہلے دستور کو اسلامیانے میں مولانا مودودی کے کردار اور طریقہ کار کا جائزہ

مراد علی*

Abstract

This paper discusses the significant events regarding the Constitutional journey of Pakistan and sheds lights on the contributions of Mawdudi particularly. Mawdudi devoted his efforts for Islamization of the entire system especially the economic and constitutional ones. For this purposes, he had been engaged in correspondence with prominent figures-religious, political and experts of various other fields-and exchanging views for how the injunctions of Islam are to be incorporated in the legal and constitutional system of this country. This paper very carefully and enthusiastically examines the literature produced by Mawdudi and letters written by him to various figures. Moreover, pursuing this aim, it refers to the works of other writers on the constitutional and political history of Pakistan as well if needed.

فکری پس منظر

بیسویں صدی میں یورپ کی استعماری طاقتوں کی ہولناک تباہیوں کے نتیجے میں مشرق استعماری طاقت کی لپیٹ میں آنے کے بعد سب سے بھاری نقصان مسلمانوں کو اٹھانا پڑا۔ نو آبادیاتی نظام نے مسلمانوں کو سیاسی اور مادی دونوں لحاظ سے مکمل طور پر زیرِ دست کر لیا۔ مغرب کے سیاسی اور فکری غلبے، استعماری لوٹ مار، معاشی بد حالی کے نتیجے میں مقبوضہ علاقوں کے اندر مختلف صورتوں میں مزاحمتی تحریکیں اٹھنا شروع ہوئیں۔ جن خطوں میں آغاز ہی سے استعمار کے خلاف مزاحمت شروع ہوئی ان میں برصغیر بھی شامل تھا، یہاں اول روز سے مزاحمت میں مسلمان صف آرا تھے۔ لیکن انیسویں اور بیسویں صدی میں مسلمان اس مزاحمت کے لیے کسی صحیح راستے کے انتخاب میں فکری انتشار کا شکار ہو گئے۔ اس انتشار کا اندازہ یہاں کے مختلف علما کی ان فتاویٰ اور آرا سے لگایا جا سکتا

* ایم ایس آئی آر اسکالر، بین الاقوامی اسلامی یونی ورسٹی، اسلام آباد۔ murad7779@gmail.com

ہے جو انھوں نے بالخصوص جہاد کے حوالے سے ظاہر فرمائیں۔[1] چناں چہ اس کے بعد انگریزوں کے تسلط سے آزادی حاصل کرنے کے لیے مختلف زاویہ ہائے نظر سامنے آئے، ان میں جو معروف ہوئے وہ اعتدال کے راستے سے ہٹے ہوئے تھے۔ مسلمانوں کی اکثریت ہندوؤں کی قیادت میں مزاحمت کا حصہ بنے۔ اس جدوجہد میں مسلمانوں کی قیادت کی باگیں ان لوگوں نے سنبھالیں جن کا سیاسی رجحان وطنی قومیت کی طرف تھا۔ اس کے نتیجے میں مسلمانوں کا اپنا سیاسی موقف دب کر رہ گیا اور دین کا سیاسی پہلو نظروں سے مستور ہوتا چلا گیا۔ مسلمانوں کے لیے جو چیز نوآبادیاتی دور میں سب سے بڑے نقصان کا سبب بنا وہ یہی فکری اور سیاسی پسپائی تھی۔

اگر برصغیر کی فکری تاریخ پر ایک غائر نگاہ ڈالی جائے تو دین کے اس پہلو کو سامنے لانے کی کوئی منظم کوشش نظر نہیں آتی بلکہ اکثر اہل علم کسی نہ کسی صورت میں اس کے مخالف نطقۂ نظر کے حامل نظر آتے ہیں، چند استثنات ضرور موجود ہیں، مگر مجموعی حالت زیادہ قابل اطمینان نہیں ہے۔ تاہم مولانا سیّد ابوالاعلیٰ مودودی نے (۱۹۷۹ء-۱۹۰۳) پہلی بار ایک منظم صورت میں نہایت شدت کے ساتھ دین کے سیاسی پہلو کو نمایاں کرنے کی انفرادی کوشش کا آغاز کیا اور یہ شدتِ اظہار نتیجہ خیز بھی ثابت ہوا۔ کیوں کہ مجدد کا اصل کام یہی ہوتا ہے کہ وہ اپنے دور کے اس خیال کو نمایاں کرنے پر زیادہ زور دیتا ہے جو ذہنوں سے اوجھل ہو چکا ہو۔ اس لیے یہ خیال درست نہیں کہ "سیاسی اسلام" مولانا کی خانہ ساز (Brain Child) ہے، بلکہ نوآبادیاتی دور میں اسلام کا سیاسی پہلو خود مسلمانوں کے لیے اجنبی بن کر رہ گیا، جس کی بازیافت کا بیڑا مولانا ہی نے اٹھایا۔ تاہم استشراقی تحریک کی علمی اور سیاسی دونوں جانب سے کچھ ایسے اثرات در آئے جو خواہی نہ خواہی اور شعوری غیر شعوری دونوں طور پر قبول کر لیے گئے۔ مولانا کا کارنامہ یہ ہے کہ انھوں نے باقاعدہ طور پر اسلامی کی سیاسی نظام کو عصری اسلوب میں تھیورائز کیا، جس میں وہ منفرد ہیں۔

مولانا مودودی کی فکری مطالعے سے یہ بات بھی سامنے آتی ہے کہ وہ اپنے نظام فکر کو آغاز ہی سے مرتب کر چکے تھے۔[2] آپ کی مختلف ادوار کی تحریروں میں مسلمانوں کی متاع گم گزشتہ کی بازیافت کا جذبہ

1- تفصیل کے لیے دیکھیے: محمد ارشد، "جدوجہد آزادی اور فتاویٰ انیسویں صدی کے فتاویٰ کا ایک تجزیاتی مطالعہ" سہ ماہی **"فکر و نظر"**، ج۵۱، ش۵ (جنوری-مارچ، ۲۰۱۴ء)، ص۵۵-۱۰۸۔

2- اس کی مختصر تاریخ کے لیے دیکھیے: سیّد ابوالاعلیٰ مودودی، **تحریک اسلامی ایک تاریخ، ایک داستان**، مرتب: خورشید احمد (لاہور: منشورات، ۲۰۱۳)، ص۸۸-۱۰۰؛ وہی مصنف، **جماعت اسلامی کے ۲۹ سال** (لاہور: اسلامک پبلی کیشنز، سن ندارد)؛ نیز دیکھیے ماہ نامہ "چراغ راہ" کراچی (نومبر ۱۹۶۳ء) **"تحریک اسلامی نمبر"** میں **"جماعت اسلامی کیسے قائم ہوئی؟"** کے عنوان سے دیا گیا انٹرویو، مشمولہ: **مولانا مودودی کے انٹرویو**، مرتب: ابو طارق ایم اے (لاہور: اسلامک

اور نظام فکر ایک خاص آہنگ میں دکھائی دیتا ہے۔[3] یہی جذبہ بالآخر "الجہاد فی الاسلام" کی صورت میں ایک مربوط صورت میں سامنے آیا۔ آپ نے صحافت کو خیر باد کہنے کے بعد ۱۹۳۰ء میں قیام دکن کے زمانے میں نواب سالار جنگ کی خواہش پر ممالک محروسہ کے لیے "تبلیغ اسلام منصوبہ" کی اسکیم بنائی۔[4] اس سے اندازہ ہوتا ہے کہ مولانا کے پیشِ نظر ایک منظم جدوجہد پہلے سے موجود تھی۔ اس کے بعد "دارالاسلام" منصوبہ اور چودھری نیاز علی خان کے ساتھ ابتدائی مراسلت سے بھی اس بات کو مزید تقویت ملتی ہے کہ مولانا مسلمانوں کے سیاسی غلبے کے لیے تحریک برپا کرنا چاہتے تھے۔[5]

تاہم عثمانی خلافت کے سقوط کے بعد مولانا کی تحریروں میں اسلام کو نظام زندگی کے طور پر سامنے لانے کا واضح اظہار موجود ہے، جس میں ایک غیر معمولی شدت بھی پائی جاتی ہے۔ یہ فکری عمل تدریج کے ساتھ شروع ہوا۔ غلبۂ دین کو انھوں نے پہلی دفعہ **الجہاد فی الاسلام** کے تیسرے باب "مصلحانہ جنگ" میں پیش کیا، جس میں مسلمانوں کو امر بالمعروف اور نہی عن المنکر کا فریضہ انجام دینے کا بین الاقوامی جماعت قرار دیا،[6] جو باطل حکومتوں کو مٹا کر حکومت الٰہیہ کے قیام کی جدوجہد منتخب کیا گیا ہے۔[7] بعد ازاں **اسلامی تہذیب اور اس کے**

پبلی کیشنز، ۱۹۷۶ء)، ص ۱۹۶-۲۰۱؛ مزید تفصیل کے لیے ملاحظہ ہو: چودھری غلام محمد، **تاریخ جماعت اسلامی تاسیسی پس منظر** (لاہور: ادارہ معارف اسلامی، ۲۰۱۹ء)۔

3– "**مسلم**" اور "**الجمیعہ**" کی ادارت کے دوران مولانا کے مضامین میں یہی جذبہ دیکھا جاسکتا ہے۔ "**مسلم**" میں شائع ہونے والے مضامین ڈاکٹر محمد رفیع الدین نے مرتب کر کے پہلی جلد شائع کی ہے، جس میں ستمبر ء تک کی تحریریں شامل ہیں: ڈاکٹر محمد رفیع الدین فاروقی، **مقالاتِ مسلم دہلی**، (حیدر آباد: شان پبلی کیشنز)۔ اس کے علاوہ "**الجمعیہ**" کے اداریوں میں بھی جذبہ موجود ہے، ان اداریوں کو جناب خلیل احمد حامدی نے چار مجموعوں میں مرتب کیا ہے: **آفتابِ تازہ** (لاہور: ادارہ معارفِ اسلامی)؛ **بانگِ سحر**، (لاہور: ادارہ معارفِ اسلامی)؛ **جلوۂ نور**، (لاہور: ادارہ معارفِ اسلامی)؛ **صدائے رستاخیز** (لاہور: ادارہ معارفِ اسلامی)۔ مزید مولانا کی پہلی تصنیف **اسلام کا سرچشمہ قوت** بھی ملاحظہ کیا جاسکتا ہے، دیکھیے: سیّد ابوالاعلیٰ مودودی، **اسلام کا سرچشمۂ قوت**، مرتب: حفیظ الرحمن احسن (لاہور: ادارہ ترجمان القرآن، ۲۰۰۴ء)۔

4– **وثائق مودودی**، مرتب: سلیم منصور خالد (لاہور: ادارہ معارف اسلامی)،، ص ۸۱۔

5– اس مراسلت کے لیے ملاحظہ کیجیے: **خطوطِ مودودی**، مرتبین: رفیع الدین ہاشمی، سلیم منصور خالد (لاہور: منشورات، ۱۹۹۵ء)، ص ۴۱-۱۷۸۔

6– سید ابوالاعلیٰ مودودی، الجہاد فی الاسلام (لاہور: ادارہ ترجمان القرآن، ۱۹۹۶ء)، ص ۹۹۔

7– نفسِ مصدر، ص ۱۴۴-۱۴۹

اصول ومبادی تصنیف کی،[8] جس میں اسلامی نظام زندگی کا جامع تصور پیش کیا کہ اسلام ایک عالم گیر تہذیب ہے اور یہ انسانی زندگی کے تمام گوشوں پر حاوی ہونے کی صلاحیت رکھتا ہے۔ علاوہ ازیں **تنقیحات** کے مضامین بھی اس ابتدائی دور میں لکھے گئے،[9] جس میں باطل کے ساتھ تعامل کی قطعی نفی کر کے یہ بات واضح کی کہ باطل کے تسلط کے ہوتے ہوئے اسلامی نظام یا قیام ممکن نہیں ہے۔

اس کے بعد وہ دور آیا جس میں ہندوستان میں آزادی کی تحریک فیصلہ کن مراحل میں داخل ہوئی۔[10] متحدہ ہندوستان میں یہاں کے سب سے معتبر دینی حلقے نے وطنی قومیت کو مذہبی بنیادیں فراہم کر کے مسلمانوں کے لیے کانگریس میں شمولیت کے راستے ہموار کئے۔ اس کے برعکس مسلم لیگ ہندوستان میں مسلمانوں کی نمائندہ جماعت تھی، جو کانگریس کے بالمقابل مسلمانوں کا مقدمہ لڑنے کی مدعی تھی۔ تحریک پاکستان میں ۳۷-۱۹۳۶ء کے الیکشن کے بعد کا زمانہ نہایت اہمیت رکھتا، یہی زمانہ تھا جس کے بعد تحریک تیزی سے آگے بڑھتی چلی گئی۔ بالکل اسی دور میں کانگریس نے "Muslim Mass Contact" کے نام سے مسلمانوں کو اپنا ہم نوا بنانے کے لیے تحریک آغاز کیا۔ ایک بااثر دینی حلقے کی کانگریس کی تائید مسلم لیگ کے لیے ایک مشکل مرحلہ تھا۔ یہ ایک مسلم تاریخی حقیقت ہے کہ مسلم لیگ کے پاس کانگریس کی حمایت کرنے والے علما کے علمی رد کے لیے مسلم لیگی لیڈروں کی تقریروں کے سوا ایسا کوئی مضبوط علمی بنیاد موجود نہیں تھی جس کے بنا کانگریس اور اس کے ساتھ علما کی علمی تائید کا رد کر سکے۔[11]

یہی دور تھا جس میں مولانا مودودی نے متحدہ قومیت کے نظریے کی تردید میں وہ مضامین لکھے جس کو بعد میں **مسلمان اور موجودہ سیاسی کشمکش** (حالیہ نام: **تحریک آزادی ہند اور مسلمان**) کے عنوان سے کتاب کی

8- یہ کتاب ان مضامین کا مجموعہ ہے جو مولانا نے ۱۹۳۲-۳۳ میں ۱۸ قسطوں میں ماہ نامہ "ترجمان القرآن" کے لیے تحریر کیے۔ کتاب کی صورت میں ۱۹۵۵ء میں شائع ہوئے: سیّد ابوالاعلیٰ مودودی، **اسلامی تہذیب کے اصول ومبادی** (اچھرہ لاہور: مرکزی مکتبہ جماعت اسلامی پاکستان، ۱۹۵۵ء)

9- یہ کتاب ان مضامین کا مجموعہ ہے جو ۱۹۳۴ء-۳۷ء کے زمانے میں لکھے گئے اور کتاب کی صورت میں ۱۹۳۹ء میں شائع ہوئے: سیّد ابوالاعلیٰ مودودی، **تنقیحات** (لاہور: دفتر ترجمان القرآن، ۱۹۳۹ء)

10- جب محمد علی جناح (1876-1948ء) نے 1936ء-37 کے الیکشن کے بعد مسلم لیگ کی تشکیل نو کی۔

11- تاہم اقبال کے مشورے اور دعوت پر "دارالاسلام" منصوبے میں ایک اہم امر مسلم لیگ کی فکری کمی کو پورا کرنا اور ان کی رہنمائی کرنا بھی شامل تھا۔ اکتوبر ۱۹۳۷ء میں اقبال کے ساتھ مولانا مودودی کی جو ملاقات ہوئی تھی اس میں یہ پہلو پر بحث ہوئی تھی۔ دیکھیے ڈاکٹر سید ظفر الحسن کے نام مولانا مودودی کا مکتوب: **خطوطِ مودودی**، ص ۱۹۷-۲۰۵۔

صورت میں شائع ہوئے۔[12] مسلم لیگ نے بڑے پیمانے پر ان کتابوں کی اشاعت کا اہتمام کیا۔ اس دور سے معلوم ہوتا ہے کہ مسلم لیگ کے پاس جو واحد علمی سہارا لٹریچر کی صورت میں تھا وہ مولانا مودودی کی تحریریں تھیں۔[13]

اس کے کچھ ہی عرصہ بعد مولانا مودودی نے مسلم لیگ کو بھی ہدفِ تنقید بنایا کہ یہ جو دعوی کو لے کر اٹھی ہے، اس کے لیے ان کے پاس اس کو عملی شکل دینے کے لیے کوئی منظم پروگرام (Well thought out Plan) اور مضبوط علمی بنیادیں نہیں ہیں، جس سے ایک مثالی اسلامی نظام حکومت اور معاشرہ وجود پذیر ہوں۔ اسلامی معاشرے کے قیام کے لیے انفرادی تربیت سے لے اجتماعی سطح تک جس جدوجہد کی ضرورت ہوتی ہے، مسلم لیگ کے پاس وہ افراد کار ہے، نہ قیادت، افراد سازی اور قیادت بنانے کے لیے کوئی باضابطہ نظام رکھتی ہے۔ یہی وجہ تھی کہ مولانا مودودی نے اس کام پر اپنی توانائیاں صرف کرنا شروع کیں، اپنی تحریروں میں مختلف پہلوؤں سے اسلامی ریاست کے قیام کے خط و خال واضح کیے۔ اس سلسلے میں وہ مقالہ نہایت اہمیت کا حامل ہے جو "اسلام کا نظریۂ سیاسی" کے عنوان سے شائع ہوا[14] اس میں حاکمیت الٰہی کی تشریح کو قرآن و سنت اخذ کر کے رائج الوقت اسلوب میں پیش کر کے دورِ جدید کے مختلف سیاسی نظاموں سے واضح کیا کہ غیر الٰہی بنیادوں پر قائم ہونے والی حکومتیں دراصل شرک کی علم بردار ہیں، ان ممالک کی دستور ساز اسمبلیاں عوام کے لیے الٰہ کی حیثیت رکھتی ہیں۔ مزید براں اسی مضمون میں "اسلامی ریاست" کے اجزاے ترکیبی کے لیے معاصر اسلوب میں بعض مخصوص اصطلاحات کا سہارا لیا۔ گویا اس مضمون میں علوم سیاسیات کی جدید زبان میں اسلامی ریاست کا پورا نقشہ پیش کیا گیا۔

ازاں بعد مولانا نے مذکورہ نظام کے عملی نفاذ کے لیے "اسلامی حکومت کس طرح قائم ہوتی ہے"[15] کے نام سے ایک مضمون تحریر کیا۔ جس میں اقامت دین، اسلام کا نصب العین جیسے تصورات پیش

12– سیّد ابوالاعلیٰ مودودی، **تحریک آزادی ہند اور مسلمان**، (لاہور: اسلامک پبلی کیشنز، ۲۰۱۴ء)

13– تفصیل کے لیے راقم کی تحریر دیکھیے: "تحریک پاکستان میں مولانا مودودی کے لٹریچر کا علمی کردار"، "دلیل" ۳ مئی، ۲۰۲۰ء:
https://daleel.pk/2020/05/03/138857, Last access 23 July 2020.

14– "**اسلام کا نظریہ سیاسی**" ماہنامہ "ترجمان القرآن" لاہور (دسمبر ۱۹۳۹ء)، ص ۱۴-۴۶۔

15– سید ابوالاعلیٰ مودودی، "اسلامی حکومت کس طرح قائم ہوتی ہے"، ماہ نامہ "ترجمان القرآن" (مارچ، ۱۹۴۱ء)، ص ۴۷-۸۳۔

کرنے کے بعد ایک خاص طریقہ کار اور منہج طے کیا۔ یہ نہایت بنیادی اور اہم تحریر ہے، راقم کی رائے میں مولانا اصولی اعتبار سے اپنے اسی موقف پر آخری وقت تک قائم رہے۔[16] تاہم یہی مضامین تھے جنھوں نے بالآخر ۱۹۴۱ء میں چند انسانوں کو جماعت اسلامی کے نام سے ایک جماعت بنانے کے لیے اکٹھا کر دیا تاکہ وہ اس نصب العین کے لیے اس خاص طریقے پر کام کریں۔[17] مولانا مودودی کے الفاظ میں: جماعت اسلامی کے مبدا تخلیق کو سمجھنے کے لیے ان مضامین کی طرف رجوع کرنا ضروری ہے۔ یہ تھا وہ پس منظر جس میں مولانا مودودی نے اپنی تحریک کا آغاز کیا۔

جدوجہد قبل از آزادی

آزادی سے قبل مولانا مودودی کی زیادہ تر توجہ انفرادی اور معاشرتی اصلاح پر تھی، انتخابات کے ذریعے اس نصب العین کے نفاذ کو درست نہیں سمجھتے تھے کیوں کہ آپ کے نزدیک غیر اسلامی اور سیکولر ریاست میں اسلامی نظام کا نفاذ کو ممکن تصور نہیں کرتے تھے۔ مزید برآں سیکولر نظام میں انتخابات کے ذریعے قیادت کا راستہ اپنانا عقیدے کے خلاف سمجھتے تھے۔ جس کی وجہ اس اصل میں "اقتدار اعلیٰ" کی بحث تھی۔ اس کے برعکس انھوں نے زیادہ توجہ دعوت پر مرکوز رکھی۔ تاہم آزادی سے قبل کے حالات میں ذیل میں دیے گئے امکانات کو واضح کیا انھوں نے پورے قضیے کو یوں واضح کیا:

> "الیکشن لڑنا اور اسمبلی میں جانا اگر اس غرض کے لیے ہو کہ ایک غیر اسلامی دستور کے تحت ایک لادینی (Secular) اور جمہوری (Democratic) ریاست کے نظام کو چلایا جائے تو یہ ہمارے عقیدہ توحید اور ہمارے دین کے خلاف ہے۔ لیکن اگر کسی وقت ہم ملک کی رائے عام کو اس حد تک اپنے عقیدہ و مسلک سے متفق پائیں کہ ہمیں یہ توقع ہو کہ عظیم اکثریت کی تائید سے ہم ملک کا دستور حکومت تبدیل کر سکیں گے تو کوئی وجہ نہیں کہ ہم اس طریقے سے کام نہ لیں۔ جو چیز لڑے بھڑے بغیر سیدھے طریقے سے حاصل ہو سکی ہو اس کو خواہ مخواہ ٹیڑھی انگلیوں ہی سے نکالنے کا ہم کو شریعت نے حکم نہیں دیا ہے۔ مگر خوب سمجھ لیجیے کہ یہ طریق کار ہم صرف اس وقت اختیار کریں گے جب کہ:

16– 5 مارچ 1975ء میں مولانا نے ایک سوال کے جواب میں بھی یہی فرمایا ہے: 1938ء میں اسلامی نظام کا پورا نقشہ میرے ذہن میں آگیا تھا جس نے میں آج تک ترمیم و اضافہ کی ضرورت محسوس نہیں ہوئی"۔ عاصم نعمانی، سید مودودی کے ساتھ گزرے ہوئے یادگار لمحات (لاہور: ادارۃ معارفِ اسلامی، 1993ء)، ص 131)۔ آخری دور تک سے ہماری مراد جمہوری اور آئینی طریقہ کار ہے۔ جماعت اسلامی کا انتخابی سیاست فی الحال ہمارا موضوع نہیں ہے۔

17– آئندہ لائحہ عمل، ص 22

اولاً: ملک میں ایسے حالات پیدا ہو چکے ہوں کہ محض رائے عام کا کسی نظام کے لیے ہموار ہو جانا ہی عملاً اس نظام کے قائم ہونے کے لیے کافی ہو سکتا ہو۔

ثانیاً ہم اپنی دعوت و تبلیغ سے باشندگان ملک کی بہت بڑی اکثریت کو اپنا ہم خیال بنا چکے ہوں اور اسلامی نظام قائم کرنے کے لیے ملک میں عام تقاضا پیدا ہو چکا ہو۔

ثالثاً: انتخابات غیر اسلامی دستور کے تحت نہ ہوں بلکہ بنائے انتخابات ہی یہ مسئلہ ہو کہ ملک کا آئندہ نظام کس دستور پر قائم کیا جائے۔[18]

اس پر مولانا کے اپنے حلقے کے لوگوں نے یہ سوال اٹھایا کہ اگر انتخابات کا راستہ بند ہے تو کیا مسلح جدوجہد کے ذریعے اسلام کے نصب العین کا حصول جائز ہے؟ اس نوعیت کے سوالات اٹھنے سے مولانا نے آزادی سے قبل بھی اپنا نقطۂ نظر ان الفاظ میں بیان کیا:

"اصولی طریق کار یہی ہے کہ پہلے ہم اپنی دعوت پیش کریں گے۔ پھر ان لوگوں کو جو ہماری دعوت قبول کریں، منظم کرتے جائیں گے۔ پھر اگر رائے عام کی موافقت سے، یا حالات کی تبدیلی سے کسی مرحلے پر ایسے آثار پیدا ہو جائیں کہ موجودہ الوقت دستوری طریقوں ہی سے نظام حکومت کا ہمارے ہاتھوں میں آجانا ممکن ہو اور ہمیں توقع ہو کہ ہم سوسائٹی کی اخلاقی، تمدنی اور سیاسی و معاشی نظام کو اپنے اصول پر ڈھال سکیں گے تو ہمیں اس موقع سے فائدہ اٹھانے میں کوئی تامل نہ ہوگا۔ اس لیے کہ ہمیں جو کچھ بھی واسطہ ہے اپنے مقصد سے ہے نہ کہ کسی خاص طریقے (Method) سے۔ لیکن اگر پرامن ذرائع سے جوہر اقتدار (Substance of Power) ملنے کی توقع نہ ہو تو پھر ہم عام دعوت جاری رکھیں گے اور تمام جائز شرعی ذرائع سے انقلاب برپا کرنے کی کوشش کریں گے۔"[19]

آزادی ہند سے قبل کے جو حالات تھے، ان میں بھی مولانا غیر دستوری جہد و جہد کے قائل نہ تھے۔

دستوری جدوجہد بعد از تقسیم ہند

آزادی سے قبل مسلم لیگ کی مرکزی قیادت کا دستور کے حوالے سے کوئی سنجیدہ سرگرمی نظر نہیں آتی۔ تاہم نچلی سطح پر اس عمل کے لیے جو کوششیں ہوئیں ان میں نواب آف چھتاری کی کاوش نمایاں ہے۔ ۱۹۴۰ء میں "قرارداد پاکستان" منظور ہونے کے بعد تحریک پاکستان تیزی سے آگے بڑھتا گیا۔ پاکستان کے حوالے سے اسلام کے سیاسی اور اقتصادی نظام کے پیشِ نظر نواب سر احمد سعید خان آف چھتاری (۱۹۸۲ء-۱۸۸۸) نے "اسلام کے نظام سیاست و معیشت کی تدوین" کے لیے ایک مجلس بنائی جس میں مولانا شبیر احمد عثمانی (۱۹۴۹ء-

18– رسائل و مسائل حصہ اول ص462- 63۔ یہ مضمون دسمبر 1945ء کے ترجمان میں شائع ہوا تھا۔

19– رسائل و مسائل حصہ اول، ص۵۰۹ دراصل یہ مضمون ستمبر و اکتوبر ۴۵ء کے ترجمان القرآں میں شائع ہوا تھا۔

۱۸۸۷ء)، مولانا آزاد سبحانی، مولانا عبدالحامد بدایونی (۱۹۷۰ء-۱۸۹۸ء)، مولانا سید سلیمان ندوی (۱۹۵۳ء-۱۸۸۴ء)، مولانا عبدالماجد دریابادی (۱۹۷۷ء-۱۸۹۲ء)، مولانا محمد اسحاق سندیلوی (۱۹۹۵ء-۱۹۱۳ء)، ڈاکٹر ذاکر حسین، اور مولانا مودودی شامل تھے۔ اس کا اجلاس جنوری ۱۹۴۱ء کو دارلعلوم ندوۃ العلما میں منعقد ہوا۔ اگر چہ یہ عمل آگے نہیں بڑھ سکا لیکن یہ اپنی جگہ ایک اچھی کاوش تھی۔ مولانا سندیلوی نے اس کا مسودہ تیار کیا، جو ۱۹۵۷ء میں دار لمصنیفن اعظم گڑھ سے **اسلام کا سیاسی نظام** کے نام سے شائع ہوا۔[20] اس کمیٹی میں مولانا مودودی کی شرکت پر پروفیسر خورشید احمد (پ: ۱۹۳۲ء) لکھتے ہیں:

> "مسلم لیگ سے تدبیر کے معاملہ میں اختلافات کے باوجود مولانا سید ابوالاعلیٰ مودودی اور مولانا سید سلیمان ندوی نے تحریکِ پاکستان کے تعمیری کاموں میں مثبت تعاون کیا۔ . . . اس سے صاف ظاہر ہے کہ چند بنیادی اختلافات کے باوجود مولانا سید ابوالاعلیٰ مودودی نے تحریکِ پاکستان سے علمی تعاون کیا اور مسلم لیگ کی قیادت نے ان سے تعاون حاصل کیا۔"[21]

تحریک آزادی کے دوران مولانا مسلم لیگ کو جس بنیاد پر ہدفِ تنقید بنایا اور جن اندیشوں کا اظہار کیا تھا وہ پاکستان بننے کے بعد درست ثابت ہونا شروع ہوئے۔ مسلم لیگ کے بعض اہم لیڈروں نے آزادی سے قبل کیے گئے وعدوں میں پس و پیش شروع کیا۔ آغاز میں دستور ساز اسمبلی کے کاروائیوں اور بعض مسلم لیگی لیڈروں کے بیانات سے یہ امر واضح ہوا کہ تقسیم کا مقدمہ جس بنیاد پر کامیاب سے ہم کنار کیا گیا تھا، وہ اب اس میں سنجیدہ نہیں ہیں بلکہ اس کے برعکس نظام کو لانے کی کوشش کر رہے ہیں۔ مسلم لیگ کے اس رویے کی وجہ سے مولانا نے "مطالبہ نظام اسلامی" مہم کا آغاز کیا۔ اس مہم کے پیچھے اصل محرک مسلم لیگ کے صفِ اول کے لیڈروں کے وہ بیانات تھے، جو پاکستان کو سیکولر ریاست بنانے پر مبنی تھے۔ اس سلسلے میں ان کا مشہور نعرہ سامنے آیا کہ: "اگر ہم نے پاکستان کو اسلامی ریاست بنایا تو ہندو بھارت میں رام راج قائم کر دیں گے"۔[22] مسلم لیگ کی اس ژولیدہ فکری پر قائدِ اعظم نے کراچی میں عید میلاالنبی کی تقریب سے خطاب کرتے ہوئے فرمایا:

20– محمد اسحاق سندیلوی، **اسلام کا سیاسی نظام**، (اعظم گڑھ: مطبع معارف، ۱۹۵۷ء)۔

21– سفیر اختر، سید مودودی اور ماہنامہ "معارف" (اسلام آباد: بک ٹریڈرز جناح سپر مارکیٹ، ۱۹۹۹ء)، ص ۱۲

22– مولانا مودودی نے لالج جنوری میں جو تقریر کی تھی، اس میں جن شبہات کے ازلے کی کوشش کی گئی ہے، اس سے معلوم ہوتا ہے کہ اربابِ اقتدار اسلامی نظام کے نفاذ میں سنجیدہ نہیں تھے، وجیہ الدین سے ریڈیو پر مباحثے سے بھی اس پر روشنی پڑتی ہے۔ دیکھیے: "کیا پاکستان کو ایک مذہبی ریاست ہونا چاہیے؟"، مشمولہ: **تحریک آزادی ہند اور مسلمان** (لاہور: اسلامک پبلی کیشنز، ۲۰۱۴ء)، ج ۲، ص ۳۰۰-۳۹۷۔

I cannot understand why this feeling of nervousness that the future constitution of Pakistan is going to be in conflict with Sharl'at Law? There is one section of the people who keep on impressing everybody that the future constitution of Pakistan should be based on the Sharl'ah. The other section deliberately want to create mischief and agitate that the Shari'at Law must be scrapped." (23)

مولانا مودودی نے اس پوری صورت حال کا خلاصہ ان الفاظ میں پیش کیا ہے:

"جن لوگوں کے ہاتھ ہم نے اپنی باگیں دے دی ہیں وہ ایک مدت سے متضاد باتیں کہ رہے ہیں۔ یہ حضرات کبھی یہ کہتے ہیں کہ ہمارے پاکستان حاصل کرنے کے کوئی معنی ہی نہیں، اگر یہاں اسلامی نظام حکومت قائم نہ کیا جائے۔ کبھی کہتے ہیں کہ یہاں ایک لادینی جمہوری اسٹیٹ (Secular Democratic State) قائم کیا جائے گا۔ کبھی کہتے ہیں کہ یہاں قرآن کی حکومت ہو گی۔ اور کبھی یہ اعلان کرتے ہیں کہ یہاں سیاسی حیثیت سے نہ ہندو ہندو ہو گا، نہ مسلمان مسلمان، بلکہ سب محض پاکستانی ہو کے رہیں گے۔ پھر اسلامی حکومت کی بھی مختلف تعبیریں کی جاتی ہیں۔ کبھی اس کی یہ تعبیر کی جاتی ہے کہ یہ انصاف اور مساوات اور اخوت کا ہم معنی ہے اور کبھی "اسلامی سوشل ازم" کی اصطلاح استعمال کی جاتی ہے۔ نہ معلوم یہ اسلامی سوشل ازم کیا چیز ہے؟ میرا خیال ہے کہ یہ لوگ خود بھی اس کا مطلب نہیں جانتے۔ کبھی یہ اسلامی جمہوریت کا بھی چرچا کرتے ہیں"(24)

ان متضاد بیانات پر مولانا مودودی اسلامی دستور کے بارے میں پہلے دن سے واضح کر چکے تھے کہ پاکستان میں اسلامی نظام کسی طریقے سے نافذ ہو گا۔ لکھتے ہیں:

"واضح طور پر سمجھ لیجیے کہ یہاں اسلامی نظام کا قیام صرف دو طریقوں سے ممکن ہے:
ایک یہ کہ جن لوگوں کے ہاتھ میں اس وقت زمام کار ہے وہ اسلام کے معاملے میں اتنے مخلص اور پنے ان وعدوں کے بارے میں جو انھوں نے اپنی قوم سے کیے تھے اتنے صاقد ہوں کہ اسلامی حکومت قائم کرنے کی جو اہلیت ان کے اندر مفقود ہے اسے خود محسوس کریں اور ایمان داری کے ساھت یہ مان لیں کہ پاکستان حاصل کرنے کے بعد ان کا کام ختم ہو گیا ہے اور یہ کہ اب یہاں اسلامی نظام تعمیر کرنا ان لوگوں کا کام ہے جو اس کے اہل ہوں۔ اس صورت می معقول طریق کار یہ ہے پہلے ہماری دستور ساز اسمبلی ان بنیادی امور کا علان کرے جو ایک غیر اسلامی نظام کو اسلامی نظام میں تبدیل کرنے کے لیے اصولاً ضروری ہیں (جنھیں ہم نے اپنے "مطالبہ" میں بیان کر دیا ہے)، پھر وہ اسلام کا علم رکھنے

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23 – Dawn, Jan. 26, 1948 (from an address before the Sindh Bar Association, on the occasion of the Prophet Day).

24– **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۶۸-۳۶۹۔

والے لوگوں کو دستور سازی کے کام میں شریک کرے اور ان کی مدد سے ایک مناسب ترین دستور بنائے، پھر نئے انتخابات ہو اور قوم کو موقع دیا جائے کہ وہ زمام کار سنبھالنے کے لیے ایسے لوگوں کو منتخب کرے جو اس کی نگاہ میں اسلامی نظام کی تعمیر کے لیے اہل ترین ہوں۔ اس طرح صحیح جمہوری طرق پر اختیارات اہل ہاتھوں میں بہ سہولت منتقل ہو جائیں گے اور وہ حکومت کی طاقت اور ذرائع سے کام لے کر پورے نظام زندگی کی تعمیر جدید اسلامی طرز پر کر سکیں گے۔

دوسرا طریقہ ہے کہ معاشرے کو جڑ سے ٹھیک کرنے کی کوشش کی جائے اور ایک عمومی تحریک اصلاح کے ذریعے س اس میں خالص اسلامی شعور وارادہ وبہ تدریج اس حد تک نشو نما دیا جائے کہ جب وہ اپنی پختگی کو پہنچے تو خود بہ خود اس سے ایک مکمل اسلامی نظام وجود میں آجائے۔

ہم اس پہلے طریقہ کا آزمارہے ہیں۔ اگر اس میں ہم کامیاب ہوگئے تو اس کے معنی یہ ہوں گے کہ پاکستان کے قیام کے لیے ہماری قوم نے جو جدوجہد کی تھی وہ لاحاصل نہ تھی بلکہ اسی کی بدولت اسلامی نظام کے نصب العین تک پہنچنے کے لیے ایک سہل ترین اور قریب ترین راستہ ہمارے ہاتھ آگیا۔ لیکن اگر خدانخواستہ ہمیں اس میں ناکامی ہوئی اور اس ملک میں ایک غیر اسلامی ریاست قائم کر دی گئی تو یہ مسلمانوں کی ان تمام محنتوں اور قربانیوں کا صریح ضیاع ہوگا جو قیام پاکستان کی راہ میں انھوں نے کیں، اور اس کے معنی یہ وہں کہ ہم پاکستان بننے کے بعد بھی اسلامی نقطۂ نظر سے اسی مقام پر ہین جہاں پہلے تھے۔ اس صورت میں ہم پھر دوسرے طریقہ پر کام شروع کر دیں گے، جس طرح پاکستان بننے سے پہلے کر رہے تھے۔[25]

تاہم کچھ مسلم لیگی قائدین نے یونی ورسٹی لاء کالج لاہور میں مولانا مودودی کو اسلامی قانون پر لیکچر دینے کی دعوت دی۔ ان میں نمایاں شخصیت ڈاکٹر عمر حیات تھے جو دستور ساز اسمبلی کے رکن بھی تھے۔ مولانا نے ۶ جنوری اور ۱۹ فروری ۱۹۴۸ء کو تقاریر کیں جو "پاکستان میں اسلامی قانون کیوں نہیں نافذ ہو سکتا؟"[26] اور "پاکستان میں اسلامی قانون کس طرح نافذ ہو سکتا ہے؟"[27] کے عنوان شائع ہوئیں۔ بعد ازاں اپریل اور مئی ۱۹۴۸ء میں مولانا نے لاہور، ملتان، کراچی، راولنڈی، سیالکوٹ اور پشاور میں "مطالبہ نظام اسلامی" کے لیے جماعت اسلامی کے عام اجتماعات میں تقریریں کیں۔[28] چناں چہ

25– ماہ نامہ "**ترجمان القرآن**" لاہور (ستمبر ۱۹۴۸ء)، ص ۷۱-۷۲۔

26– ماہ نامہ "**ترجمان القرآن**" لاہور (جولائی، ۱۹۴۸ء)، ص ۳۹-۶۷؛ مشمولہ: **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۰۸-۳۳۸۔

27– **ترجمان القرآن**" (اگست، ۱۹۴۸ء)، ص ۳۸-۶۰؛ **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۳۹-۳۵۶

28– یہ تقریریں مولانا کی سیفٹی ایکٹ کے تحت گرفتاری کی وجہ "ترجمان القرآن" میں سے شائع نہ ہو سکیں، بعد ازاں ۱۹۴۹ء کے آغاز پمفلٹ کی صورت میں شائع ہوئیں: سیّد ابوالاعلیٰ مودودی، **مطالبہ نظام اسلامی** (لاہور: مرکزی مکتبہ جماعت اسلامی، ۱۹۴۸ء)۔ "**ترجمان القرآن**" میں بھی (جون ۱۹۴۹ء، ص ۱۲-۳۲) شائع ہوا۔ اب یہ **تحریک آزادی ہند اور مسلمان** حصہ دوم میں بھی شامل ہے۔ دیکھیے: **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۵۷-۳۸۴۔

"پاکستان میں اسلامی قانون کیوں نہیں نافذ ہو سکتا؟" میں اسلامی قانون کا عصری اسلوب میں عمومی تعارف اور بعض شبہات اور عذرات کا ازالہ کیا گیا، اس کے آغاز میں "بنیادی حق کا تصور" کے زیر عنوان حاکمیت (Sovereignty) کے تصور کو واضح کیا گیا۔ ثانی الذکر لیکچر میں " پاکستان میں اسلامی قانون کس طرح نافذ ہو سکتا ہے؟" کے نام سے دیا گیا جس میں پورے طریقِ کار کو واضح کیا گیا۔ وہ چار نکات بھی اسی لکچر میں پیش کیے گئے تھے، جس پر آگے ۶ مارچ ۱۹۴۸ کو جہانگیر پارک کراچی میں "مطالبہ نظام اسلامی" کے نام سے باقاعدہ مہم کا آغاز کیا۔ تاہم مذکورہ لیکچر میں اسلامی نظام کے نفاذ کا حسبِ ذیل طریقِ کار بتایا گیا:

"....پاکستان اسلام کے نام سے اور اسلام کے لیے مانگا گیا ہے اور اسی بنا پر ہماری مستقل ریاست قائم ہوئی ہے تو ہماری اس ریاست ہی کو وہ معمار طاقت بننا چاہیے جو اسلامی زندگی کو تعمیر کرے۔ اور جب کہ یہ ریاست ہماری اپنی ریاست ہے اور ہم اپنے تمام قومی ذرائع و وسائل اس کے سپرد کر رہے ہیں، تو کوئی وجہ نہیں کہ ہم اس تعمیر کے لیے کہیں اور سے معمار فراہم کریں۔

یہ بات اگر صحیح ہے تو پھر اس تعمیر کی راہ میں پہلا قدم یہ ہونا چاہیے کہ ہم اپنی ریاست کو، جو ابھی تک انگریز کی چھوڑی ہوئی کافرانہ بنیادوں پر قائم ہے، مسلمان بنائیں۔ اور اسے مسلمان بنانے کی آئینی صورت یہ کہ ہماری دستور ساز اسمبلی باقاعدہ اس امر کا اعلان کرے کہ

۱- پاکستان میں حاکمیت خدا کی ہے اور ریاست اس کے نائب کی حیثیت سے ملک کا انتظام کرے گی

۲- ریاست کا اساسی قانون شریعت خداوندی ہے جو محمد ﷺ کے ذریعہ سے ہمیں پہنچی ہے

۳- تمام پچھلے قوانین جو شریعت سے متصادم ہوتے ہیں بتدریج بدل جایے جائیں اور آئندہ کوئی ایسا قانون نہ بنایا جاسکے گا تو شریعت سے متصادم ہوتا ہے۔

۴- ریاست اپنے اختیارات کے استعمال میں اسلامی حدود سے تجاوز کرنے کی مجاز نہ ہو گی۔

یہ وہ کلمۂ شہادت ہے جسے اپنی آئینی زبان ـــــ یعنی دستور ساز اسمبلی ـــــ کے ذریعہ سے ادا کر کے ہماری ریاست "مسلمان ہو جائے گی۔[29]

دوسرے اقدام کے عنوان کے تحت لکھتے ہیں:

"اس اعلان کے بعد ہی صحیح طور پر ہمارے رائے دہندوں کو یہ معلوم ہو گا کہ انہیں کس مقصد اور کس کام کے لیے اپنے نمائندے منتخب کرنے ہیں۔ عوام میں علم و دانش کی لاکھ کمی سہی، مگر وہ اتنی سمجھ بوجھ ضرور رکھتے ہیں کہ انہیں کام کے لیے کس کی طرف رجوع کرنا چاہیے اور ان کے درمیان کون لوگ کس مطلب کے لیے موزوں ہیں۔ آخر وہ اتنے

29- **تحریک آزادی ہند اور مسلمان**، ج2، ص345-346۔

نادان تو نہیں ہیں کہ علاج کے لیے وکیل اور مقدمہ لڑنے کے لیے ڈاکٹر کو تلاش کریں۔ وہ اس کو بھی کسی نہ کسی حد تک جانتے ہیں کہ ان کی بستیوں میں ایماندار اور خدا ترس لوگ کون ہیں، چالاک اور دنیا پرست کون، اور شریر و مفسد کون۔ جیسا مقصد ان کے سامنے ہوتا ہے ویسے ہی آدمی وہ اس کے لیے اپنے اندر ڈھونڈ نکالتے ہیں۔ اب تک ان کے سامنے یہ مقصد آیا ہی نہ تھا کہ انہیں ایک دینی نظام چلانے کے لیے آدمی درکار ہیں۔ پھر وہ اس کے چلانے والے آکر تلاش کرتے تو کیوں۔ جیسا بے دین اور غیر اخلاقی نظام ملک میں قائم تھا اور اس کا مزاج جس قسم کے آدمی چاہتا تھا، اس کے لیے ویسے ہی آدمیوں پر لوگوں کی نگاہ انتخاب پڑی انہی کو رائے دہندوں نے چن کر بھیج دیا۔ اب اگر ہم ایک اسلامی ریاست کا دستور بنائیں اور لوگوں کے سامنے سوال یہ آجائے کہ اس نظام کو چلانے کے لیے انہیں موزوں آدمی منتخب کرنے ہیں، تو چاہے ان کا انتخاب کمال درجہ کا معیاری نہ ہو، مگر بہر حال اس کام کے لیے ان کی نگاہیں فساق و فجار اور دین مغربی کے مومنین پر نہیں پڑیں گی۔ وہ اس کے لیے انہی لوگوں کو تلاش کریں گے جو اخلاقی، ذہنی اور علمی حیثیت سے اس کے اہل ہوں گے۔

پس ریاست کو مسلمان بنانے کے بعد تعمیر حیات اسلامی کی راہ میں دوسرا قدم یہ کہ جمہوری انتخاب کے ذریعہ سے اس ریاست کی زمام کار ایسے لوگوں کے ہاتھ میں منتقل ہو جو اسلام کو جانتے بھی ہوں اور اس کے مطابق ملک کے نظام کو ڈھالنا چاہتے بھی ہوں۔"[30]

اس کے بعد تیسرا قدام یہ بیایا گیا ہے کہ اجتماعی زندگی کے مختلف پہلوؤں کی ہمہ گیر اصلاح کا منصوبہ (Plan) بنایا جائے اور اسے عمل میں لانے کے لیے ریاست کے تمام ذرائع وسائل استعمال کیے جائیں۔"[31]

یہاں یہ وضاحت ضروری معلوم ہوتی ہے کہ مولانا کا مسلم لیگ کے ساتھ بنیادی اختلاف ان کے طریق کار پر تھا، ان کے پاس افراد سازی کا کوئی پروگرام نہ تھا۔ بعد میں جب مولانا نے دستور مہم کا آغاز کیا، اور پھر انتخابات میں حصہ لینا شروع کیا تو بظاہر یہ تضاد محسوس ہونے لگا کہ جس بنیادی پر مولانا نے مسلم لیگ کو ہدفِ تنقید بنایا، اب خود اسی پر عمل پیرا ہیں۔ مولانا اس سے قبل اسلامی انقلاب سے پہلے سماجی انقلاب پر زور دیتے آرہے تھے، لیکن آزادی کے بعد جب ملک میں دستور کی بحث ہو چلی تو مولانا نے زیادہ تر توجہ "اسلامی دستور" کی مہم پر دی۔ جب یہ سوال مولانا مودودی سے پوچھا کہ اگر انفرادی اور اجتماعی تربیت کے بغیر اسلامی نظام قائم کیا گیا تو اس کے خلاف ردِ عمل پیدا نہ ہوگا؟ تو انھوں نے جواب میں لکھا:

"اس مسئلے کی اگر پوری وضاحت کی جائے تو اس کے لیے بڑے تفصیلی جواب کی ضرورت ہے، لیکن مختصراً جواب یہ ہے کہ بلاشبہ سیاسی انقلاب سے پہلے ایک مدنی، اجتماعی اور اخلاقی انقلاب کی ضرورت ہوتی ہے اور یہی اسلامی انقلاب کا فطری

30– **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۴۶۔

31– "**ترجمان القرآن**" (اگست ۱۹۴۸ء)، ص ۴۳ -۴۵۔

طریقہ ہے، اور بلاشبہ یہ بات بھی دسرت ہے کہ اسلام کے احکام و قوانین صرف اوپر سے ہی مسلط نہیں کے جاسکتے بلکہ اندر اسے ان کا اتباع کا دلی جذبہ بھی پیدا کیا جاتا ہے، لیکن اس حقیقت سے کوانکار کر سکتا ہے کہ پاکستان کے قیام کی شکل میں سیاسی انقلاب رونما ہو چکا ہے۔ اب یہ سوال چھیڑنا بالکل بے کار ہے کہ معاشرتی انقلاب پہلے برپا کرنا چاہیے اور سیاسی انقلاب بعد میں۔ اب تو سوال یہ پیدا ہو گیا ہے کہ جب تک قوم میں ذہنی انقلاب واقع نہ ہو اس وقت تک آیا ہم سیاسی اختیارات کو کافرانہ اصولوں کے مبابق استعمال کرتے رہیں، یا ان اختیارات کو بھی اسلامی اصولوں کے مطابق کام میں لائیں۔ سیاسی اقتدار کا کوئی نہ کوئی مصرف اور مقصد بہر حال ہمیں متعین کرنا پڑے گا۔ حکومت کی مشینری کو اخلاقی انقلاب رونما ہونے تک معطل بہر حال نہیں کیا جاسکتا۔ . . . پھر اس معاملے کا ایک دوسرا پہلو بھی ہے اور وہ یہ کہ اگر آپ اجتماعی و اخلاقی انقلاب لانا چاہتے ہیں تو آپ کو غور کرنا پڑے گا کہ اس انقلاب کے ذرائع و وسائل کیا ہو سکتے ہیں۔ ظاہر ہے کہ ان ذرائع میں تعلیم و تربیت، معاشرتی اصلاح، ذہنی اصلاح اور اسی قسم کی بہت سی چیزیں شامل ہیں۔ انھی کے ساتھ ساتھ حکومت قانونی اور سیاسی ذرائع و وسائل بھی ہیں۔ حکومت کی طاقت نہ صرف بجائے خود ایک بڑا ذریعۂ اصلاح ہے، بلکہ وہ ساری اصلاحی تدابیر کو زیادہ موثر، نتیجہ خیز اور ہمہ گیر بنانے کا بھی ذریعہ ہے۔ اب آخر کیا وجہ ہے کہ اخلاقی انقلاب لانے کے لیے حکومت کے وسائل کو بھی استعمال نہ کیا جائے۔"[32]

اس سے قبل بھی مولانا اس بات کی وضاحت کر چکے تھے:

"اس مطالبہ کی ضرورت اس لیے پیش آئی کہ یہاں ایک مصنوعی انقلاب رونما ہو گیا ہے۔ اگر یہ اسلامی اصولوں کے مطابق فطری طور پر رونما ہوا ہوتا، تو اس مطالبہ کی ضرورت پیش نہ آتی، بلکہ انقلاب کے ساتھ ہی آپ کے ملک میں اسلامی حکومت قائم ہو جاتی۔ لیکن بحالتِ موجود ایک مصنوعی انقلاب کے جتنا اس امر کا امکان ہے، کہ یہاں اسلامی نظام قائم کیا جائے، اتنا ہی اس امر کا بھی امکان ہے ایک غیر اسلامی نظام اس ملک پر مسلط کر دیا جائے۔"[33]

اس سے مولانا کا موقف واضح ہو جاتا ہے۔ مزید یہ کہ اوپر تیسرے اقدام کے تحت سماجی انقلاب کو بھی اپنے بنیادی مطالبات میں شامل کیا، گویا یہ حکومت کے ذریعے بہ طریقہ احسن ممکن تھا۔

ڈائریکٹر ریڈیو پاکستان کی فرمائش پر ۴ جنوری سے ۱۴ مارچ تک مولانا "اسلام کا نظامِ حیات"[34] کے موضوع پر پانچ تقریں کیں، جس میں اسلامی نظام کے خط و خال پیش کیے۔ بعد ازاں ایک فیصلہ کن مرحلہ آیا جب ریڈیو پاکستان کے نمائندہ وجیہ الدین اور مولانا مودودی کے درمیان "پاکستان کو اسلامی ریاست ہونا چاہیے" کے

32– ترجمان، ستمبر ۱۹۵۴؛ سید ابوالاعلیٰ مودودی، **اسلامی ریاست** (لاہور: اسلامک پبلی کیشنز، ۲۰۱۶ء)، ص ۴۹۹-۵۰۰۔

33– **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۶۸۔

34– ماہ نامہ "ترجمان القرآن" لاہور (جون ۱۹۴۸ء)، ص ۹-۵۲؛ مشمولہ: سیّد ابوالاعلیٰ مودودی، **اسلامی نظام زندگی اور اس کے بنیادی تصورات** (لاہور: اسلامک پبلی کیشنز، ۲۰۱۶ء)، ص ۲۹۴-۳۲۲۔

عنوان سے مکالمہ ہوااور اس میں سیکولر نقطۂ نظر دلیل و برہان کے میدان میں بے بس ہو گیا۔ اس سلسلے سے جو بات سامنے آئی وہ یہ تھی کہ موجودہ نظام سیکولر بنیادوں پر کھڑا ہے،اس کو تبدیل کرنے کے لیے دستور ساز اسمبلی کو پہلے قدم پر اس امر کا اعلان کرنا چاہیے کہ پاکستان میں حاکمیت خدا کی ہے اور ریاست اس کے نائب کی حیثیت سے کام کرے گی، ریاست کا سیاسی قانون شریعتِ خداوندی ہے جو محمد ﷺ کے ذریعے سے ہمیں پہنچا ہے، تمام پچھلے قوانین جو شریعت سے متصادم ہوتے ہیں، بتدریج بل دایے جائیں اور آئندہ کوئی ایسا قانون نہ بنایا جائے جاسکے گا کو شریعت کے خلاف ہو، ریاست اپنے اختیارات کے استعمال میں اسلامی حدود سے تجاوز کرنے کی مجاز نہ ہو گی۔[35]

قرارداد مقاصد

قانون آزادِ ہند مجریہ ۱۹۴۷ء کی رو سے گورنمنٹ آف انڈیا ایکٹ ۱۹۳۵ء کچھ ترامیم کے ساتھ پاکستان کا عبوری دستور قرار پایا۔[36] قانون آزادِ ہند مجریہ ۱۹۴۷ کے تحت دستور ساز اسمبلی کے قیام کا مقصد دو ذمہ داریاں تھیں: نئی مملکت کے لیے دستور تیار کرنا اور دوسرا مرکزی وفاقی قانون ساز اسمبلی کے فرائض ادا کرنا۔[37] تاہم قرارداد مقاصد منظور ہونے تک مولانا پاکستان کی اسی نظر سے دیکھتے تھے جس نظر سے انگریز حکومت کو،اس کی وجہ وہ بیان کرتے ہیں:

> "ہمارے ملک کا نظام اس وقت گورنمنٹ آف انڈیا ایکٹ ۱۹۳۵ء پر قائم ہے، جسے انگریز نے اپنے اصول و مقاصد کے مطابق بنایا تھا۔ انگریز کی حکومت اسلام کی حکومت نہیں تھی، کفر کی حکومت تھی۔ پاکستان میں بھی وہی نظام حکومت اب تک قائم ہے۔ اگرچہ اسے مسلمان چلا رہے ہیں، لیکن یہ نظام اپنی فطرت کے لحاظ سے کافرانہ ہی ہے۔"[38]

اس کے بعد ریاست کو مسلمان بنانے کا پہلا اصول بیان کرتے ہوئے لکھتے ہیں:

35– "پاکستان کو ایک مذہبی ریاست ہونا چاہئے" ماہنامہ "ترجمان القرآن" (جون ۱۹۴۸ء)، ۵۳-۵۹؛ مشمولہ: **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۰۰- ۳۰۷۔

36 – Section 8 of the Indian Independence Act, 1947. See: Hamid Khan, Constitutional and Political History of Pakistan (Karachi: Oxford University Press, 2016) 50.

37 – Ibid,. 51.

38– **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۶۳۔

"اب اس نظام کو مسلمان بنانے کے لیے اگر کوئی بنیادی تبدیلی سب سے پہلے کرنے کی ہے، تو وہ یہی ہے، کہ جس طرح فرد کو مسلمان بنانے کے لیے کلمہ پڑھایا جاتا ہے اسی طرح اسے بھی کلمہ پڑھایا جائے۔"(39)

اس سلسلے میں مولانا نے پہلا قدم یہ اٹھایا کہ ریاست کو کلمہ پڑھوانے کی غرض سے دستور ساز اسمبلی کے ارکان کو اپنا پیغام پہنچایا لیکن ان کی طرف سے مایوس کن اظہار کے بعد مولانا نے عوامی تحریک اٹھائی۔(40) اسی دوران مولانا مودودی اپریل ۱۹۴۸ء کو مولانا امین احسن اصلاحی، میاں طفیل محمد اور چودھری غلام محمد کی معیت میں مولانا شبیر احمد عثمانی سے ملے اور ان کے ساتھ چار نکاتی مطالبہ ڈسکس کیا۔(41) قرارداد مقاصد کا اصل خیال بھی مولانا نے پیش کیا، انھوں نے اس تقریر میں ہندوستان کی مثال مثال دی:

"جب کسی ملک کا دستور مرتب کیا جاتا ہے، تو سب سے پہلے بطور اصول موضوعہ یہ طے کیا جاتا ہے کہ کن اصولوں کے مطابق نظام بنانا ہے۔ ابھی آپ کے سامنے ہندوستان کا دستور بن چکا ہے، اور وہاں آپ دیکھ چکے ہیں کہ سب سے پہلے ملک کی دستور ساز اسمبلی نے ایک قرارداد مقاصد پاس کر کے ان مقاصد (Objectives) کا تعین کیا ہے، جن کے لیے وہاں کی حکومت کام کرے گی، بالکل اسی طرح پاکستان میں بھی دستور سازی کا پہلا قدم یہی ہو سکتا ہے کہ مقاصد کو طے کر لیا جائے۔"(42)

مولانا مودودی نے رائے عامہ ہموار کرنے کے لیے مارچ ۱۹۴۸ کے آغاز میں مولانا نے حکومت سے اس مطالبہ کو منوانے کے لیے ملک گیر مہم چلائی۔ جس کے نتیجے میں مولانا اپنے ارفقا سمیت پنجاب سیفٹی ایکٹ کے تحت گرفتار کر لیے گئے۔(43) تاہم یہ مہم قرارداد مقاصد کی منظوری کی صورت میں نتیجہ خیز ثابت ہوا۔(44)

39– ایضاً، ص ۳۶۳۔

40 – Pakistan Since Independence: The Political Role of the Ulama, vol 2 (PhD Dissertation, Department of Politics, University, UK, 1989), p. 314

41 – Leonard Binder, Religion and Politics in Pakistan (Berkeley and Los Angeles: University of California Press, 1963), 138.

42– **تحریک آزادی ہند اور مسلمان**، ج ۲، ص ۳۶۴۔

43– مولانا کی گرفتاری کی وجہ یہ بیان کی گئی ہے کہ انھوں نے "جہاد کشمیر" کے خلاف فتویٰ دیا ہے۔ اس مسئلہ پر مولانا ایک علمی موقف رکھتے تھے، جس پر مولانا شبیر احمد عثمانی کے ساتھ طویل مراسلت بھی ہوئی (دیکھیے) لیکن اصل وجہ یہ نہیں تھی بلکہ اسلامی دستور کو رکھوانے کے لیے آپ کی گرفتاری عمل میں لائی گئی۔ یہی وجہ تھی کہ مسئلہ کشمیر پر مولانا شبیر احمد عثمانی کے ساتھ اختلاف کے باجود مولانا عثمانی نے مولانا مودودی کی گرفتاری پر حکومت کو سخت تنقید کا نشانہ

جس وقت قرارداد مقاصد منظور ہوئی اس دوران مولانا مودودی ملتان جیل میں تھے، قرارداد کا متن مولانا مودودی کو جیل میں دکھایا گیا جس میں انھوں نے بعض لفظی ترمیمات کیں۔ (45) تاہم ۱۲ مارچ ۱۹۴۹ کو قرارداد مقاصد منظور ہونے کے بعد دستور سازی کا عمل شروع ہوا۔ قراردادِ مقاصد کی منظوری سے پہلے مولانا پاکستان کو بھی اسی نظر سے دیکھ رہے تھے جس نظر سے تقسیم سے قبل برصغیر کو لیکن اس کے بعد یہ حیثیت تبدیل ہوگئی، مولانا ان خیالات کا اظہار کیا:

"اب اس ریاست کی شرعی حیثیت سابق غیر مسلم ریاست سے بالکل مختلف ہو چکی ہے۔ اب اس کی ملازمت جائز ہے، اس کے قوانین اپنی عارضی نوعیت میں قابلِ تسلیم ہیں، اس کی عدالتوں میں جانا حلال ہے اور اس کی اسمبلی و پارلیمنٹ کے انتخابات میں ہر حیثیت سے حصہ لیا جاسکتا ہے۔ اس دستوری تغیر کے ساتھ جماعت نے اپنی پالیسی میں بھی یہ تغیر کیا کہ وہ آئندہ اس ملک کے انتخابات میں حصہ لے آئینی طریقوں سے اس ملک کو مکمل دارالاسلام بنانے کی کوشش کرے گی۔ یہ ہماری تحریک کی تاریخ میں ایک اہم نقطۂ انقلاب تھا، جس نے ہمارے لیے ایک طریقِ کار کے بجائے دوسرے طریقِ کار کا دروازہ کھول دیا۔"(46)

بنیادی اصول کی کمیٹی

دستور ساز اسمبلی نے دستور سازی کے لیے کمیٹیاں قائم کی گیں جن میں سے ایک بنیادی اصول کی کمیٹی (Basic Principles Committee) تھی۔ اس کمیٹی کے تحت مختلف ذیلی کمیٹیاں قائم ہوئیں جس میں قرار دار مقاصد کی اسلامی شناخت کی روشنی میں بنیادی اصول کی کمیٹی کی رہنمائی کے لیے بورڈ آف تعلیمات کا قیام عمل میں لا گیا۔ تاہم نومبر ۱۹۵۰ء میں لیاقت علی خاں نے پہلی دستوری سفارشات پیش کیں، جو قرارداد مقاصد سے قطعی ہم آہنگ نہ تھیں۔ سیاسی حلقوں کے ساتھ ساتھ مذہبی حلقوں نے بھی عدمِ اطمینان کا اظہار کیا۔ یعنی یہ جمہوری اور اسلامی اصولوں دونوں کی رو سے یہ نہایت ناقص رپورٹ تھی۔ ۱۴/اکتوبر ۱۹۵۰ء کو مولانا مودودی لاہور کے موچی دروازے پر ایک تاریخی خطاب میں دلائل کے ساتھ ان سفارشات کو مسترد

بنایا۔ مولانا کی اس گرفتاری کی تفصیل کے لیے دیکھیے: "مولانا مودودی اور ان کے رفقا کی نظر بندی" ماہ نامہ "**ترجمان القرآن**" لاہور (ستمبر ۱۹۴۹ء)، ص ۳۶-۶۱۔

44– ماہ نامہ "**ترجمان القرآن**" لاہور (اکتوبر، ۱۹۴۹ء)، ص ۵۴۔

45– سید ابوالاعلیٰ مودودی، **تصریحات**، مرتب: سلیم منصور خالد (لاہور: البدر پبلی کیشنز ۲۰۰۹ء)، ص ۴۵۱؛ عبد الغنی فاروق، **کاروان عزیمت** (لاہور ادارہ معارفِ اسلامی، ۱۹۸۶ء)، ج ۱، ص ۱۸۱؛ **مولانا مودودی کے انٹرویو**، ص ۴۵۸۔

46– سیّد ابوالاعلیٰ مودودی، **جماعت اسلامی کا مقصد، تاریخ اور لائحہ عمل** (لاہور: اسلامک پبلی کیشنز، ۲۰۱۴ء)، ص ۵۸-۵۹۔

کردیا۔ وزیر اعظم لیاقت علی خان نے علما کو دعوت دی کہ وہ دستور کے لیے واضح اسلامی سفاشات پیش کریں۔[47] اس کے نتیجے میں ۲۱تا۲۴ جنوری ۱۹۵۱ء کو کراچی میں ۳۱ جید علما کا اجتماع منعقد ہوا، جس نے اسلامی دستور کے لیے ۲۲ بنیادی اصول مرتب کئے۔[48]

اس کے اٹھارہ ماہ کی مکمل خاموشی کے بعد مولانا مودودی نے مئی ۱۹۵۲ء وہ آٹھ نکات پیش کئے[49] جس میں پھر اس ان مطالبات کا اعادہ کیا گیا جو پہلے پیش کیے گئے تھے۔ جولائی ۱۹۵۲ کو دستخطی مہم چلائی گئی۔[50] نومبر ۱۹۵۲ء کو جماعت اسلامی نے بنیادی اصول کی کمیٹی میں علما کے ۲۲ نکات کو شامل کرنے کے لیے "دستوری ہفتہ" منایا۔[51] ان مہمات کے نتیجے میں خواجہ ناظم الدین نے ۲۲ دسمبر ۱۹۵۲ء کو دستور سفارشات کی دوسری پیش کی۔ ۱۱ جنوری ۱۹۵۳ء کو پھر انہی علما کی مجلس منعقد ہوئی، جنھوں نے ۱۹۵۱ء میں ۲۲ نکات پر اتفاق کیا تھا، اور خواجہ ناظم الدین کی رپورٹ کا جائزہ لیا اور اس میں چند اصلاحات اور ترامیم تجویز کیں، ان میں قادیانیوں کو اقلیت قرار دینے کی تجویز بھی شامل تھی۔[52] مولانا مودودی نے بھی آٹھ نکات میں اضافہ کرکے قادیانی مسئلہ حل کرنے کی تجویز الگ بھی پیش کی۔

تحریک ختم نبوت ۱۹۵۳ء

جیسا کہ اوپر ذکر ہوا کہ ۲۲ نکات کے بعد مئی کے آخر میں مولانا نے دستوری رپورٹ میں آٹھ نکات شامل کرنے کا مطالبہ کیا۔ اسی ماہ کے آخر میں احرار نے قادیانی مسئلہ چھیڑ دیا۔ اس ہنگامہ آرائی کے دوران جولائی ۱۹۵۲ء میں ملتان میں فائرنگ ہوئی، جس سے ملک کے حالات بگڑنے کا اندیشہ تھا۔ اس دوران مولانا مودودی نے عوام سے دستوری سازی کے دوران مزاحمتی کاروائیوں سے بچنے کی اپیل کی۔ ان کا موقف یہ تھا کہ اسلامی

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47 – M, Rafique Afzal (ed.), Speeches and Statements of Qaid-i-Millat Liaquat Ali Khan (Lahore: Research Society of Pakistan, 1975), p.510.

48– سید ابوالاعلیٰ مودودی، **اسلامی ریاست**، ص

49– **تصریحات**، ص ۴۵۶-۴۵۷۔

50–

51 – Safir Akhtar, Pakistan Since Independence: The Political Role of the Ulama, vol 2, op. cite, p. 328.

52– **تصریحات**، ص 458

دستور بننے کے بعد قادیانی مسئلہ خود بہ خود حل ہو جائے گا۔[53] اس کا واضح اثر سامنے آیا اور دستوری مہم جاری رہی۔ خواجہ ناظم الدین رپورٹ دراصل اس کے بعد پیش ہوئی۔

مولانا نے دستور ساز اسمبلی کی توجہ کے لیے ۱۹۵۲ء میں ایسے مضامین تحریر کیے جس میں قادیانیت کے معاشرتی، معاشی اور سیاسی پہلوؤں اجاگر کیے گئے۔ اسی سال دستور ساز اسمبلی کی توجہ کے لیے ایک مفصل مضمون لکھا، جس میں مذکورہ مسئلہ کا صحیح حل پیش کیا گیا۔ لیکن ۱۹۵۲ء کی بنیادی اصول کی کمیٹی کی رپورٹ میں اس مسئلہ کو قابل اعتنا نہیں سمجھا گیا۔ اس کے نتیجے میں ۱۱ جنوری ۱۹۵۳ء کو دستوری سفارشات پر ۱۱ اصلاحات اور تجاویز پیش کیے، جن میں مرزا غلام احمد قادیانی کو مذہبی پیشوا ماننے والوں کو اقلیت قرار دینے کی تجویز بھی شامل تھی۔[54] لیکن ۱۵ اور ۱۷ جنوری کو احرار اور جمیعت علمائے اسلام نے کراچی میں قادیانی مسئلے کے متعلق الگ تحریک چلانے کے لیے کنونش بلائی۔ دستوری مہم کے دوران مولانا کی تمام تر توجہ صرف دستور سازی ہی پر تھی۔

اس دوران میں ۱۵ سے ۱۷ جنوری تک احرار اور جمیعت علما اسلام کے ایما پر کراچی میں ایک کنونش منعقد ہوئی۔ اس کنونشن میں مولانا بھی شریک ہوئے۔ کنونشن کے اس اجلاس میں ایک سب جیکٹ کمیٹی بنائی گئی، مولانا مودودی اس کے رکن تھے۔ ۱۶ جنوری کی رات کو اس کمیٹی کا اجلاس ہوا اور اس میں طے پایا کہ قادیانی مسئلہ کو حل کرنے کے لیے دستوری سفارشات میں شامل کرنے کے بعد اس کے لیے الگ جدوجہد کی ضرورت نہیں ہے۔ لیکن ۱۷ جنوری کو کنونشن کے اجلاس میں میں سب جیکٹس کمیٹی کی طے کردہ تجویز کو مسترد کر دیا گیا اور ارکان کی اکثریت نے الگ جدوجہد پر اتفاق کیا۔ ۱۸ جنوری کو کنونشن کے اجلاس میں مولانا ابوالحسنات نے فیصلہ سنایا کہ: "یہ کنونش صرف تحفظ ختم نبوت کے لیے بلائی گئی ہے، یہاں کوئی دوسرا مسئلہ حتیٰ کہ اسلامی دستور کا مسئلہ بھی نہیں چھیڑا جا سکتا"۔[55] اس کے بعد تاج الدین انصاری نے ریزلوشن پڑھنا شروع کر دیا جس میں ایک ماہ میں مطالبات منظور نہ ہونے کی صورت میں ڈائرکٹ ایکشن کی تجویز بھی درج تھی۔

مولانا مودودی لکھتے ہیں کہ ڈائرکٹ ایکشن کا ریزولیشن پیش ہونے کے بعد میرا فوری رد عمل یہ تھا کہ اس کی مخالفت کروں اور اپنی جماعت کو اس سے الگ کر دوں۔ لیکن غور کرنے کے بعد اس نتیجے پر پہنچا کہ میری

53– **تصریحات**، ص ۴۵۷-۴۵۸۔

54– "**ترجمان القرآن**" (فروری، ۱۹۵۳)، ص ۲۔

55– **قادیانی مسئلہ**، ۱۹۳۔

علیٰحدگی فساد کو روکنے میں مؤثر ثابت نہ ہو گی۔ یہی وجہ تھی کہ میں ریزولیشن کی براہ راست مخالفت کے بجائے یہ تجویز پیش کی کہ ایک مرکزی مجلس عمل بنائی جائے جو کنونشن کی شریک جماعتوں کے ذمہ داری لیڈروں پر مشتمل ہو اور پوری تحریک اسی مجلس کی رہنمائی میں چلائی جائے۔ یہ تجویز تسلیم کر لی گئی اور اس کے آٹھ ارکان منتخب ہوئے۔ لیکن ۱۸ جنوری کو مرکزی مجلس عمل کے بعض ارکان کی غیر موجودگی میں ڈائرکٹ ایکشن کا فیصلہ کر لیا گیا۔ مولانا کو شروع دن سے ڈائرکٹ ایکشن سے اختلاف تھا۔ تاہم ڈائرکٹ ایکشن کے فیصلہ اور شروع ہونے کے درمیانی عرصہ میں مولانا نے اپنے رفقا: میاں طفیل محمد، ملک نصر اللہ خان عزیز شیخ سطان احمد کے ذریعے کمیٹی کو اپنے تحفظات پہنچاتے رہے۔ بالآخر ۲۷ فوری کو ڈائرکٹ ایکشن شروع ہوا اور اس کے بعد پنجاب میں فسادات رونما ہونے کے نتیجے میں پہلی بار مارشل لاء نافذ ہوا۔ لیکن مولانا نے اس سے قبل خود کو اس تحریک سے الگ کر لیا تھا۔ اس سے واضح ہوتا ہے کہ مولانا نے اس مرحلے پر بھی غیر آئینی ذرائع کے استعمال سے گریز ہی کیا۔

محمد علی بوگرا فار مولا اور دستور ساز اسمبلی کی معطلی

خواجہ ناظم الدین کو برطرف کرنے کے بعد محمد علی بوگرا کو امریکہ سے سفارت کے عہدے سے واپس بلا کر وزیر اعظم نامزد کیے گئے۔ مولانا مودودی جیل میں تھے، اس دوران شیخ سلطان احمد جماعت اسلامی کے امیر تھے انھوں نے اسلامی دستور کی مہم اسی طرح جاری رکھی۔ وزیر اعظم نے قسط وار دستور سازی کا امکان ظاہر کیا۔[56] اس پر امیر جماعت اسلامی نے شدید تنقید کی۔ بعد ازاں انھوں نے اس خیال کی تردید کے لیے کانفرنس کی کہ حکومت سیکولر آئین کے حق میں نہیں ہے اور ساتھ اسلامی دستور بنانے کی یقین دہانی بھی کی۔ اسلامی دستور کی تفصیل میں انھوں نے کہا: "پاکستان کا آئین اسلامی سوشل ازم، جمہوریت اور انصاف کے اصولوں پر بنایا جائے گا"۔[57] اس سے قبل سیکولر ازم کی جو اصطلاح استعمال کی تھی، اس کی وضاحت میں کہا: "میں نے لفظ سیکولر کا استعمال اس سیاب وسباق میں کیا تھا کہ ہم اپنے یہاں تھیوکریسی (Theocracy)

56– میاں طفیل محمد، جماعت اسلامی کی دستوری جدوجہد، مرتب: فیض احمد شہابی (لاہور: ادارہ معارف اسلامی، ۲۰۱۴ء)، ص ۸۸۔

57– روزنامہ جنگ، ۱۱ جولائی ۱۹۵۳

قائم نہیں کر سکتے۔" اس بیان پر واشنگٹن پوسٹ کے ایک اداریے میں یہ تبصرہ کیا: "ملاؤں کی حکومت" کے رجحان کو ختم کرنے کے امکانات روشن ہو گئے"۔[58] اس واقعہ پر میاں طفیل محمد تبصرہ کرتے ہوئے لکھتے ہیں:

"وزیر اعظم نے اسلامی نظام کو ملائیت قرار دے کر کر مسلم لیگ کے ان دعوؤں اور وعدوں کو خاک میں ملا دیا کہ پاکستان اسلامی نظام کا گہوارہ بنے گا۔[59]

جماعت اسلامی کی مرکزی مجلس شوریٰ کے جون ۱۹۵۳ء فیصلے کے مطابق بڑے شہروں میں جلسے منعقد کیے، جن میں اسلامی دستور کے حوالے حکومتی پالیسیوں کو ہدفِ تنقید بنایا گیا۔ ۳۱ جولائی ۱۹۵۳ء کو جماعت اسلامی نے ملک بھر کے بڑے بڑے شہروں میں "یوم دستور" منایا۔[60] جماعت اسلامی کی مرکزی مجلس شوریٰ کا اجلاس ۲۱ تا ۲۵ نومبر ۱۹۵۳ء کو کراچی میں منعقد ہوا، جس میں دستور ساز اسمبلی سے مکمل اسلامی دستور مرتب کرنے کا مطالبہ کیا گیا۔ مجلس شوریٰ نے دیگر مطالبات ماننے پر بھی زور دیا تاکہ ۱۴ اگست ۱۹۵۴ء کو دستور نافذ العمل ہو جائے۔[61]

اکتوبر ۱۹۵۴ء کے آخر میں دستور ساز اسمبلی کا آخری اجلاس ہونے والا تھا، جس پر دستخط کر کے مکمل کرنا تھا، لیکن ۲۴ اکتوبر کو ملک غلام محمد نے دستور ساز اسمبلی توڑ دی۔ اس دوران میاں طفیل محمد نے کراچی کا دورہ کر کے اسمبلی کے اسپیکر مولوی تمیز الدین کو گونر جنرل کے اقدام کو عدالت میں چیلنج کرنے پر آمادہ کیا لیکن وہ تذبذب کا شکار تھے اور میاں صاحب سے کہا کہ ان کے پاس قانونی چارہ جوئی کے لیے وسائل بھی نہیں ہیں، اس وقت میاں صاحب نے ان پانچ ہزار روپے دیے۔ میاں صاحب لکھتے ہیں:

"اس سلسلے میں ہم نے جناب منظر عالم سیکرٹری مسلم لیگ، قاضی شریح الدین صدر بار ایسوایشن کراچی، مولانا ظفر احمد انصاری صاحب سے ملے اور اگلے دن سردار عبد الرب نشتر کو اس طرف متوجہ کیا اور اس دن تک کی کہان سنائی؛ چناں چہ دو دن سردار عبد الرب نشتر مرحوم، جنھوں نے اس وقت کراچی میں وکالت شروع کر رکھی تھی، کے دفتر واقع بندر روڈ کراچی میں آٹھ دس سیاسی رہنماؤں سے اس بارے میں تبادلہ خیال ہوتا رہا، جس میں میں اور چودھری غلام محمد مرحوم برابر نہ صرف شریک رہے بلکہ اس کام کو بلا تاخیر شروع کرنے پر زور دیتے رہے۔ "[62]

58– بہ حوالہ: **جماعت اسلامی کی دستوری جدوجہد**، ص ۸۹۔

59– ایضاً، ص ۸۹۔

60– ایضاً، ص ۹۰۔

61– ایضاً، ص ۹۲۔

62– میاں طفیل محمد، جماعت اسلامی اور قومی سیاست۔

سندھ ہائی کورٹ کے فُل بنچ نے مولوی تمیز الدین کے حق میں فیصلہ سنا دیا اور گورنر جنرل کے اقدام کو غیر آئینی قرار دیا۔ حکومت اس فیصلے کے خلاف فیڈرل کورٹ میں اپیل میں گئی اور چیف جسٹس نے پہلی بار آئین میں تحریف کر کے ہائی کورٹ کے فیصلے کو کالعدم قرار دیا۔

دوسری دستور ساز اسمبلی کی تشکیل اور ۱۹۵۶ کا دستور

۲۸ مئی کو نئی دستور ساز اسمبلی تشکیل دی گئی، جس کا پہلا اجلاس ۷ جولائی ۱۹۵۵ء کو مری میں منعقد ہوا۔ چودھری محمد علی وزیر اعظم نامزد ہوئے۔ ۲۸ مئی ۱۹۵۵ء کو مولانا مودودی بھی جیل سے رہا ہوئے تھے، انھوں نے عوامی تحریک کے سلسلہ جنبانی شروع کر دی۔ ۲۲ نومبر ۱۹۵۵ء کو مولانا مودودی نے سالانہ اجلاس میں اسلامی دستور کا مطالبہ پر مزید زور دیا۔ جماعت اسلامی کی مجلس شوریٰ کا اجلا مولانا مودودی کی صدارت میں ۳تا۹ جنوری ۱۹۵۶ کو اچھرہ میں منعقد ہوا۔ جس میں تمام حلقوں کے امرا نے دستوری مہم کی رپورٹیں پیش کیں، اس مہم عوام نے بھرپور حصہ لیا۔ میاں صاحب اس آخری مرحلے کے بارے میں لکھتے ہیں:

"مجلس شوریٰ کا اجلاس ابھی جاری تھا کہ ۹ جنوری ۱۹۵۶ء کو وزیر قانون نے دستور پاکستان کا مسودہ پیش کر دیا۔ اسی دن کے اخبارات میں اس مسودے کا خلاصہ بھی شائع ہو گیا۔ مجلس شوریٰ نے اس موقع پر امیر جماعت کی سرکردگی میں ایک کمیٹی قائم کر دی۔ کمیٹی کو یہ اختیار دیا گیا کہ پورا مسودہ شائع ہونے پر وہ اس کا بغور مطالعہ کرے گی اور جماعت کے موقف کا فیصلہ کرے گی۔ اس کمیٹی کے صدر مولانا سید ابوالاعلیٰ مودودی تھے۔ کمیٹی کے ارکان میں جہاں مولانا امین احسن اصلاحی صاحب، ملک نصر اللہ خان عزیز صاحب، جناب فضل الرحمن نعیم صدیقی صاحب شامل تھے، وہاں خاکسار بھی اس کمیٹی کا رکن تھا۔ فروری ۱۹۵۶ء میں مولانا مودودی مشرقی پاکستان گئے جہاں انھوں نے کئی عوامی جلسوں سے خطاب کیا۔"[63]

۲۹ فروری ۱۹۵۶ء کو مجلس دستور ساز پاکستان دستور پاس کر دیا۔[64] ۲ مارچ ۱۹۵۶ء کو گورنر جنرل نے منظوری دے دی۔ جماعت اسلامی کی مرکزی مجلس شوریٰ کا اجلاس ۱۵تا۱۸ مارچ ۱۹۵۶ء کو لاہور میں منعقد ہوا، دستور کے جائزے کے لیے جو کمیٹی قائم کی گئی تھی، اس نے نئے دستور کا جائزہ لینے کے بعد قرارداد منظور کی،

63– **جماعت اسلامی کی دستوری جدوجہد**، ص۱۰۸۔

64 – Hamid Khan, Constitutional and Political History of Pakistan, 96

جس میں قرار دیا گیا کہ :" یہ دستور اپنی تمام خامیوں کے باوجود متعدد وجوہ سے اطمینان بخش اور قابل قبول ہے"۔[65] نو سال کی اس جدوجہد کے بعد ۲۳ مارچ کو پاکستان کو پہلا دستور ملا۔

پاکستان کی پہلی دستور بننے تک مختلف آئینی طریقوں سے دستور کی اسلام کاری کا عمل جاری رہا۔ 1956ء کی دستور کے ضمن وہ مراسلت نہایت اہمیت کا حامل ہے جو مولانا مودودی اور ڈاکٹر احمد حسین کمال کے مابین ہوا۔ جس میں اسلامی نظام کے عملی نفاذ کے حوالے سے بہت اہم سوالات زیر بحث آئے۔ ڈاکٹر حسن کمال کے سوالات کا لب لباب یہ تھا کہ حق و باطل میں پوری پوری تمیز اور تفریق برتنی چاہیے۔ موجودہ دستور، 1956ء، اپنی ہیئت ترکیبی کے لحاظ سے اسلام کی حقیقی بالادستی کو تسلیم نہیں کرتا۔ نیز قانون سازی صدر مملکت کی ک منظوری کے محتاج ہو جاتے ہیں۔ قوانین الہیہ بھی انسانی آرا کی منظوری کے محتاج بن جاتے ہیں، پھر ان قوانین کو عدالتی تشریح و توضیح کا محتاج بنادیا گیا، اس نوع کے دیگر سوالات پر مولانا مودودی اور ڈاکٹر حسین کمال کے درمیان دو خطوط میں طویل مراسلت ہوئی۔ نظریت اور حکمت عملی کو واضح کرتے ہوئے مولانا لکھتے ہیں:

"آپ نے جن مسائل کی طرف توجہ دلائی ہے، ان کے متعلق ہمارا نقطۂ نظر یہ ہے کہ ہم اپنی تحریک خلا میں نہیں چلا رہے ہیں، بلکہ واقعات کی دنیا میں چلا رہے ہیں۔ اگر ہمارا مقصد محض اعلان و اظہار حق ہوتا تو ہم ضرور صف بے لاگ حق بات کہنے پر اکتفا کرتے لیکن ہمیں چوں کہ حق کو قائم بھی کرنے کی کوشش کرنی ہے اور اس کی اقامت کے لیے اسی واقعات کی دنیا میں سے راستہ نکالنا ہے اس ہمیں نظریت (Idealism) اور حکمت عملی (Practical Wisdom) کے درمیان توازن برقرار رکھتے ہوئے چلنا پڑتا ہے۔ آئیڈیل ازم کا تقاضا یہ ہے کہ ہم اپنے آخری مقصود کو نہ صرف خود پیش نظر رکھیں بلکہ دنیا کو بھی اس کی طرف بلاتے اور رغبت دلاتے رہیں۔ اور حکمت عملی کا تقاضا یہ ہے کہ ہم اپنے مقصود کی طرف بتدریج بڑھیں اور واقعات کی دنیا میں ہم کو جن حالات سے سابقہ ہے ان کو اپنے مقصد کی طرف موڑنے، اس کے لیے مفید بنانے اور مزاحمتوں کو ہٹانے کی کوشش کرتے رہیں۔... دستورِ اسلامی کے بارے میں جو باتیں آپ نے لکھی ہیں، ان میں سے کوئی بھی ہم سے پوشیدہ نہیں ہے، نہ کبھی پوشیدہ تھی، لیکن یہاں ایک کھلی کھلی لادینی ریاست کا قائم ہو جانا ہمارے مقصد کے لیے اس سے بہت زیادہ نقصان دہ ہوتا جتنا اب اس نیم دینی نظام کا نقصان آپ کو نظر آرہا ہے بلاشبہ ہم نے پوری چیز حاصل نہیں کی ہے، مگر کشمکش کے پہلے مرحلے میں ہم نے اتنا فائدہ ضرور حاصل کیا ہے کہ ریاست کو ایک قطعی لادینی ریاست بننے سے روک دیا، اور اسلام کی چند ایسی بنیادی باتیں منوالیں جن پر آگے کام کیا جاسکتا ہے۔ ہم اس غلط فہمی میں نہیں ہیں کہ ہمارا مقصود حاصل ہو گیا ہے۔ ہ اس مقام پر ٹھہر جانے کا کوئی ارادہ نہیں رکھتے۔ بلکہ جو کچھ ہم نے حاصل کیا ہے اسے مزید مقاصد کے حصول کا ذریعہ بنانا چاہتے ہیں اور اب ہم پیش قدمی کے لیے اس سے بہتر پوزیشن میں ہیں جو اس قریبی مقصود کے حاصل نہ ہونے کی صورت میں ہماری ہوتی۔"[66]

65– میاں طفیل محمد، **جماعت اسلامی کی دستوری جدوجہد**، ص ۱۰۸۔

66– ماہ نامہ "**ترجمان القرآن**" (دسمبر ۱۹۵۶ء)، ص ۱۱-۱۲۔

اس فرق کو دوسرے خط میں مزید واضح کرتے ہوئے لکھتے ہیں:

"ہم جس ملک اور جس آبادی میں بھی ایک قائم شدہ نظام کو تبدیل کر کے دوسرا نظام قائم کرنے کی کوشش کریں گے، وہاں ایسا خلا ہم کو کبھی نہ ملے گا کہ ہم بس اطمینان سے "براہ راست" اپنے مقصود کی طرف بڑھتے چلے جائیں۔ لامحالہ اس ملک کی کوئی تاریخ ہو گی، اس آبادی کی مجموعی طور پر اور اس کے مختلف عناصر کی انفرادی طور پر کچھ روایات ہوں گی۔ کوئی ذہنی اور اخلاقی اور نفسیاتی فضا بھی وہاں موجود ہو گی۔ ہماری طرح کچھ دوسرے دماغ اور دست و پا بھی وہاں پائے جاتے ہوں گے جو کسی اور طرح سوچنے والے اور کسی اور راستے کی طرف اس ملک اور اس آبادی کو لے کر چلنے کی سعی کرنے والے ہوں گے۔... ان حالات میں نہ تو اس امر کا کوئی امکان ہے کہ ہم کہیں اور سے پوری تیاری کر کے آئیں اور یکایک اس نظام کو بدل ڈالیں جو ملک کے ماضی اور حال میں اپنی گہری جڑیں رکھتا ہے۔ نہ یہ ممکن ہے کہ اسی ماحول میں رہ کر، کشمکش کیے بغیر، کہیں الگ بیٹھے ہوئے اتنی تیاری کر لیں کہ میدانِ مقابلہ میں اترتے ہی سیدھے منزل مقصود پر پہنچ جائیں۔ اور نہ اس بات ہی کا تصور کیا جا سکتا ہے کہ ہم اس کشمکش سے گزرتے ہوئے کسی طرح "براہ راست" اپنے مقصود تک جا پہنچیں۔ ہمیں لامحالہ واقعات کی اس دنیا میں موافق عوامل سے مدد لیتے ہوئے، اور مزاحم طاقتوں سے کشمکش کرتے ہوئے بتدریج اور بروقت قدم اٹھانا ہو گا۔"(67)

۱۹۵۶ء تک کے دستور تک جدوجہد سے یہ حقیقت بالکل واضح ہو کر سامنے آتی ہے کہ اس پورے عرصے میں مولانا نے اپنے اہداف کے لیے کسی بھی ایسے ذریعے کا سہارا نہیں لیا جس کو غیر قانونی یا غیر اخلاقی کہا جا سکے۔

67– ایضاً، ص ۲۰۔