

The Evolution of Islamic Law in Pakistan: From Ideals to Implementation

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Introduction

The primary reason Muslims in undivided India demanded the creation of Pakistan was their desire for a state where they could live according to their cultural values, traditions, and laws. This motivation unified the Muslims of the sub-continent in support of Pakistan, leading Mr. Jinnah to declare: "Our religion, our culture, and our Islamic ideals are our driving force to achieve our independence." This objective was realized on August 14, 1947, when Pakistan emerged as a new sovereign state, envisioned as the homeland of Islam, where people aspired to live under Islamic laws. However, establishing Pakistan was one thing; implementing Islamic law as its governance framework was another challenge altogether.

Upon achieving independence, Pakistan faced numerous complex questions that needed resolution before significant Islamisation could commence. These included the interpretation of Islamic laws on issues like Riba, Hudood, and women's rights. There was also the question of whether it was feasible to govern a modern state based on Islamic laws in the 20th century. Some viewed these laws as medieval, harsh, and a hindrance to progress and modernity. As a result, the initial steps towards introducing Islamic laws were cautious and modest. Early measures included the West Punjab Muslim Personal Laws (Shariat Application) Act of 1948, aimed mainly at limiting the influence of customary laws.

However, numerous Islamic scholars disagreed with this cautious approach, advocating for more rapid implementation of Islamic law. They argued that Islamic law was dynamic and flexible enough to address contemporary issues effectively. For example, Maulana Abul Ala Maududi emphasized this in a speech at the University Law College in Lahore on January 6, 1948, discussing the Constitution and Law in Islam. On March 7, 1949, Prime Minister Liaquat Ali Khan presented the 'Objectives Resolution' in the Constituent Assembly, clarifying the new state's ideals and goals, and committed to basing Pakistan's Constitution on Islamic principles. He asserted that Pakistan was established because Muslims in the subcontinent wanted to live according to Islamic teachings and traditions, demonstrating to the world that Islam offers solutions to modern societal problems.

The 'Objectives Resolution' proclaimed: "Sovereignty over the entire universe belongs to Allah Almighty alone. The authority delegated to the State of Pakistan, through its people, is a sacred trust to be exercised within the limits prescribed by Him." This Resolution committed the Constituent Assembly to draft a Constitution for Pakistan, ensuring the exercise of power through elected representatives and the observance of Islamic principles of democracy, freedom, equality, tolerance, and social justice. It also pledged to enable Muslims to live in accordance with Islamic teachings, protect minority rights, ensure judicial independence, and contribute to international peace and progress.

The first Constitution of Pakistan, effective from March 23, 1956, included the 'Objectives Resolution' as its preamble and had a chapter on 'Islamic Provisions.' These provisions mandated that all existing laws be aligned with Islamic injunctions as laid down in the Quran and Sunnah, and no future laws be contrary to these injunctions. An Advisory Council of Islamic Ideology was

established to recommend measures to align existing laws with Islamic principles. Despite these provisions, little progress was made in the first 30 years to align the country's laws with Islamic teachings. The Constitution of 1956 remained in force until October 7, 1958, but saw limited implementation of these objectives.

Similarly, the 1962 Constitution included provisions for an Advisory Council of Islamic Ideology to review existing laws for conformity with Islamic teachings. However, little was accomplished because Article 6(1) assigned the responsibility for determining the compatibility of proposed laws with Islamic principles to the legislature, not the judiciary. Consequently, this provision acted more as a guideline for lawmakers than an enforceable obligation. The 1973 Constitution also aimed to align all laws with Islamic injunctions, but again, the responsibility for implementation was left to the legislature, with no enforcement power given to the superior judiciary.

The process of Islamisation gained momentum when Gen. Muhammad Zia-ul-Haq assumed power in July 1977. Shortly after taking office, he announced that courts would be empowered to invalidate any laws conflicting with the Quran and Sunnah. To achieve this, the 'Superior Courts Shariat Benches Order' was issued on December 2, 1978, effective from February 10, 1979, coinciding with the enforcement of the Hudood laws. Consequently, five Shariat Benches were established in the High Courts of Lahore, Peshawar, Karachi, and Quetta, and in the Supreme Court in Islamabad. These benches could strike down any laws, excluding the Constitution, personal Muslim law, procedural laws, or fiscal laws related to taxes and fees, that were deemed un-Islamic.

These Shariat Benches had the authority to declare to what extent a law was un-Islamic and how it could be amended to align with Islamic injunctions, with the government obliged to implement their orders. On May 27, 1980, the High Courts' Shariat Benches were replaced by the Federal Shariat Court in Islamabad, comprising five judges and three traditional ulemas. In March 1982, the Federal Shariat Court's powers were expanded to allow it to review any law within its jurisdiction and recommend amendments to comply with the Quranic injunctions. This judicial review power, aimed at Islamising existing laws, was unprecedented and unmatched in Islamic history.

Unlike in historical Islamic governance, where scholars provided legal opinions (fatwas) that were adopted by rulers without interference, the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court in Pakistan had the unique power to invalidate any existing law found to be inconsistent with Islamic teachings. This power could be exercised both upon request and suo motu, making it a powerful tool for rapid Islamisation. This authority was fully utilized by these courts, leading to significant legal changes, often described as a silent revolution.

Simultaneously with the Superior Courts Shariat Benches Order, the Hudood laws were introduced on February 10, 1979. These laws, enforced through a Presidential Order and three Ordinances, amended the Pakistan Penal Code to align certain criminal offenses with Islamic teachings. The Prohibition (Enforcement of Hadd) Order, 1979, revised laws related to intoxicants. The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, covered theft and robbery. The Offence of Zina (Enforcement of Hudood) Ordinance, 1979, addressed fornication, adultery, rape, and other related offenses. The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, dealt with false accusations of adultery. These laws emphasized that, for crimes impacting society, individual rights are secondary to societal or state rights. Hadd punishments aim to uphold Islamic values and provide spiritual purification, a concept unique to Islamic jurisprudence.

Establishment and Role of the Council of Islamic Ideology:

The Council of Islamic Ideology was established to examine laws enacted during British rule and after the creation of Pakistan, ensuring no provisions were contrary to Islamic injunctions. The Council recommended amendments to numerous laws, leading to significant legislative changes such as the repeal of the Evidence Act of 1872 in 1984, replaced by the Qanoon-e-Shahadat Order to align with Islamic principles. However, the most profound changes in the legal system resulted from the decisions of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court.

Notable Judicial Decisions:

a) Customary Laws on Land Disposal:

- **Case:** Federation of Pakistan v. Mohammad Ishaque, PLD 1983 S.C. 273
- **Decision:** The court declared that the customary law in Punjab, which restricted the disposal of ancestral agricultural land, was un-Islamic. Islam does not distinguish between ancestral and non-ancestral property, invalidating the customary law.

b) Retirement Without Show Cause Notice:

- **Case:** Pakistan & others v. Public at Large, PLD 1987 S.C. 304
- **Decision:** Provisions in the Civil Servants Act, 1973, allowing retirement without show cause notice were deemed unfair and contrary to Islamic injunctions. Islam emphasizes complete justice, including protection against unfair treatment.

c) Pre-Emption Acts in Punjab and NWFP:

- **Case:** Government of NWFP v. Said Kamal Shah, PLD 1986 S.C. 360
- **Decision:** Provisions of the Punjab Pre-emption Act and NWFP Pre-emption Act were found inconsistent with Islamic injunctions, replacing customary rules with Islamic principles.

d) Appeal Rights in Court Martial:

- **Case:** Pakistan through Secretary Ministry of Defence v. The General Public, PLD 1988 S.C.
- **Decision:** Provisions in the Army Act, Navy Ordinance, and Air Force Act barring appeals against court martial sentences were un-Islamic. Islam's concept of complete justice required the right to appeal.

e) Freedom of the Press:

- **Case:** Federation of Pakistan & others v. Public at Large & others, PLD 1988 S.C. 202
- **Decision:** The West Pakistan Press and Publications Ordinance, 1963, was declared un-Islamic. Islam supports practical activities and discourages undue interference with press freedom.

f) Doctrine of Caveat Emptor:

- **Case:** Federation of Pakistan v. Public at Large, 1988 S.C.M.R. 2041
- **Decision:** The doctrine of caveat emptor (buyer beware) was invalid in Islam, which obligates sellers to disclose defects without being asked by buyers.

g) Compoundability of Murder:

- **Case:** Federation of Pakistan through Secretary, Ministry of Law v. Gul Hasan Khan, PLD 1989 Supreme Court 633

- **Decision:** Sections of the Pakistan Penal Code and Criminal Procedure Code were repugnant to Islamic injunctions. New laws introduced compoundability for murder and hurt cases, defining various classes and specifying punishments according to Islamic law.

h) **Land Ownership Ceilings:**

- **Case:** Qazalbash Wakf v. Chief Land Commissioner Punjab, PLD 1990 S.C. 199
- **Decision:** Land Reforms Regulations and Acts setting maximum landholding limits were un-Islamic. Restrictions on land ownership were abolished.

i) **Riba (Interest) and Mark-Up:**

- **Case:** Mahmoodur Rehman Faisal v. Secretary Ministry of Law etc., PLD 1992 F.S.C. 1
- **Decision:** Provisions in various statutes permitting interest (riba) were invalid. The mark-up system in the Negotiable Instruments Act was also un-Islamic. The implementation of this decision has been suspended pending appeal.

These decisions illustrate the extensive influence of the Federal Shariat Court and Shariat Appellate Bench in aligning Pakistan's legal system with Islamic principles.

Rights of Women in Pakistan: Legal Progress through Islamic Provisions

Considerable progress in the status of women in Pakistan has been achieved through the application of Islamic provisions. The Constitution mandates that all laws repugnant to the Quran and Sunnah be invalid, and that court decisions be based on Islamic injunctions. This has resulted in significant legal reforms benefiting women.

Inheritance Rights

One of the most significant changes has been the repeal of customary laws that denied inheritance rights to women for agricultural property. Now, every heir, male or female, is entitled to their share of inheritance as per Shariat, with absolute property rights including the right to dispose of it. This change has had a profound impact, especially considering that 75% of Pakistan's population lives in rural areas and was previously governed by customary laws.

Landmark Judicial Decisions

Several landmark judicial decisions have reinforced the rights of women:

1. **Property Rights:**

- **Sardar Ali v. Ghulam Sarwar (PLD 1990 S.C. 1):** The Supreme Court rejected the claim of brothers who had excluded their sister from her property, stating that Islamic law requires brothers to protect the property rights of their sister.

2. **Dissolution of Marriage:**

- **Abdul Rahim v. Mst. Shahida Khan (PLD 1984 S.C. 329):** The court recognized the right of a wife to seek dissolution of marriage on the ground of khula if there is extreme discord, even if the husband does not agree.
- **Mst. Sahi Bibi v. Khalid Hussain (1973 S.C.M.R. 577):** The court held that a wife cannot be forced to live with her husband against her will.
- **Sakina Bibi v. Muhammad Aslam (1987 P. Cr. L.J. 377):** The court ruled in favor of a mother seeking habeas corpus for her daughter, who was confined by her husband, emphasizing a woman's right to visit and live with her parents.

3. **Custody of Children:**

- **Ghazala Yamin v. Muhammad Yamin (NLR 1988 C.L.J. 315):** The High Court of Sind granted custody of a minor girl to her mother, disregarding a previous agreement that had given custody to the father, prioritizing the welfare of the child.

4. **Detention in Dar-ul-Aman:**

- Courts have held that major women cannot be detained in Dar-ul-Aman without their consent, even against the wishes of their parents or brothers, as seen in **Farman Ullah v. D.M. Sukkur (1975 P.Cr.L.J.472)** and **Noor Hussain v. Superintendent Darul Aman (PU 1988 Lah. 422)**.

5. **Impact of Zina Ordinance:**

- To prevent misuse of the Zina Ordinance, courts have ruled that if a woman bona fide believes her previous marriage is dissolved and remarries, she and her new husband are not guilty of zina, as in **Bashiran v. Muhammad Hussain (PLD 1988 S.C. 186)**.

6. **Admissibility of Women's Evidence:**

- In **Begum Rashida Patel v. Federation of Pakistan (PLD 1989 F.S.C. 95)**, the Federal Shariat Court ruled that women's evidence is admissible for Taazir punishments.

Constitutional Provisions

Article 25 of the Constitution fortifies women's rights by ensuring equality before the law and non-discrimination based on sex. It also allows the state to make special provisions for the protection of women and children, ensuring a legal framework supportive of gender equality. Therefore, the judicial and constitutional advancements in Pakistan have significantly improved the rights of women, particularly in areas such as inheritance, marriage dissolution, custody of children, and protection against unjust confinement. These changes reflect a progressive interpretation of Islamic provisions and a commitment to gender equality enshrined in the Constitution.

Legal Scope of Article 25 and Women's Rights in Education

In a significant ruling, the Supreme Court of Pakistan clarified the scope and intent of Article 25 of the Constitution, which guarantees equality and non-discrimination. This clarification arose from a case concerning the admission of girls to medical colleges.

Supreme Court Ruling on Gender Discrimination in Education

The court held that discrimination on the ground of sex alone is not permissible, except under reasonable and intelligible classification. This permits, for the present, the establishment of educational and professional institutions exclusively for either females or males. However, in institutions where co-education is permitted, setting a maximum limit on the number of female students is not allowed unless justified as a protective measure under Article 25(3). The court emphasized that while a minimum number of seats for girls can be fixed, merit should prevail if girls exceed the fixed number of seats.

The court's ruling was highlighted in the case **Shirin Munir v. Government of the Punjab (PLD 1990 S.C. 295)**, where the Supreme Court accepted the claim of girl students who were discriminated against in admission to co-educational medical colleges, suppressing their merit in favor of boys. The court concluded that admission to co-educational medical colleges must be based strictly on merit, while girls retain exclusive admission rights to colleges such as Fatima Jinnah Medical College for Girls.

Enforcement of Shari'ah Act, 1991

The National Assembly of Pakistan enacted the Enforcement of Shari'ah Act, 1991, establishing Shari'ah as the supreme law of Pakistan. This Act mandates the following:

1. **Interpretation of Laws:** All laws are to be interpreted in light of Shari'ah.

2. **Observance and Education:** Muslim citizens are to observe Shari'ah, and the State is responsible for arranging teaching and training in Shari'ah.
3. **Islamization of Systems:** The educational and economic systems are to be Islamized.
4. **Promotion of Islamic Values:** The mass media is to promote Islamic values.
5. **Protection and Welfare:** The State is to take steps to protect life, liberty, and property of citizens, eliminate bribery and corruption, and eradicate obscenity and vulgarity.
6. **Establishment of Institutions:** The State is to establish a Nizami-Adl (justice system) and Bait-ul-Mal (welfare fund).
7. **Safeguarding Ideology:** The State is to protect the ideology of Pakistan and safeguard citizens against false imputations.

However, the Act also protected the existing political and governmental systems, the rights guaranteed to women and non-Muslims under the Constitution, and the international financial and other obligations of the state. Some protective provisions of this Act were challenged in the Federal Shariat Court in **Muhammad Ismail Qureshi v. Federal Government of Pakistan (1992 F.S.C. 445)**, which declared certain provisions to be repugnant to Islamic injunctions. The matter remains sub judice, pending an appeal before the Shariat Appellate Bench of the Supreme Court of Pakistan.

Conclusion

Pakistan's legal framework has undergone significant Islamization, aligning most laws with Islamic injunctions. Formally, an Islamic polity has been established. However, the true measure of success lies in the willingness and ability of Pakistan's citizens to conform their conduct to Islamic precepts. As an Urdu couplet poignantly reflects:

"The believers, fired by their zeal, succeeded in building a mosque in one night;
But being sinners at heart, could not become namazis (worshippers) even in years."

The future alone will reveal whether Pakistan can truly establish and sustain an Islamic order in practice.