Anglicization of Islāmic Law in the Sub-Continent and its Impact on the Legal System of Pakistan

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Abstract:

This article is related to the justice system of sub-continent and then corelated to the legal system of Pakistan. It has been discussed in detail that the justice is one of the basic rights of mankind. In sub-continent, some of the rulers have their own fame to provide the justice to every one on doorstep. The introduction of justice in Pakistan's court and their implications is co-related to the justice system of sub-continent, which is discussed in detail in the said article.

Key Words: Sub-Continent, Slaves, Foundation, Justice, Inheritance, Adultery.

Anglicization of *Islāmic* Law in the Subcontinent

Before going into the discussion about the *Islāmic* law and its Anglicization process, it seems appropriate the history and background of advent of Muslims and *Islāmic* law in the Sub-continent.

Advent of Islām in the Subcontinent: -

Muslims of Arab became familiar with the Sub Continent soon after the establishment of an independent state of *Madīna*, but it was in the later centuries that they established trade relations with the people and rulers of these parts of Asia.

Without going into the details of the stories and reasons which provoked Muslim armies to conquer these areas, it is important to mention that Muslims formally entered into the Subcontinent under the leadership of *Imād Ul Dīn Muḥammad Bin Qāsim*, a seventeen years old Muslim General in third expedition against the local ruler of *Daibal* (Sindh), but the initial Muslim rule was not established on permanent basis, hence, they went back to their own country without any permanent annexation[1].

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[1] Muhammad Munir, "The Administration of Justice in the Reign of Akbar and Aurangzaib: An Overview" (March 22, 2011). Journal of Social Sciences, Vol. 5, No. 1 (August 2012), pp. 1-19.. Available at SSRN: https://ssrn.com/abstract=1792411 or http://dx.doi.org/10.2139/ssrn.1792411, last accessed on 03-01-2019.

Later on, *Maḥmūd b. Subaktagēn of Ghaznī* (d. 421/1030) launched various military campaigns in the Sub Continent and occupied a major portion of the area. He was followed by *Shahābuddīn Muḥammad Ghorī* (d. 602/1206) who annexed Punjab and made it a part of the Caliphate. He conquered Delhi in 1192[2].

It was in 1206 AD when *Quṭub Uddīn Aibek*, the founder of the Turkish slave dynasty established his government in Delhi on permanent basis but even then, whole of the Sub-continent was not under him[3]. From 1206 to 1526, five Muslim dynasties ruled India, namely the Slaves, the *Khilgīs*, the *Tughluqs*, the *Sayyeds*, and the *Lodhīs*. In 1526, the *Lodhīs* were defeated by the *Mughals* which continued till 1857, though it was in decay after the death of the great emperor *Aurangzeb Alamgīr*, 1707[4]. Sultāns and particularly Sultāns of Delhī were strict adherents of the *Shar'iah* law. They implemented it in their respective jurisdictions and hesitated to make any amendment in that. According to Barni, "all breaches of the Holy law were forbidden"[5].

After defeating the last king of *Lodhī* dynasty, *Zahīr Uddīn Babar* established the *Mughal* Government in India, which lasted till 1750, and nominally till 1857, when Queen Victoria succeeded the last *Mughal* ruler as Empress of India[6]. Various *Mughal* Emperors ruled the Indian Sub-continent and last six were called as greater *Mughals*. The dynasty survived till 1857 but it was in decay after 1707, when the last of these six emperors namely *Muḥammad Awrangzeb* died[7].

The legal development in this period is of vital importance. Muslim rule was established and a particular legal regime remained applicable in the territory since that time period. After the advent of Muslims in the Sub-continent, *Islāmic* law was imposed in the area in different shapes, sometimes in small codes while at times from different books and scattered rulings.

After taking control of the area by *Zahīr Uddīn Bābar* (d. 936/1530), foundation of the Mughal Empire was laid down. *Jahāngīr* and *Shah Jahān* were more famous in respect of judicial reforms. Three emperors namely *Jalāl Uddīn Akbar* (1556-1605), *Awrangzeb* (1658-1707) and *Nūriddīn Muḥammad Jahangīr* (d.1037/1627) are remembered for their judicial and legal reforms, though the

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[2] Ibid.

[3] Muhammad Basheer Ahmad, *The Administration of Justice in Medieval India* (Aligarh: The Aligarh Historical Research Institute, 1941), 57.

[4] Muhammad Munir, "The Judicial System of the East India Company: Precursor to the Present Pakistani Legal System", Islamabad: Annual Journal of International Islāmic University Islamabad, 2005-06.

[5] Ahmad, *The Administration of Justice in Medieval India*, 98, 100.

[6] Ibid, 133.

[7] Munir, "The Administration of Justice in the Reign of Akbar and Aurangzaib".

foundation of ideology was different in each case[8]. In this era, hierarchy of the courts was set up from top to bottom, cases according to their nature were distinctly categorized and the mechanism of litigation from trial to appellate level was also set up. However, the common principle being followed was that religious rulings, norms, customs and traditions of the indigenous population were being observed till the replacement of the system which started its growth at the end of 16th and beginning of the 17th century[9].

It is also an important fact that the concept to engage lawyers was also existing during Mughal Rule. In various translations, it has been discussed that the word *tajjna* was used for a person who knew the facts of the case and was authorized to appear and plead a case on another's part[10]. More particularly, during the reign of *Aurangzeb*, it was decided by the administration of *Mughal* Empire that the Government should employ lawyers (*wakīls*) to represent its interests before the courts. According to Khafi Khān, "A *wakīl-i-shar'ia* for the emperor '*Alamgīr* was appointed in every city and *Subah*, and in other areas, so that he might sit together with the *Qāḍī* in the court of justice". It is also evident from historical documents of 18th century that appointment of government *wakīls* existed during this period. Their function was to conduct suits on behalf of government, to facilitate the execution of decrees passed in favour of state and to act as legal advisors on behalf of people who could not afford to engage the lawyers. The last function of lawyers also suggests that *Mughals* were aware of the difficulties faced by poor people and adopted concrete measures in this regard[11].

With the passage of time, British East India Company (BEIC) indulged in the administration of the Sub-Continent. Until 1862, Anglo-Muhammadan jurisprudence, being two different concepts, overlapped through the medium of law. Muslims and British people differed on 'law', how it is to be enforced and how it fit into the given society. This difference of Islāmic and English law, forced BEIC to enforce Islāmic law in the Sub-Continent. Officers of the Company administered it, primarily for two reasons. Firstly, to establish their legitimacy in administration

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[8] Ibid.

[9] Ibid.

[10] Ludo Rocher, "Lawyers in Classical Hindu Law", Blackwell Publishing: Law & Society Review, Vol. 3, No. 2/3, Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India (Nov., 1968 - Feb., 1969), pp. 383-402, available at http://www.jstor.org/stable/3053008, last accessed on 19-12-2018.

[11] Philip B. Calkins, "A Note on Lawyers in Muslim India", Law and Society Review: Blackwell Publishing, Nov. 1968-Feb. 1969, Vol. 3, No. 2/3), 406, available at http://www.jstor.org/stable/3053009, last accessed on 19-12-2018.

and disguise their control, and secondly, to secure cooperation from the locals to gain actual control[12].

Anglicization

Initially, BEIC remained busy in commercial activities and did not focus on complicated legal issues until the regulations of Warren Hastings. He was appointed as Governor of Fort William in 1772 and tried to rule differently. He tried to legitimize the British rule through the authority of *Mughals* and in this regard also adopted Persian as administrative language. However, he brought some changes during his period. He authorized the company officers to act as revenue collectors and ordered his officers to directly supervise the settlement of disputes. With regard to applicable law during his period, according to 1772 Regulations, he formed basis for arbitration between Muslims and *Hindūs* on the ground that officers would apply the respective law of Muslims and *Hindūs* to the matters of inheritance, marriage, caste and religious institutions. It was further stated in the Regulations that their matters pertaining to succession of lands, rents, goods and contracts shall be dealt with by Islāmic law in case of Muslims and by Hindū law in case of Hindūs. In the case, where one party was a Muslim and the other one was a Hindū, matter would be dealt with by the law of defendant[13].

However, both parallel legal systems, namely Islāmic and English law could not implement simultaneously. After 1784, BEIC created civil service, the purpose of which was creation of bureaucracy. Hastings also opened many educational institutions, the purpose of which was to train servants including Indians and English. The teachers in these institutions were orientalists and their primary object was to compile and translate indigenous law Codes for understanding of English officers[14].

With the passage of time, different hard cases were brought before the administration of BEIC, which further instigated them to develop new rules to secure certain goals. It was unclear as to who will inherit his estate. In the meanwhile, his nephew namely Bahādur Beg, who came to Paṯnā from Kābul and married his uncle's sister in law, filed a petition before the Provincial Council of Patna, claiming his estate. He complained that widow of Shahbaz Beg namely Nāderah Begum was disposing of the estate, hence, he asked to secure his interest. Court of the Provincial Council immediately directed the *Qāḍī* and *Muftī* to prepare

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[12] Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islāmic Jurisprudence in Colonial South Asia", Modern Asian Studies, Cambridge University Press, Vol. 35, No. 2, (May, 2001), 259, available at http://www.jstor.org/stable/313119, last accessed on 08-10-2016.
[13] Ibid, 262.
[14] Ibid, 264.

inventory of the estate and to secure it. The Court further asked as to who and which extent was entitled for the estate[15].

Similar cases made it necessary for BEIC to develop a different legal system. It became more essential when BEIC assumed the charge of Mughal post of *Diwānī* in *Bengāl*, *Bihār* and *Orissā* in the year 1765. Though initially, BEIC remained reluctant to take control of judicial system and seemed more interested over its jurisdiction over company employees and supervision of activities related to revenue collection, but with the passage of time judicial system was also taken into control by BEIC. In this regard, Hastings introduced a system comprising of two courts at the first instance. The first one was *Diwānī 'Adālat* while the second was *Faujdārī 'Adālat.* The former was created to deal with civil cases, while the later was dealing with the trial of crimes and misdemeanors. Revenue collectors were directed to preside over the civil courts and in this manner, control of revenue and property disputes were directly given in British hands. Civil courts were directed to apply Islāmic law to Muslims and *Hindū* law to *Hindūs*, while Criminal courts were directed to apply Islāmic law universally. Appellate forum was also created at Calcutta to hear appeals from civil courts. Still the legal system was based on the foundation laid down by *Mughals* and *Mughal* rulers were though not vested with any formal jurisdiction but were still entitled to settle disputes of petty nature. Criminal courts were still presided over by *Mughals* and in civil courts, Muslims and Hindūs were employed on salaries to assist BEIC employees and advise them on local and religious laws. This system remained functional till 1773, when six large divisions, grouping the districts, were created. Each division had a Chief and a Provincial Council staffed by the employees of BEIC. Under the new setup of Provincial councils, courts' request to refer a case for opinion of *Qāḍī* was following the rules set forth in the new legal system[16].

Case of Shahbaz Beg was also referred for advice and was returned back in less than a month with a report and *fatwā,* which stated that the nephew had a claim and also challenged the evidence presented by the widow. She presented two basic documents in support of her claim but the *Qāḍī* and *Muftī* agreed with the claim of nephew that they were created after the death of the deceased by using his seal, hence were forged. They further recommended awarding of three quarters of the estate to the nephew and one quarter to the widow and also stated that large portion could not be given to the widow under Islāmic law. As a consequence, widow was

[15] In issuing this request, the provincial court was testing a complex legal order recently devised by Warren Hastings for the British East India Company (BEIC). The plan combined limited jurisdiction of English-led courts over British subjects and Company employees with continued judicial authority of Muslim and Hindu law over most inhabitants of BEIC-controlled territories.

[16] Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State".

ousted from the property and was forced to take refuge in a local shrine. Moreover, she and her supporters were also charged of forgery and five of her supporters including a nephew were arrested. Brother in law of the widow not made appeal to Hastings. She also complained before the Supreme Court against Bahadur Beg, *Qāḍī* and two *Muftīs* for assault and battery and for undergoing a personal body search and demanded an amount of rupees 6000,00. The appeal was to be filed in the court next in hierarchy over the Patna court. Supreme Court at that time was established in 1773 by the Regulating Act passed by the Parliament on political pressure and alleged corruption to administer British law. Other employees of BEIC including Indians were declared its subjects including all those people who voluntarily surrendered to its jurisdiction. The Act also created the post of Governor General for which Warren Hastings was nominated along with four Councillors. President and the Councillors at Fort William were given the supervisory role of country courts which led to clashes with the Supreme Court, but for the first time a British Court, presided by British employees was established without any interference from the locals or local law[17].

At this point, Patna case and complaint filed by the widow was a golden moment for Supreme Court to assert its authority against the Governor General and the Council who were opponents of each other at that time. Supreme Court ordered arrest of *Bahadur Beg*, *Qaḍī* and two *Muftīs* and despatched a sheriff to execute the orders. On this act, Hastings and four other Councillors were outraged stating that they were employees of the company, acted on the authority of Patna Court and were arrested after performing official functions and their arrest meant that there was no guarantee to protect the employees of the company. Hastings further insisted that council should come forward for their bail and indemnify them with rupees 4000,00[18].

Apart from inheritance, several other disciplines were also declared gray areas where appropriate legislation was required including Hindū law and more particularly law of adoption. According to W. H. Macnaghten, "law of adoption is

[17] Ibid. The Court was given a mandate to rule over matters involving British subjects and Company employees. This meant that for the first time, a British court was extending jurisdiction directly, and not through the auspices of the Mughal administration into the provinces. Yet, by not claiming full sovereignty, the charter left open the question of the court's authority over other indigenous inhabitants. It did not specifically exclude them from its jurisdiction, since it allowed that individuals who were neither British subjects nor Company employees could file suit in the court and fall within its jurisdiction if both parties to the suit were amenable. More troubling still, the Act and Charter offered no clear definition of a Company employee. This vagueness was significant because in the layered system of rent farming, it was often quite difficult to determine when an individual was acting for the Company, with a portion of the revenue retained as salary, and when he was acting as an independent agent.

[18] Ibid.

deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindū jurisprudence more surrounded by doubts and difficulties". Moreover, it was also noted that the case law of the 19th century revealed that no other law lacked clarity than the law of adoption as mentioned in Hindū law and the decisions thereon lacked clarity and certainty[19]. According to British administration, different verdicts in cases containing similar facts, was due to this uncertainty and ambiguity in these Hindū laws. The British administration was responsible for administration of justice in India, hence Hastings' decided to form a commission for laws in order to eliminate uncertainty and inconsistency. In one of the speeches before the Parliament in 1834, Thomas Babington Macaulay, at the occasion of the second reading of the Charter Act of 1833, renewing the East India Co.'s charter-said: -

> "We do not mean that all the people of India should live under the same law; far from it; …. We know how desirable that object is but we also know that it is unattainable. We know that respect must be paid to feelings generated by differences of religions, of nation, and of caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But, whether we assimilate those systems or not let us ascertain them; let us digest them. We propose no rash innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this-uniformity where you can have it; diversity where you must have it-but in all cases certainty"[20].

Although, *Dharmasatra* was translated into English but still English people were relying on the opinions of local *Pandits* and were taking their opinions in the decisions until 1864, when their office was abolished by Act XI of 1864. In this regard, Sir William Jones in a letter addressed to Lord Cornwallis on March 19, 1788 said: -

> "It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men; but my experience justifies me in declaring, that I could not with an easy conscience, concur in a decision, merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the Court"[21].

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[19] George Rankin, "Hindu Law To-Day", Cambridge University Press: Journal of Comparative Legislation and International Law, Third Series, Vol. 27, No.3/4 (1945), pp. 1-17, available at http://www.jstor.org/stable/755098, last accessed on 19-12-2018.

[20] Richard W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past", Association for Asian Studies: The Journal of Asian Studies, Vol. 48, No. 4 (Nov., 1989), pp. 757-769, available at http://www.jstor.org/stable/2058113, last accessed on 19-12-2018.

[21] Ibid.

So, the allegation of partiality, corruption and favoritism was leveled against the local *Pandits*. British people believed that they used to pick and choose the law texts which favored their favorite party. In this regard, Francis Macnaghten said that: "Native lawyers may not be deserving of the blame which is imputed to them but there are instances of their partiality and tergiversation which cannot be palliated or denied; nothing but an ascertainment of the law can prove a corrective of this evil". The ascertainment of the law was the real problem being faced and was focused to be addressed. They further believed that the first step towards ascertainment of law was to remove the connection of Hindū *Pandits* by translating the original Sanskrit texts and making it directly accessible for the British judges. It was believed that the original texts do not contain uncertainty or ambiguity in this regard and the system can only be made effective and pure by removing these *Pandits*[22].

However, people believed that in Hindū law, these *Pandits* implemented Hindū law and made it accessible for the people. Their removal meant a change in the legal system. Removal of these *Pandits* was highly appreciated and only after fifteen years of their removal a puisne judge of the High Court of Calcutta was ready to proceed only on the basis of precedents. In this way "*dharmas'astraas*" a science which was available to help the courts in various complicated matters, was replaced by English law and precedents[23].

In this manner, both Islāmic law and Hindū law were started to implemented by British judges but soon it was felt that even the texts of these laws were not sufficient to fulfill the requirements of English Courts. For the said reason, process of legislation was started and most of the laws were promulgated during the last half of the 19th century. Along with substantive and procedural laws to deal with administration of justice, several Acts pertaining to administration of justice and functions of the Government were also passed greater impact on our Constitution and legal system. For instance, Pakistan Penal Code was promulgated in 1860, The Code of Criminal Procedure in 1898, Civil Procedure Code in 1908 (before framing it, three previous Codes were framed in 1859, 1877 and 1882)[24], Contract Act in 1872 and Evidence Act was also promulgated in 1872. After independence, Indian Independence Act 1947 was adopted and section 18 of the Act provided that law of British India shall remain applicable in India and Pakistan. Furthermore, existing laws were adopted through separate legislations and had been given protection by all Constitutions including Article 268 of the Constitution of 1973[25].

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[22] Ibid.
[23] Ibid.
[24] Aamer Raza A. Khan, *The Code of Civil Procedure* (Lahore: Tenth Edition).
[25] Muhammad Munir, "the Judicial System of East India Company: Precursor to the present Pakistani Legal System", Hawliyyat, 13th and 14th edition, (2026-27 A.H/ 2005-06 A.D.), 65.

Islamization

There is no question that Pakistan was founded in the name of Islām. *Quaid e Azam Muḥammad Ali Jinah* once said: -

> "What more can one really expect than to see that this mighty land has now been brought under a rule, which is Islāmic, Muslim rule, as a sovereign independent State". (Speech in reply to the Welcome Address by the Principal, Staff and Students of Edwards College, Peshawar, 18 April 1948)[26].

For the said reason, the Constitution and the legal system be immediately brought in conformity with the Injunctions of Islām, but after independence, it took three Governor Generals, four Prime Ministers, two Constituent Assemblies (1947-1954 & 1955-1956), and nine years of protracted constitution making process[27], that the first Constitution was framed in the year 1956. Although, the same could not succeed to remain alive for long but after two experiments, the parliament made 1973 Constitution which is still enforced. Although, various provisions of this Constitution deal with Islām but it is still debated as to whether our legal system is Islāmic or un-Islāmic or partly Islāmic and partly un-Islāmic[28].

On this point, various scholars argue that very contention that the Qur'ānic law and Muslim law are *Shari'ah* and *fiqh. Shari'ah* is divine law in Islām and can either be revealed directly such as the Holy Qur'ān, which in true sense is word of Almighty ALLAH, or it can be revealed indirectly such as the words, acts and actions of the Holy Prophet (Peace be upon Him). *Fiqh* on the other hand is the interpretation of that Divine law by Muslim jurists called *mujtahidīn* and the process by which they interpret *shari'ah* and derive rules therefrom is called *ijtihād*. Thus, *fiqh* in Islāmic law is an essential element of legal system and in its absence, the legal system cannot be enforced in an Islāmic society. The principles of *fiqh* have separately been discussed by Muslim jurists under a separate discipline of Islāmic law which is called *Usūl al Fiqh* (Principles of Islāmic Jurisprudence)[29]. On the same touchstone, Islāmic law is a law which fulfils the requirements set forth and discussed in *Usūl al Fiqh*[30]. Therefore, the decision as to whether a

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[26] Aamir Butt, "Jinnah's Pakistan: Islāmic state or secular democracy?", *The Nation*, 25 December 2015.

[27] http://www.constitutionnet.org/country/pakistan, last accessed on 03-01-2019.

[28] Dr. Tanzilur Rahman, "Islāmic Provisions of the Constitution of the Islāmic Republic of Pakistan, 1973: What More is Required?", The Qur'anic Horizons, July-September, 1997 Volume 2. : No. 3.

[29] Translation is provided just to indicate the meaning and does not reflect the exact translation because according to many Muslim jurists, *fiqh* cannot be translated as jurisprudence.

[30] Moeen H. Cheema and Abdul-Rahman Mustafa, "From the Hudood Ordinances to the Protection of Women Act: Islāmic Critiques of the Hudood Laws of Pakistan", UCLA Journal of

particular law in Pakistan is Islāmic or otherwise, can only be made on the same principles. In this regard, a bird eye view of the laws enforced in Pakistan reveals that few of them have specifically been dealt with by Islāmic law and few of them have not been specifically discussed because of their emergence in the recent period. From the few, which have specifically been dealt with under Islāmic law, are various acts of criminal nature for which punishment has been made under Islāmic law. It is also a bitter fact that after Anglicization, definition and punishment for these offences was totally changed in contravention of Islāmic law and despite of various attempts after independence, these crimes could not be Islāmized. Among them are the crimes of rape and adultery as described under Indian Penal Code 1860, adopted by Pakistan as Pakistan Penal Code (PPC). Rape has been defined in section 375 PPC in the following manner: -

> A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,
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> (i) against her will.
> (ii) without her consent
> (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,
> (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
> (v) With or without her consent when she is under sixteen years of age.

Thus, offence of rape falling in the abovementioned categories was declared an offence and anything done with the consent of victim where she was above sixteen years of age was not an offence which explicitly contradicts the injunctions of *Islāmic* law, every act of sexual intercourse done with any person not being lawfully wedded wife is called adultery. Punishment provided for the rape as compared to that provided under *Islāmic* law was another aspect. Said law remained enforced in Pakistan and is still enforced but in order to Islāmize it, Offence of *Zinā* (Enforcement of *Ḥudūd*) Ordinance (*Zinā* Ordinance) was promulgated in 1979. Offence of adultery was though available but was later repealed by the Offence of *Zinā* (Enforcement of *Ḥudūd*) Ordinance, VII of 1979. *Zinā* Ordinance created two new offences which included *Zinā* liable to *ḥadd* and *Zinā* liable to *ta'zīr*. The difference has been drawn depending on the criteria of proof of offence and the punishment in both categories also differs. However, an important aspect is that offence of *Zinā* has been defined as "a man and a woman are said to commit *Zinā* if they willfully have sexual intercourse without being validly married to each

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Islāmic and Near Eastern Law, 2008-2009, available at: http://ssrn.com/abstract=1286055, last accessed on 28-12-2018.

other". Moreover, *Zinā bil jabr* has also been included as a separate offence with separate punishment but was redefined with the same definition as provided for rape in PPC. The requirements to prove *Zinā bil jabr* were the same as that of corresponding types of *Zinā* as defined in the Ordinance. Said requirement to prove *Zinā bil jabr* remained under serious criticism and was again tried to be supplemented by Protection of Women (Criminal Laws Amendment) Act, 2006. Through this Act, sections 375 and 376 PPC were again added. Sections 396-A-396-C PPC where added in respect of fornication, section 203-A-203-C PPC were also added in respect of procedure to file complaints of *Zina*, *Qadhf* and fornication respectively.

In the above-mentioned state of affairs, two main arguments are presented in respect of Islamization of laws in the states which remained under colonial rule. One such view is that Islamization of laws would lead to old conservative and narrow idea of laws presented by orthodox '*Ulemās* and the same is the reason of unrest, resistance and insurgency in many Muslim states. The second and dominating view in Muslim states is that Islamization of laws in all these states is a pre-requisite for political and social stability of these states and without Islamization of laws, a true *Islāmic* and ideal society cannot be formed. Apart from these two views, a third one is also found which states that Islamization of laws is not possible unless and until the system is entirely replaced by Islāmic legal system and Islamization of existing laws through minor amendments is not possible. The last view holds more strength from the fact that though several attempts were made for Islamization of laws but the issue was not taken up seriously and even the proponents of Islamization remained reluctant to execute the idea in its entirety. The critics argue that though *Ḥudūd* laws were introduced and Federal Shari'at Court (FSC) was established, but the process was very slow. So that orthodox '*Ulemās* could not succeed in the execution of whole project. It is also said that the regime of that time lacked a true commitment and clear vision in the execution of process. Moreover, it is also a fact that the ruling military regime of that time failed to comprehend the complications and solutions of a legal system. For instance, the introduction of *Ḥudūd* laws was seen a failure on the ground that in a very first decision of FSC in *Ḥazūr Bakhsh* case, punishment of *rajam* (stoning to death) as punishment of *zinā* (adultery or fornication), was declared contrary to the injunctions of Islām. Due to this decision, power of review was given to FSC thorough a constitutional amendment and a review petition was filed, wherein while setting aside the earlier order, the law was declared to be Islāmic and the main reason behind the decision was that three judges which announced the earlier decision were removed in the meanwhile. 'So, the Islamization of that time was

meant to be Islamization at the will of the Government'[31]. However, it was not every time that the courts have shown courage to stand before their own architect. Except in rare cases, the courts remained reluctant to stand before a strict military regime, but due to criticism of several fractions of society, it was only at the end of Zia regime that the laws introduced during the process of Islamization were subject to the test of actual Islamization before the courts. Even then, the process of review was slow and it was only after the end of Zia regime in 1988 and establishment of democratic government in Pakistan that the decisions, one after the other were given, declaring even the so-called Islāmized laws, un-Islāmic[32].

Another major issue was the law governing injuries to a person and homicide cases. Although, relevant Ordinance in this regard was promulgated in 1979 but the relevant provisions of PPC dealing with the issue could not be amended. In this regard, enactment of *Qiṣāṣ* and *Diyat* Act was proposed but the same could not be promulgated during Zia regime. Subsequent Governments comprising of PPP and PML also remained reluctant to enact the same. It was in the second tenure of Nawaz Sharif (1996-1999) that a constitutional amendment was proposed to increase the powers of Prime Minister to Islāmize laws. However, it was also alleged that the main focus was on increase in powers of PM rather than on Islamization of laws. Moreover, the amendment could not be passed in the upper house and the plan was not succeeded. Pervez Musharraf came into power through a military coup in 1999, but the process of Islamization remained in decay during his tenure. Rather he expounded the idea of "enlightened moderation" to justify his power before the international forum and to eliminate the element of militancy and extremism from the religious factions of society. However, his military rule succeeded to introduce various significant amendments in *Ḥudūd* laws. In the year 2005, powers to investigate a crime of rape and adultery were vested. Again, significant amendments were introduced in 2006 which amended the *Ḥudūd* laws of *Zinā* and *Qadhf* Ordinances through Protection of Women Act 2006[33]. Different views were expressed over amendments of *Ḥudūd* laws at that time. The first group clearly stated that these laws were unjust and resulted into serious miscarriage of justice during 1980's, hence are required to be entirely repealed. The second group strongly stood behind these laws fully convinced that these were Islāmic laws and any attempt to repeal or amend these laws was an attempt against Islām. The third

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[31] Moeen H. Cheema, "Beyond Beliefs: deconstructing the Dominant Narratives of the Islamization of Pakistan's Law", The American Journal of Comparative Law, Volume LX, Fall 2012, Number 4.

[32] Ibid.

[33] Moeen H. Cheema, "Beyond Beliefs: deconstructing the Dominant Narratives of the Islamization of Pakistan's Law", The American Journal of Comparative Law, Volume LX, Fall 2012, Number 4.

view consisted of the people who suggested amendments but again comprised of two main groups. First group suggested amendments to remove restrictions and hardships on the parties and more particularly on females and was comprising mostly of human rights activists. The second group primarily comprised of scholars who admitted that these laws were amenable to amendment to remove discrepancies and make them in accordance with actual Islāmic law[34]. From the point of view presented by scholars, it appears that original sources either partially or completely were not considered at the time of promulgating these laws and that is the main reason for serious criticism levelled against these laws.

According to many Muslims, Islām is the only solution to the prevailing problem and they consider implementation of Islāmic law, politics and good governance. Many groups in Muslim states are striving for the same and are raising this slogan since decades and centuries. Though it is alleged that Orthodox Islāmic law cannot meet the current requirements of administration of justice but it is an admitted fact that at the times when all the societies lacked any constitution or legal system, Islām provided constitutional and legal principles which were followed over the centuries. Moreover, rulers of the time always consulted traditional Muslim scholars and hesitated to implement any law which in any way contradicted the principles of *Shari'ah*[35]. For the said reason, how it can be said that a system which governed different societies and states over the span of a considerable time period, cannot meet the requirements of prevailing legal system? Apart from imparting justice from the floors of rulers, independent court system also existed. The roots of court system in Muslim states existed since centuries but later on were colonized by Western Colonial rule and are still working in the same sphere[36]. Pakistan also inherited the same legal system from British rule. Though the idea of Islamization was presented before independence, but its process before the leading political party of that time was not clear. It was only after independence that Islāmic provisions were introduced in the constitution and legal system of the country. All three constitutions though contained Islāmic provisions but the Constitution of 1973 went a step further. *'Abdul Hafīz Pīrzādā*, who was the then Law Minister and the main person behind drafting the constitution said that: -

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[34] Ibid.

[35] Dawood I. Ahmed and Moamen Gouda, "Measuring Constitutional Islamization: The Islāmic Constitutions Index", (November 12, 2014). *Hastings International and Comparative Law Review*, Volume 38, Issue 1, Winter 2015, available at SSRN: https://ssrn.com/abstract=2523337, last accessed on 19-12-2018.

[36] Clark B. Lombardi and R. Michael Feener, "Why Study Islāmic Legal Professionals", Pacific Rim,
Law & Policy Journal, Volume 21, Number 1, Special Isuue, Islāmic Law and Islāmic legal Professional in Southeast Asia.

> "a serious effort has been made to take out the Islāmic provisions (of the constitution) from the cold storage of the principles of the policy…and convert them into substantial parts of the constitutions. The Islāmic provisions of the constitution would transform the basic injunctions and tenets of Islām into law and give them legislative effect"[37].

Many peoples criticized that Islamization is not the solution of problem. They support their view by saying that Muslims could not succeed to make any development in the modern sciences and technology. Corruption, unrest and demoralization are prevailing in every Muslim society and justice is not imparted with in all the Muslim societies. The answer to the allegations is simple that a community of Muslims cannot be termed an Islāmic society on the score that Muslims are living there, unless Islām is implemented in its true sense. Moreover, it was the colonial rule in most of the countries which deprived the Muslims from their Islāmic legal system and such is the case in Pakistan and India, hence it was the conspiracy for depriving the Muslims from their rule which is to be blamed and not Islām. By saying this, it should not be concluded that Muslims are duty free, rather it is now their primary duty to establish Islāmic legal system in such a manner that it fulfils the requirements of the present time by the method which Allama Muhmmad Iqbal termed as "Reconstruction of Islāmic thought" and the same according to Professor Ansari is possible only through the medium of education which can make Muslims "the spiritual beings and the refined servants of God on earth"[38]. It appears that till now, the afore-mentioned approach has never been adopted while making attempts for Islamization of laws.

According to contemporary scholars, first time concrete step for Islamization of laws was taken by Zia regime in late 1970s and early 1980s. According to them, the process for Islamization was started to achieve a threefold agenda, which included political, social and economic spheres. The political agenda was to legitimize his military rule, political agenda comprised to gain support of religious parties and economic agenda included to introduce principles of Islāmic banking. Apart from these internal factors, certain external factors were also present which included strengthening the Islāmic identity of Pakistan, generating funds from Muslim countries and strengthening military ties with Muslim states. Islāmic reforms were introduced in politics, military, economy, education and legal system[39].

Ḥudūd Ordinances and particularly *Zinā* Ordinance was severely criticised at

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[37] Ibid.

[38] Manzoor Ahmed Abbasi, "The Problem of Islamization in Pakistan: A Policy Perspective", Hazara Islamicus January to June 2014 (3-1) 49.

[39] Jamal Shah, "Zia-Ul-Haque and the Proliferation of Religion in Pakistan", International Journal of Business and Social Science Vol. 3 No. 21; November 2012, 310.

national and international level and a movement was started to repeal it. The campaign was backed with the assertion that it amounted to great miscarriage of justice. Several instances supported this stance. In one such case, the punishment of *Fehmidā* and *Allah Bukhsh* for stoning to death was set aside in 1981. In another example, a blind girl of 13 years namely *Ṣafia Bibi* was punished for adultery, while her rapists were acquitted[40]. The decision was much criticised that FSC on its own motion called for the record of this case and released her[41]. Amendments were brought in Pakistan Penal Code (PPC) and Criminal Procedure Code (Cr.P.C) through Ordinances promulgated in 1980, 1982 and 1986. Section 295-A-295-C were added in PPC. Section 295-C PPC was dealing with defiling the name of the Holy Prophet (Peace be upon Him) and was made punishable with death or imprisonment for life and fine. It was contended by religious segments that no punishment other than death was available under Islām, hence the provision was challenged before FSC which declared it to the extent of punishment other than death as un-Islāmic[42].

On the issue of family laws, though Pakistan adopted Muslim Family Law Ordinance in 1961 and Muslim Family Law Act in 1964 but subsection 3 and subsection 5 of section 7 of Muslim Family Law Ordinance, 1961 were decaled against the injunctions of Islām by FSC[43].

Most importantly, FSC was established through insertion of chapter 3-A of the Constitution and was vested with the jurisdiction to examine any law on the touchstone of Islāmic law and to declare as to whether the same is repugnant to the injunctions of Islām or not. However, under Article 203-D of the Constitution, it has been laid down that FSC can declare any law un-Islāmic, but it's decision cannot take effect until the time period provided for appeal lapses and if appeal is filed, until it is decided. The effect of this provision was that every decision declaring any law un-Islāmic was challenged before *Shari'at* Appellate Bench of the Supreme Court and neither the same was fixed for hearing thereafter nor the decision of FSC could take effect. Judgment on *Ribā*[44], on the levy of Court Fee[45], on family laws[46] and judgment on criminal laws[47] are the few instances. Hence, the insertion of this Article 203-D was deliberate attempt to put restrictions on the jurisdiction of FSC. Critics also contend that said act on the part of ruling regime

[40] See Safia Bibi v. The State, 1985, PLD Federal Shariat Court 120.
[41] Shah, "Zia-Ul-Haque and the Proliferation of Religion in Pakistan".
[42] PLD 1991 FSC 10.
[43] P L D 2000 Federal Shariat Court 1.
[44] PLD 1992 Federal Shariat Court 1.
[45] PLD 1992 Federal Shariat Court 195.
[46] PLD 2000 Federal Shariat Court 1.
[47] PLD 2011 Federal Shariat Court 1.

of that time clearly depict that the attempt of Islamization of laws was not a serious attempt and was introduced for political purposes.

From the foregoing instances and without going into the debate of actual intent of legislature, it can easily be inferred that insertion of minor amendments in the prevailing laws could not make them Islāmic, because several other problems are being faced. These problems never appeared during *Mughal* period and other Muslim dynasties. The problem started with the process of Anglicization and still continues. Introducing amendments in the laws promulgated by English rule could not make them Islāmic and the main cause is departure from original Islāmic sources. Therefore, unless original sources are consulted and laws are promulgated in accordance with original sources of Islāmic law by following the theory of "*Ijtihād*" as introduced by Allama Muhammad Iqbal, Islamization of laws is not possible.

Conclusion

Anglicization of Islāmic law in the Sub-continent, deprived Pakistan from Islāmic legal system. In order to restore the same, attempts have been made for Islamization of laws. These attempts were made by affixing certain tags, by way of introducing certain amendments in the existing legal system, but could not turn to be effective. The concept of Islamization according to '*Ulemā* is restoration of traditional form of *Shari'ah* without any change and according to them there is no question of interpretation. This view, according to many Muslims and Non-Muslim jurists leads Islām to a situation which cannot confront the modern challenges. According to many Muslim scholars of the present time, in order to implement Islām in general and Islāmic law in particular, there is need to interpret the same in a liberal and dynamic manner rather than conservative and narrower sense, so that the current challenge can easily be addressed. This approach was also adopted by a Muslim scholar Allama Muhammad Iqbal which is apparent from his lectures on "The Principle Movement in the Structure of Islām". He advocated the theory of *Ijtihad* contending that the same can take place in the present times, and should be given to the legislative Assembly and *Ijmā'* can take place even in the present times[48]. On the basis of this theory, a great challenge and primary obligation is on Muslim jurists and ruling regime to implement the principles of Islāmic law by interpreting the same in light of the principles of *Ijtihad* as guided by Allama Muhammad Iqbal.

[48] Muhammad Iqbal Chawla et al. "Islamization in Pakistan: An overview", JRSP, Vol. 52, No. 1, January-June, 2015.