INTERPRETATION OF LAWS ACCORDING TO ISLAMIC INJUNCTIONS: A STATUTORY OBLIGATION WITH SPECIAL REFERENCE TO FAMILY LAW

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Abstract:

Pakistan is a state created in the name of Islam. Since independence, a struggle started for Islamization of laws. Attempts were made by the Parliament and several provisions were inserted in the constitutions as well as other laws to bring them in conformity with Islamic injunctions. However, multi-cultural societal norms and earlier colonialism were the main challenges in this regard. Until the 1980s, the main source of any Islamic law was the Parliament but thereafter many scholars have noted that the Federal Shariat Court became the primary source for Islamization of law and in absence of any political leadership or societal consensus, the actual determinant for the Islamization of laws in Pakistan are the courts. Various Islamic provisions have been inserted in the Constitution and other laws including Articles 2-A and 227 of the Constitution, but all of them cannot be declared Islamic, unless they are interpreted by the courts in accordance with Islamic injunctions. On the hand, provisions declared against the injunctions of Islam can also be interpreted in the light of Islamic injunctions. Article 227 of the Constitution impliedly and Section 4 of the Enforcement of Shari'ah Act, 1991 expressly cast a duty on courts to take the judicial notice of the provisions of laws and interpret them in accordance with Islamic law. The matter also came before the Apex Court of Pakistan in Hakim Khan etc. v Government of Pakistan etc. (PLD 1992 SC 559), wherein it was held that any question regarding any provision of the Constitution being against the injunctions of Islam shall be referred to the Parliament, which is the sole authority to bring it in conformity with the injunctions of Islam. According to Prof. Imran Ahsan Khan Niyazee, the matter could have been solved easily if it was interpreted in accordance with the injunctions of Islam by declaring that Article 45 is not applicable in Qisas. Therefore, interpretation of any law by the courts is very important and this paper attempts to highlight the need, scope, mode and problems of interpretation of laws in accordance with Islamic injunctions with special reference to family laws.

Keywords: Islamic Law, Family Law, Constitution of Pakistan 1973, Federal Shariah Court.

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Background:

Before the present-day legal system, Pakistan was part of Indian Sub-continent and during Muslim rule; it stretched over several dynasties and Mughal Empire. At that time, Islamic legal system was in field. Though Islamic law was not implemented in its true spirit, but was the primary source of all laws and guidance. In 1600, Charter of East India Company (EIC) was created that allowed the Company to administer laws in its own territories. However, in the presidency towns of Madras, Bombay and Calcutta, local laws and cultures were allowed to be implemented. With the passage of time, EIC took political and economic control over several parts of the Sub-continent, but was not in a position to implement its own legal system. However, it was implemented in piecemeal with focus on political and economic concerns. Initially, civil and criminal administration of justice was being administered in accordance with local laws. In personal matters, Hindu law was applied to Hindus and Islamic law to Muslims, while in criminal law, Islamic law was implemented universally. Initially, presiding officers of the courts were chosen from the locals and were mostly Muslims. With the passage of time, English judges replaced them but still Qazis and Pandits were attached to the courts to seek legal advice, but the courts were not bound by their opinion. Gradually, these Qazis and Pandits were removed and the administration of justice was totally given in the hands of British Judges.[1]

Administration of justice by British judges was a big challenge for them as local laws were being implemented in most of the cases and British judges were not much aware of them. To achieve that end, various texts from Islamic and Hindu laws were translated for their implementation by British judges. However, soon it was realized that even translation of these texts was not sufficient to fulfil the existing gap in the courts being presided over by British judges and for the said purpose, process of formal legislation was started in the second half of the nineteenth century. Most of the laws, both substantive and procedural, were enacted during this period including Indian Penal Code (presently Pakistan Penal Code) 1860, the Evidence Act 1872, the Contract Act 1872, the Code of Criminal Procedure 1898 and Civil Procedure Code 1908 (before its earlier promulgation in 1859, 1877 and 1882 respectively). After independence, all the existing laws were adopted through Indian Independence Act, 1947 and these laws have also been given protection under Article 268 of the Constitution of Pakistan 1973.[2] This process is called Anglicization which literally means making English in form or character[3] and academically means process of making the Islamic law to English.

Till 1864, case law and text books available in different fields were considered sufficient to dispense justice but thereafter British judges started its application themselves. Though these judges tried to implement Islamic law in personal

matters including family laws, but unauthentic translations of religious texts and application of Islamic law by British judges with their own interpretations left serious impact on Muslim personal law including family laws. In this way, philosophy and principles of equity were inserted in all the matters relating to family laws.[4] Previously, Muslim law of marriage, divorce, dower, legitimacy, guardianship, gifts, wakfs, wills and inheritance was applicable throughout the Subcontinent. Certain amendments were made in these matters with the passage of time on the basis of prevailing customs that have reshaped certain principles of Muslim personal law. However, in 1937, through the Shariat Act, these customs were invalidated which were contradictory to Muslim personal law.[5] Even then, the original shape of Islamic law was changed by inserting various concepts in Muslim personal law and after formal legislation on the basis of translated texts of Muslim personal law, particularly when most of them were translated from another translation. Various provisions were inserted in Muslim personal law especially family laws that contradicted Islamic law and have been declared so by the Federal Shariat Court (FSC).[6]

Role of Courts in Interpretation of Law:

However, before the establishment of Shariah benches in high courts and the Federal Shariat Court, according to Dieter Conrad, after independence, the power of interpretation of laws and to bring all the laws in accord with the injunctions of Islam, was vested in the parliament by the first Constituent Assembly of Pakistan and the parliament was the chief and final authority in this regard. All the constitutions framed till 1973 explicitly vested this power in the parliament and it was the political responsibility of the parliament to introduce Islamic principles in the legal system of this country.[7] The Constitution of Pakistan 1973 also contained a provision which fixed this responsibility on the legislature in the shape of Article 227. Said Article reads as under:

All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Our'an and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions.[8]

The position remained the same until 1980, when according to Martin Lau, the locus for introduction of any Islamic law being parliament was changed and this task was assigned to the FSC to Islamize the law independently.[9] The FSC was established by inserting Chapter 3-A in the Constitution through the Constitution (amend) Order, 1980 (P.O. No. 1 of 1980) and under Article 203D of the Constitution, the FSC was given power to examine any law on the touchstone of injunctions of Islam. Relevant Sub-Article 1 of the said Article reads as:

The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.[10]

The Court was competent to take up the matter and exercise its jurisdiction either on its own motion or on any petition. Since then, according to Charles Kennedy, the actual determinant for any law being contrary to the injunctions of Islam, are the courts and according to Lau, the Constitution and judicial review restricted the power of parliament to enact any law irrespective of its being against the injunctions of Islamic law.[11]

After establishment of the FSC, another milestone was achieved in respect of interpretation of law according to Islamic injunctions by introducing the Enforcement of Shariat Act, 1991. Section 4 of the Act deals with this issue and states that:

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.[12]

However, the provision deals with the matters where more than one interpretation is possible. The real problem arises where only one or more than one interpretation is possible, but said interpretation becomes inconsistent with the injunctions of Islam. In this respect, the primary responsibility is that of the parliament in accordance with Article 227 supra and then of the FSC in accordance with Article 203D supra where the Court has been vested with suo motu powers to examine any law on the touchstone of Islamic injunctions and strike down the same if it is so inconsistent. Our family laws including the Muslim Family Laws Ordinance, 1961 (MFLO) have been promulgated in accordance with the Muslim personal law, but as discussed above, various provisions of the MFLO have been declared against the injunctions of Islam in Allah Rakha case supra by the FSC. Appeal against the said judgment is still pending before the Shraiat Appellate Bench of the Supreme Court and till the final decision of the appeal, these provisions are still applicable and the decision of the FSC could not take effect. Analysis with regard to the fact as to whether these provisions that have been declared against the injunctions of Islam can be interpreted according to general principles of Islamic law shall be made later. At this stage, another important element is necessary to be

discussed that is though not directly linked to family laws, but enunciates the same principles of interpretations.

Section 338-F was inserted in Pakistan Penal Code (PPC) that deals with the interpretation of provisions of chapter XVI and reads as under:

In the interpretation and application of the provisions of this Chapter, and in respect of matter ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.[13]

According to this section, the courts have been empowered to interpret and apply the law in accordance with Islamic injunctions as laid down in the Holy Quran and Sunnah. Various courts in this regard held that "this provision of law is in line with the assurance given in the Constitution that Pakistan is the Islamic Republic and that the state religion is Islam. It also leaves no ambiguity that the guidance is to be taken from the Holy Qur'an and Sunnah. In Islam, rights of minorities are fully protected and honoured. Hence, it is the true interpretation and application of these provisions that will bring the healthy results. Heavy duty is cast on the legal fraternity and the Hon'ble members of the Bench to play the role. Provisions make the Islamic Law on the subject applicable not only to cases relating to the offences enumerated in Chapter XVI of Penal Code but also to all matters ancillary or akin thereto"[14]; "court is to be guided by Injunctions of Islam as laid down in Qur'an and Sunnah"[15]; "court, in matter of interpretation and application of provisions of Chap. XVI, PPC in respect of the offences mentioned therein or the matters ancillary or akin thereto, can seek guidance from the Holy Qur'an and Sunnah as provided in S. 388-F, PPC but it cannot bring a non-compoundable offence within the purview of S. 345, Cr.P.C. by virtue of S. 338-F, PPC for the purpose of compounding it on the basis of compromise"[16]; "compounding an offence by Court which is non-compoundable in statutory law in the light and concept of forgiveness in Islam, on the basis of compromise. Accused had been sentenced to death under S. 396, P.P.C. and to ten years R.I. under S. 412, P.P.C. by the trial Court and he had lost his case on merits upto Supreme Court in regular proceedings. Accused moved an application in the Court of first instance for his acquittal on the basis of his compromise with the legal heirs of the deceased wherein he also made an alternate prayer of reduction in sentence"[17]; "court cannot bring a non-compoundable offence within the purview of Section 345 Cr.P.C. by virtue of Section 338-F, P.P.C. for the purpose of compounding it on the basis of compromise"[18]. All these decisions of the courts make it clear that the provision has been praised and applied in various proceedings before these courts and accordingly, various provisions have been interpreted in the light of Islamic injunctions as laid down in the Holy Quran and Sunnah.

Challenges of Interpretation:

However, it has also been commented that mere insertion of this principle was not sufficient as all the judges in Pakistan might not be as such familiar and acquainted with the sources of Islamic law and accordingly, might not be able to interpret it in accordance with Islamic injunctions. Moreover, there are non-Muslim judges as well who might have heard about the sources of Islamic law. Ahmadis have been constitutionally barred from calling themselves Muslims and accordingly their interpretation of law according to Islamic injunctions is also not acceptable by the Muslims of Pakistan. On the other hand, an Ahmadi is not constitutionally or legally barred from becoming a judge and thus he according to law is also entitled to interpret the provisions of chapter XVI supra according to injunctions of Islam as laid down in the Holy Quran and Sunnah. On the basis of these complexities, a full bench of Lahore High Court criticised the grant of such vide powers to the courts.[19] The court in this regard held that "such unlimited powers of the court were likely to lead to injustice and arbitrariness".[20] It was further observed that the presiding officers of the courts may belong to different schools of thought of Islamic law and may have different approaches towards the understanding of substantive as well as procedural principles of Islamic law and may have different opinions in this regard. This kind of complications can be observed in the case Ghulam Murtaza v the State[21] wherein Tanzilur Rehman J. prior to the enforcement of Qisas and Diyat Ordinance observed that in order to convict an accused of murder with death sentence, there must be evidence of at least two male adult male witnesses of unquestioned integrity (Tazkiyat-al-Shahood) as provided under the inunctions of Islam and laid down in the Holy Quran and Sunnah. It was settled that Tazkiyat-al-Shahood is the most important element of a testimony without which evidence cannot be accepted by the court. However, the term 'Tazkiyat-al-Shahood' has not been defined nor mentioned in the Qanun-e-Shahadat Order 1984. It is though mentioned in the Hudood Ordinances introduced during General Zia-ul-Haq regime and has been made necessary ingredient to prove any offence of hadd, but has not been defined therein specifically as well. Concept of 'Tazkiyat-al-Shahood' has been given as the satisfaction of the court that the witnesses are truthful persons and abstain from major sins (kabair). It has also been provided that Tazkiyat-al-Shahood means the mode of inquiry of the court as to satisfy itself with regard to the truthfulness of the witnesses. The courts in this regard had different interpretations. In the case titled Ghulam Ali v the State, the court adopted its own mode of inquiry with regard to Tazkiyat-al-Shahood and sentenced the accused with amputation of his right hand under the Offences Against Property (Enforcement of 'Hudood') Ordinance, 1979. The FSC concurred with the decision of the trail court being satisfied with the mode of inquiry adopted for Tazkiyat-al-Shahood. However, the Shariat Appellate Bench of the Supreme

Court while disagreeing with the findings of the FSC held that the mode of inquiry adopted by the court to satisfy itself with the condition of Tazkiyat-al-Shahood was "mockery of Islamic law of Evidence" and the accused was acquitted accordingly. The Supreme Court held that the mode of such inquiry can either be secret or open. While the trial court adopted the inquiry procedure after their depositions against the accused and asked about their conduct and character, whereupon a police report was submitted that the witnesses had no criminal record and said report was verified by a superior officer. The Supreme Court held that this mode was not satisfactory to determine the existence of Tazkiyat-al-Shahood.[22] Therefore, it is evident that there is no definite mode to determine the condition of Tazkiyat-al-Shahood and different modes are adopted by different courts in this regard.

However, the contention that insertion of section 338-F PPC is likely to lead to injustice and arbitrariness cannot be justified as in accordance with the Constitution and general principles of law, it is the primary duty of courts to interpret the provisions in accordance with Islamic injunctions. Moreover, any complication in this regard can also be settled through legislation or interpretation and that too in accordance with Islamic injunctions. As far as the contention that various judges on the basis of their belief or any other reason are unable to interpret the law according to Islamic injunctions cannot be justified either. Since the Constitution casts a duty to bring all laws in conformity with the injunctions of Islam, any such condition leading to violation of this duty would lead to violation of the Constitution. Therefore, every judge is also liable to be acquainted with the general principles of Islamic law in order to become capable to interpret the law in accordance with Islamic inunctions and a heavy responsibility lies on the State and all the institutions established in this regard including Shariah Academy of International Islamic University, Islamabad, which was established for this purpose.

Interpretation of Family laws:

Family laws were also promulgated during the process of Islamization of laws that include the MFLO 1961 and West Pakistan Family Courts Act 1964.[23] However, as discussed earlier, there are several challenges in the MFLO 1961.[24] The MFLO is considered the only post-partition legal reform in family laws,[25] but as discussed in Allah Rakha case supra, it contained various provisions that have been declared against the injunctions of Islam by the FSC. Primarily, criticism is levelled on section 4 and 7 of the Ordinance.[26] Since these two sections of the MFLO have been declared against the injunctions of Islam, different courts had different interpretations in this regard.

For instance, in a case before Sindh High Court, it was decided that though section 4 of the MFLO has been declared repugnant to the injunctions of Islam,

but matter is sub-judice before Shariat Appellate Bench of the Supreme Court and in accordance with Article 203D of the Constitution, provision being still applicable, grandchild would inherit the property of his grandfather after death of his father.[27] Supreme Court remained more explicit in this regard by holding that the effective date of the decision of the FSC, even if affirmed in appeal, would be 31-03-2000, that cannot be given retrospective effect and thus inheritance opened before that date would be dealt with in accordance with section 4 of the Ordinance. However, in another case, the Supreme Court of Pakistan held that before the promulgation of the MFLO, Muhammadan law was applicable on the estate of a deceased Muslim and in case of his death and inheritance already concluded under Muhammadan law, before the promulgation and application of the MFLO 1961, legal heirs of pre-deceased son would not be entitled to inherit the estate of grandfather.[28] The same principle was re-affirmed by Lahore High Court in another case.[29] All these decisions make it abundantly clear that presently courts hold the opinion that during the pendency of appeal against Allah Rakha case, section 4 is applicable and before the promulgation of the MFLO 1961, Islamic law was applicable, whereby the grandchild was not entitled to inherit the property of predeceased son.

However, even before Allah Rakha case, some courts adopted a different view. In a case, Supreme Court held that section 4 the MFLO 1961 was enacted to cater the needs of a grandchild and to overcome his sufferings but cannot be interpreted to decrease the shares of other descendants. The court further held that the same was required to be interpreted in consonance with section 2 of Muslim Personal Law (Shariat) Application Act, 1962 and both the statutes can stand together.[30] This decision of the Supreme Court allows deviation from the strict interpretation of section 4 in cases where share of grandchild decreases the share of other descendants and courts in this regard are required to be guided by other principles of Muslim personal law and Islamic law.

As far as section 7 of the MFLO is concerned, the primary criticism in this regard is that under Islamic law, divorce becomes effective as soon as it is pronounced, whereas under the MFLO, it becomes effective when a notice in that regard is received by the chairman. Secondly under Islamic law, period of Iddat commences from the time of pronouncement of divorce, whereas under the MFLO, it commences when a notice in this regard is received by the chairman. Under Islamic law, if the marriage is not consummated, no Iddat is prescribed, whereas under the MFLO, Iddat period in the shape of ninety days is prescribed for every case.[31]

The main problem arises when divorce is pronounced and no notice in this regard is given to the chairman of the arbitration council. According to the developed case law on this issue, the Supreme Court once held that where

husband does not give notice of talaq, it would be deemed that he has revoked it.[32] However, subsequently it was held that failure to give notice of talaq does not by itself amounts to revocation of talaq but the same becomes merely ineffective.[33] However, the gardezi rule was again laid down in another judgment by the Supreme Court once again in 2006.[34] The above-mentioned practice of the Supreme Court makes it abundantly clear that the Court is not consistent in its interpretation of the same provision of law and in accordance with Article 227 of the Constitution read with Article 2-A and section 4 of the Enforcement of Shariat Act, 1993, courts are bound to interpret all the provisions of all laws including section 4 and 7 of the MFLO, 1961 according to the injunctions of Islam as laid down in the Holy Quran and Sunnah.

Conclusion:

Under the Constitution of Pakistan as well as other laws, courts in Pakistan are bound to apply Islamic law. Responsibility to bring all laws that are inconsistent with the injunctions of Islam in consistency with such injunctions, has been given to the parliament and the FSC, but even after declaring various provisions as such, no decision could take effect. The primary reason is proviso of Article 203D(b) and consequent appeals filed against such decisions before the appellate forum i.e. Supreme Court Shariat Appellate Bench. However, since the courts in Pakistan are bound to interpret all laws in accordance with injunctions of Islam, even the provisions declared against the injunctions of Islam can be interpreted according to injunctions of Islam and attempts in this regard have already been made by the superior courts. The only deficiency is that the judges in Pakistan must be well versed in Islamic law so that they could easily apply and interpret the law in accordance with injunctions of Islam and Shariah Academy of International Islamic University, Islamabad can play a vital role in this regard.

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