



RESEARCH PAPER

Application of Islamic Laws through Judiciary in Pakistan: A Case Study of Riba

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ABSTRACT

This study investigates that how the process of Islamization of laws shifted to judiciary and elucidates challenges being faced by the government in application of *Shariah* law with special emphasis on the eradication of *Riba* from economic activities. This legal research has been conducted in light of qualitative and deductive research methodology wherein constitutional amendments, legal instruments and case laws have been critically investigated. This paper has been divided into five segments: in first segment, an overview and development of the legal and judicial mechanism has been given. In second segment, Islamization and judicial activism in Pakistan has been discussed. In third segment, permissible financing instruments have been discussed. In forth stage, Islamization of laws through judiciary has been examined. In fifth segment, the article has been concluded which is coupled with findings to translate and materialize the existing financial system with the proposed Islamic financial system

Introduction

The Indian Subcontinent was ruled by the Muslims after Qutab ud Din established Muslim Sultanate here in 1206 AD. This region was ruled through five different dynasties from 1206 to 15026: the *Slaves*, the *Khiljis*, the *Tughlaqs*, the *Sayyids* and the *Lodhis*. However, it was *Zahiruddin Babar* who founded a complete independent Mughal empire after defeating *Ibrahim Lodhi* in the first battle of Panipat, 1526. Until 1706, the Mughals firmly ruled this region, but the internal strife among princes coupled with other external matters the Mughal authority gradually eroded and the British extended their influence on the other hand. The last attempt to save the Subcontinent from the British, the War of Independence 1857, also failed resulting in establishment of British Rule over here (Munir, 2012).

During the days of East India Company as well as during the British Raj after War of Independence, the colonial masters introduced new set of Western courts for implementation of Western laws replacing the then existing judicial system. The same judicial system was adopted by the newly established state of Pakistan after 1947. In the Eighties, General *Zia-ul-Haq* soared on the religious slogan and took himself the responsibility of Islamization of Laws as well as the then existing judicial system of Pakistan. The Federal Shariat Court (FSC) was established and was conferred with *suo motu* jurisdiction, which resulted in significant legal development through judiciary. With the insertion of Article 2-A to the Constitution, the process of Islamization of legal system transformed to judiciary. The Superior Judiciary explicitly declared supremacy of Islamic Provisions and observed that no law could prevail over Islamic precepts. The Court gave its stance on *Riba*. Consequently, the government passed the Eradication of *Riba* Act, 2019 whereby provisions pertaining to interest constituting *Riba* have been omitted from the fiscal and procedural laws. The Islamic socio-economic system is depended on equity, fairness, non-exploitation, welfare, and justice. In Islamic financial system, deposits are treated as either *Amanat* or partnership in profits and losses. Conversely, *Riba* violates these basic Islamic principles. Islamization of financial institutions doesn't necessarily means replacing *Riba* with an instrument promising variable rates of return rather it is based on the reconstruction of the entire financial system, in order to strike a balance between the existing economic order and the Islamic economic system (Sherazi, 2000).

Islamization and Judicial Activism in Pakistan

Several Muslim countries initiated Islamic reforms in 1970s and 1980s. By that time, the legislature had to face so many challenges, including the establishment of the content of *Shariah* norms (Giunchi 2013). Pakistan has been accredited to be the first Islamic country which has taken constitutional liability of abolishing interest based economy (Khan, 1985). This conceptual framework of financial and corporate system, based on Quran and Sunnah, was declared in December, 1943. The elimination of interest roots out the menace of *Usury*, the issue regarding amassment and accumulation of wealth in few hands was addressed through law of inheritance, *Zakat* ensures circulation of wealth to the weak segment of the society, and charity obliterates poverty and disproportion of economic resources (Sharifuddin, 1992).

Throughout the 19th century, *Shariat* courts were influenced by the colonial imperialists and were replaced with the western judicial system. Despite the fact that in some countries Islamic reforms were reintroduced, whereas the western legal system remained functional on the parallel. New Islamic courts were established which continue their functioning according to the western procedures. In exceptional cases, courts' composition remained mixed wherein judges were sitting along with the *ulema* due to uneasy division of their functions (Sharifuddin, 1992, p.190). The Islamization of *Shariah* laws started its roots in Pakistan at the end of 1970s through motivation of executive, which was followed by judiciary in the subsequent decades. The then Prime Minister, *Zulfiqar Ali Bhutto*, introduced some of

the Islamic reforms in the second half of the 1970s. This process was accelerated when General *Zia-ul-Haq* seized power in 1977 (Sharifuddin, 1992, p. 194).

The Constitution of Pakistan, 1962 in its Principles of Policy, provided for elimination of *Riba*. The Council of Islamic Ideology established under the same Constitution recommended that Pakistan's financial system is based on *Riba*, which is proscribed in Islam. On 23rd December, 1969, the Council declared *Riba*, in all its manifestations and forms, prohibited in Islam so any variation in rate of interest doesn't affect its prohibitive character. The Council declared the following modes of individual and institutional transactions as *Riba* based: in the existing banking system, excess on the original sum received or paid, discount on treasury bills, interest on loans paid on saving certificates, payment of prizes on bonds, interest on provident funds or postal life insurance, interest on loans to provinces, local bodies, and government servants. Nevertheless, these recommendations could not receive formal public consideration from the then Prime Minister, Zulfikar Ali Bhutto, nor from the framers of the Constitution of Pakistan, 1973. In the policy making, the issue of *Riba* got concern after *Zia-ul-Haq* seized power as Chief Martial Law Administrator in July 1977 (Sherazi, 2000).

In the application of Islamic laws, *Zia-ul-Haq* played a significant role, which was projected as leading Pakistan in the directions of becoming truly Islamic state. *Zia's* regime effected political, legal, social, and economic institutions of the state. His reforms were very complex and may be broadly divided into Structural, Procedural, and Criminal Law Reforms (Kennedy, 1990 & Muzaffar et. al., 2017).

In 1978, through structural law reforms, the High Courts were granted with original jurisdiction of the Appellate Shariat Benches and were conferred with the authority to entertain Shariat petitions, including appeals against Hudood cases. In 1980, the Appellate Shariat Benches of the High Courts were dissolved and replaced with the FSC, which was conferred with limited *suo motu* jurisdiction. Until 1985, provisions regarding the FSC were changed twenty eight times through 12 Ordinances so as to ensure laws' compliance with injunctions of Islam. In procedural law reforms, Law of Evidence, 1872 was replaced with *Qanoon-i-Shahadat* Order, 1984. Through criminal law reforms, *Zia* promulgated four Ordinances on 10th February 1979, which were collectively termed as Hudood Ordinances and were comprised of the following Ordinances: the *Zina* Ordinance that deals with penalty for sexual crimes such as prostitution, rape, and adultery: the *Qazaf* Ordinance that deals with false allegation of *Zina* and penalty thereof: the Prohibition that Ordinance deals with intoxication and its penalties: the Property Ordinance deals with theft related offences and provides penalties for such crimes (Kennedy, 1988).

After the adoption of *Shariah* laws in Pakistan, it is significantly important to examine how Islamization of legal system shifted to judiciary. Due to *Zia-ul-Haq's* death, Islamization was temporarily interrupted but resumed by Nawaz Sharif who remained the Prime Minister of Pakistan for three times: 1990 - 1993, 1997 - 1999, and 2013 - 2017. With the enforcement of *Shariah* Act, 1991, *Shariah* was declared as the supreme law of the land. The Act declared that laws to be interpreted by the

courts in the light of *Shariah* and government was directed to take appropriate measures for Islamization of education and economy. The Act also urged the media to promote Islamic values, directed the state to eradicate social evils, including bribery, corruption, obscenity, and vulgarity through legislative and administrative measures. The Act emphasized on the Islamization of judicial system and protection of the ideology of Pakistan (The Shariah Act of 1991). It implies that every law has to be construed by the courts in the light of *Shariah* and all Muslim citizens should observe it. Recently, on 21.01.2019, the Senate introduced a Bill to omit clause 2 of Article 30, which protected actions of the state organs and authorities even if such actions were contrary to the provisions of the principles of policy set forth in Part II of Chapter 2 of the Constitution of Pakistan, 1973.

Moreover, all areas not covered by the Islamic injunctions should be constitutionalized by the legislature, who should be authorized to enact laws for the areas not covered by the Quran and Sunnah, and the existing laws should be amended if so required. Introduction of Islamic reforms and dissemination of Islamic laws both in traditional religious institutions and modern educational institutions was declared indispensable, in order to overcome potential threat of modern social sciences to Islamic institutions (Muslim, 1987).

Permissible Types of Financing

The State Bank of Pakistan laid down mechanism of profit and loss sharing in interbank transactions and explicated the manner in which the banks' profits to be distributed among the shareholders. The State Bank of Pakistan broadly divided permissible modes of financing into the following three categories: Lending, Trade, and Investment. Financing by lending is either in the form of loan carrying service charges or *Qarz-e-Hasana*. Trade related financing is carried through purchase of goods, property, including both movable and immovable, development charges on the basis of property development, trade bills' purchase, leasing, and hire-purchase. Financing through investment includes *Musharaka*, shares' purchase and equity participation, *Mudaraba*, certificates' purchase, and rent sharing (Muslim, 1987, pp. 64-66).

The abolition of interest based economy took impetus after Zia's announcement on 10th February 1979 on the birthday of the Holy Prophet (PBUH). In this regard, essential supportive framework of law was necessitated so as to keep the proposed system on the right track. In order to ensure its conformity with *Shariah*, following two enactments and necessary changes to the existing laws were made: *Modaraba Companies and Modaraba (Floating and Control) Ordinance, 1980*, which was supplemented by *Modaraba Rules of 1981*. The rules were meant to provide and facilitate matters pertaining to registration, management, and regulation of *Modaraba*. Second enactment was in the form of *Banking Tribunal Ordinance, 1984*, which provided for the establishment of banking tribunal having powers of civil and criminal courts. The tribunal was required to dispose off suit in ninety days. The

Council of Islamic Ideology also recommended for restructuring and amendment in the existing fiscal laws so as to ensure laws' compliance with *Shariah*.

The Islamization of financial institutions was not only limited to eliminate interest based transactions, but was meant to provide a mechanism based on equity, fairness, and justice. The most challenging task attached with the application of alternative Islamic financial system is the risk bearing instrument, which can provide the investors with their liabilities, security, and proof of liabilities to encourage their holdings (Cizaka, 1995). Moreover, the proposed alternative policy instrument must be complied with ethical philosophy of Islam and objectives of Islamic economic system. Practically speaking, in Islam, there is no concept of fixed and predetermined rate of return for consumption of debts and loans except *Qaraz-e-Hasana* or equity oriented (profit and loss sharing) financing for agriculture, trade, and industry.

In the existing alternatives of Islamic financial system, *Musharaka* is one of the best modes of finance. *Musharaka* is the system of profit and loss sharing wherein both the parties subscribe their capital and work as per their predetermined mutually agreed ratio, whereas loss is shared according to proportionate finance of both the parties. However, the Council of Islamic Ideology found some features of the *Musharaka* agreements conflicting with *Shariah*: there is no legal framework for governing *Musharaka*, not documented in the form of negotiable instrument, legal relationship constituted between entrepreneur and financial institution is familiar to creditor and debtor and not is that of shareholder in work (Sherazi, 2000).

Application of Islamic Law through Judiciary

Despite the fact that the concept of Islamization was backed by the executive, it was overwhelmingly continued beyond the governmental control. The Provincial High Courts relied upon un-codified *Shariah* principles. The Courts went to the extent of replacing the codified norms with that of the un-codified Islamic principles in the light of Quran, Sunnah, and *fiqh*. Apparently, it was a paradoxical view that judicial activism had taken roots in the High Courts. In fact, judges of the High Courts were younger having more orientation to Islam as compare to judges of the Islamic Courts (Giunchi, 2013).

In 1970s, some judges urged that the issues not covered under the statutory laws should be dealt with in accordance with the *Shariah* Principles instead of referring it to the British precedents. Furthermore, the Objectives Resolution, which is not a conventional preface rather it embodies fundamental concepts of the Constitution ('Haji Nizam Khan v Additional District Judge', 1976). The Supreme Court, however, declared that technically the Objectives Resolution cannot be considered as an active part of the Constitution ('State v. Zia-ur-Rehman', 1973). Hence, Islamization of laws was not within the ambit of judiciary and the same could be carried out only by the executive ('B. Z. Kkaus v. President of Pakistan', 1980; 'Federation of Pakistan v. Farishta', 1981). However, in 1985, through

Constitutional Amendment, Article 2-A made Objectives Resolution as a substantive part of the Constitution.

By virtue of Article 2-A, Shariah became a normative system which was declared superior to the statutory system and the courts were required to apply it directly. If a matter was not reserved to the FSC and excluded from its jurisdiction, the same would fall under jurisdiction of the other courts and may be declared un-Islamic by the High Courts or the Supreme Court. The Superior Courts assumed such jurisdiction in 1980s, particularly in cases of family laws and *Riba*. This Islamic judicial activism also targeted the Muslim Family Law Ordinance (MFLO), 1961 (Giunchi, 2013). In 1988, the Supreme Court explicitly asserted that with the inclusion of Article 2-A, Islamic percepts prevail over other laws except the areas specifically excluded from competence of the FSC. In such cases, the High Courts and the Supreme Court would be the ultimate forum of adjudication, which would have binding effect on the FSC ('Muhammad Sarwar and another v. the State', 1988; 'Mirza Qamar Raza vs. Mst. Tahira Begum and Others', 1988; 'Allah Dad v. Mukhtar Ahmad', 1992).

The FSC itself has progressively referred to un-codified Shariah principles, especially in cases not covered by the statutory laws ('Muhammad Naseer v. the State', 1988). This change contributed entrance of Islamic judges along the judges of modest background. For instance, the head of Islamic Ideology Council, *Tanzil-ur-Rahman*, who after five years of his nomination as judge of the Sindh High Court in 1986 was elevated as a judge of the FSC. He promoted the idea of Objectives Resolution being supra-constitutional norm and that the MFLO was un-Islamic (Giunchi, 2013). In some cases ('Hakim Khan and Others v. the Government of Pakistan and others', 1992; 'Mst Kaneez Fatima v. Wali Muhammad and another', 1993) it was observed that the courts have judicial role only and can neither consider the Objective Resolution as supra-constitutional document nor can declare it self-executory. In absence of statutory laws, the judges were at liberty to apply Islamic percepts. Nevertheless, in a leading case ('Zaheer-ud-din v. the State', 1993) the Supreme Court declared Objectives Resolution as effective and remained operative even if fundamental rights were suspended.

By virtue of Article 2-A, the authority of judiciary has been expanded in comparison to legislative and executive. This judicial activism targeted and eroded the fiscal laws and economic system, which was evident in case of *Riba*. Following examples of the High Court ruling, the FSC and the Appellate Shariat Bench of the Supreme Court (ASBSC), directed the government in 1991 and 1999 respectively about the fiscal laws: the government was directed to revamp conventional insurance and banking system, to ensure replacement of *Riba* involving transactions with other instruments, to amend all fiscal laws and other economic related statutes within two years. However, in response to the directions, the government showed reluctance for its application could isolate the economy of Pakistan and could discourage foreign investment and capital that consequently could push the fragile

economic system of the country to collapse (Giunchi, 2013). Against the impugned judgment of *Riba*, the government filed review petition in the Supreme Court in 2002. Meanwhile, the government also partially changed composition of the judges of the Supreme Court. The Court overturned the decision and remanded the case to the Federal Shariat Court for fresh hearing with the directions to take into account literary contribution of the contemporary jurists of the Muslim world, in order to address the issue of *riba*.

On 5th November, 2013, the FSC took up the case for fresh hearing. Consequently, the government, with collaboration of the State Bank of Pakistan, has taken serious steps for eradication of *riba* from the economic and banking system of the country. On 6th October, 2015, Chief of Tanzeem-e-Islami Pakistan, *Hafiz Akif Saeed*, filed petition for elimination of *Riba* and alleged that the government had failed to enforce Article 38 (F) of the Constitution of Pakistan, 1973 so as to provide *Riba* free system. The Court dismissed the petition for the matter was already referred to the FSC. In this regard, *Sher Akbar Khan*, MNA *Jamaat-e-Islami* introduced Eradication of *Riba* Bill 2015. The Bill referred to the following provisions: Article 227 of the Constitution that elucidates laws' compliance with the Quran and Sunnah and prohibits the government regarding legislation of any law repugnant to the Islamic injunctions. Article 38 (F) explicates elimination of *Riba* at the earliest. The Bill also referred to the Council of Islamic Ideology regarding interest-related laws, which recommended that fiscal laws should be amended so as to ensure its compliance with Quran and Sunnah. The Bill also emphasizes eradication of *Riba* from fiscal laws and repeals the Interest Act, 1939. The Bill was opposed by the government on the ground that the matter is sub-judice in the FSC. However, on 23rd April, 2019, Parliament passed the Eradication of *Riba* Act, 2019. This Act aims to bring changes in procedural and fiscal laws so as to ensure elimination of interest based economic activities. The Act directed for deletion of certain provisions and the word 'interest' constituting *Riba* to be deleted and be reorganized and substituted appropriately. The Act brought about amendments in the following legislative instruments: Sections 2(12), 34, 34A, 34B, 35(3), 144(1) of the Civil Procedure Code, 1908, Section 74 of the Contract Act, 1872, Section 80 of the Negotiable Instruments Act, 1897, State Bank of Pakistan Banking Services Corporation Ordinance, 2001, Banking Companies Ordinance, 1962, Banks Nationalization Act, 1974, Micro-Finance Institution Ordinance, 2001, Pakistan Insurance Corporation (Reorganization) Ordinance, 2000, Government Saving Banking Act, 1873, Insurance Act, 1938, and repealed Interest Act, 1839 (The Eradication of *Riba* Act of 2019).

The Eradication of *Riba* Act, 2019, in its statement of objects and reasons, referred to Article 31 of the Constitution of Pakistan, 1973 wherein the government was required to take necessary measures so that the Muslims may order their lives according to the Islamic injunctions. Through various reports, it was made clear to the government that interest in all its manifestations constitutes *Riba*, which is prohibited in Islam. Elimination of interest based economy, being matter of public concern, extends to all the loans and transactions at domestic and international level. In this regard, the government should revisit any arrangement made by any

government in the past or present under Islamic law. The Act emphasizes on riba-free system and pointed out a report about 200 financial institutions around the world, including the USA and Europe, which are working on interest-free system. The report also pointed out that the interest-free system is growing three times faster than interest-based organizations (The Eradication of Riba Act of 2019). It is worth-mentioning that mere amendments in fiscal and procedural laws by omitting the word interest constituting *Riba* shall not necessarily eradicate it from the economic activities. Rather, it is subject to re-orientation of the economic policies followed by adjustments in laws and introduction of new laws whenever needed. Despite the fact that legislation in the form of Eradication of Riba, Act 2019 is a tip of the iceberg in application of Islamic laws, it has far-reaching effects and provides legislative mechanism wherein the Muslims may order their economic activities according to the injunctions of Quran and Sunnah.

Conclusion

Islamic laws were introduced in India since the establishment of Muslim rule in 1206. These Islamic laws in result gave birth to Islamic judicial system in India, which remained intact until the British took hold of the region and replaced Islamic judicial setup with the western judicial system. After 1947, both India and Pakistan relied on the legal system introduced by the British. In Pakistan, the Islamization of Shariah laws have its roots back in 1970s through motivation of executive, which was subsequently accelerated by judiciary. The same process of Islamization got impetus in 1980 during Zia's regime. During the Islamization of laws, legislature was facing challenges in the establishment of Shariah norms and its various interpretations. However, after insertion of Article 2A, the judiciary proactively performed its functions, which turned into judicial activism in terms of application of Shariah laws. Judiciary took cognizance of the legislative instruments, including the Muslim Family Law Ordinance, 1961 and interest constituting *Riba* in fiscal and procedural laws. In the recent past, some significant constitutional and legislative developments have taken place, which compelled the legislature to omit laws conflicting with the injunctions of Islam.

Furthermore, a Bill has been introduced in the Senate on 21.01.2019, which aims to omit clause 2 of Article 30. The provisions of Principles of Policy such as promotion of Islamic way of life, social justice, and eradication of *Riba* would get constitutional protection. This amendment aimed to remove doubts regarding action of the state organ or state authority, which was previously not subjected to be called in question if found contrary to the principles of policy. Consequently, Article 38(F), which is about eradication of *Riba* at the earliest imposed liability on the legislature to take positive steps for the eradication of *Riba* from the economic activities of the country. Article 227 urges compliance of laws with Quran and Sunnah and prohibits enactment of any law conflicting with the Islamic injunctions. In order to ensure laws' compliance, Federal Shariat Court has been established and authorized under Article 203A to 203J of the Constitution of Pakistan, 1973. These legal and

constitutional developments compelled the government to enact the Eradication of *Riba* Act, 2019 and repeal the Interest Act, 1839. The former brought about changes in the fiscal laws so as to eradicate *Riba* from the commercial activities of the state and provide individuals with interest free fiscal mechanism. It is worth-mentioning that by just omitting the term 'interest' constituting *Riba* from the fiscal laws shall not necessarily change the existing pro-interest mechanism. The government should take necessary steps to restructure and substitute the existing pro-interest system with the anti-interest mechanism so as to ensure *Riba* free commercial system for the economic life of the state and its subjects.

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