
Revival of *Ijtihad* for Legislation Pertaining to Islamization of Laws

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ABSTRACT

Sharī'ah (Islamic Law) is a Divine Order based on not only ideology and sacred code but also serves the law for state and Judiciary. Pakistani plural legal system derived its laws from Sharī'ah and worldly laws. The Sharī'ah in its unique form is not executed according to its spirit which causes problems of Islamization of Laws in Pakistan. Islamic Laws are illustrated interpreted and implemented which fails to bring required results for sustainable development and emerging challenges in the enforcement of Sharī'ah. For new issues and inventions, many modes of thought and contemplation have come to the surface by individual scholars, based on *ijtihad* and deliberations on the lines of their own making. These different modes of *fatawa* and *ijtihad* are not a product of modern times and do not meet the challenges. In Pakistan, the Federal Shariat Court (FSC) that has given exclusive powers for the implementation of Islamic laws in its spirit constitutes the process of legislation of Islamization of Laws. Another institute that works under the Constitution is the Council of Islamic Ideology, but its functions are mere of optional nature that can put forward endorsements to the Parliament. This paper attempts to emphasize the renewal of collective *ijtihad* institutionalized under an Islamic State for the

revival of laws for revolutionary reforms in establishing justice in its letter and spirit.

Keywords: Ijtihad, Shariah, Islamization of laws, Islamic Ideology, Islamic State

Introduction

Religion, in general, is considered as a personal matter and laws of the land are different as it deals with the worldly affairs. The laws of the state are originated from the customs, order of the judiciary, supreme authority, parliament, or people constitute a legislative assembly. According to Islamic Law, the law of the state could only be Sharī'ah, Divine Commandments, which cannot be amended or legislated by any supreme authority of the state. Its constitutions are not due to national or through the help of any organization devoted to the administration, due to the divine nature of the Islamic law.

Sharī'ah has not provided a ruling for every individual case that would occur in time to come. It has prescribed only universal principles for an infinite number of cases. Therefore, the Muslim scholars established to instruct *Fuqaha* (Juristic consultation) and *Hukm* (court of law) to deal with legal cases and derive principles and laws from the Qur'ān and Hadith. This methodology required a great effort and this whole process is called *Ijtihad*. The science of *ijtihad* (reasoning) and interpretation is working to comprehend and apply the spirit of the Qur'ān and Hadith for improvements in emerging challenges.

Purpose of State in the establishment of Sharī'ah (Islamic Law)

Islamization of laws is the process in which the State follows Islamic Philosophy, where the structure and functions of the State are formed according to the doctrine of Sharī'ah injunctions (Islamic Law). The Qur'ān

clearly emphasizes the purpose and objective of Sharī'ah to launch communal righteousness through values of Divine injunctions. Allah Almighty says in the Qur'ān that He has send down Messengers with His clear signs along with the Divine commandments in the form of Book and the balance so that the Justice may prevail in the society.¹ Muslims are the best nation brought forth for mankind, Sharī'ah provides a guiding principle for the establishment of a civilization that God almighty give authority to the people in land so that they established religion of Islam, enjoy goodness and forbid wrong in the community.² The objective of Islamic Law is to acquire justice and peace in society. The ruler is abide by Shariah and to enjoin what is right and forbid what is wrong while believing in Allah.³

Scope of *Ijtihad* in Legislation under Islamic Law

Sharia on one side guides ways of worship that develop a relationship of the human being with their Creator, on the other side, Islamic law governs and commands about city life. Islamic Law is primarily divided into two major sections, private law, and common law. Thus the civil law which is the source of private law, including all of its branches and Islamic law provides grounds for a mujtahid to explore new avenues and enables the scholars to meet the conditions of *ijtihad* to look for solutions in all fields of life. *Ijtihad* covered all areas of life and includes all branches of law. Accordingly, *ijtihad* is a collective religious duty and one of the necessities of Sharī'ah. In this respect, Muhammad Al-Tahir Ibn Ashore said:

“*ijtihad* is considered as a communal duty on Ummah to an extent required by its needs and circumstances. The Ummah as certainly sinned by its omission seeing that it has adequate capacities in term of means and mechanism”.⁴

The Source of Islamic Law is the Hakim i.e Allah Almighty, therefore, Islamic Sharī'ah does not exclude human legislation. It only limits its scope and guides it on the right lines. Human legislation according to Islam is and should be subject to the supremacy of Divine Law and within the limits prescribed for this legislation. The effort added by the *mujtahid* in quest of knowledge of the *ahkam* (rules) of the Sharī'ah through interpretation is called *ijtihad*. Divine promise a reward for mujtahid.

Messenger of Allah said, “when a judge makes *ijtihad* and reaches a correct conclusion, he receives a double reward; and if his conclusion is incorrect, he still receives a reward”⁵.

Interpretation of Divine Laws

The Quran and Sunnah have laid down explicit injunctions and prescribed detailed rules of matters to be acted upon. No jurist, judge, legislative body, not even Ummah as a whole can alter the Divine injunctions of the Sharī'ah by any force. However, interpretations of Divine injunctions are scope left for legislation in this sphere.

Analogy (Qiyas)

Sharī'ah rulings are based on the issues defined in Quran and Hadith with its explicit order. The analogy is used to the derivation of laws for a new situation, in which human reasoning and logic are used to derive the underlying cause.

Inference (Implication of Divine Laws)

The implication of Sharī'ah is a human effort to understand Divine objectives. Sharī'ah as an executive legal paradigm system is an integral part of Muslim which covers all matters of life-based on the commands of the Qur'ān and Sunnah. For the inference of Sharī'ah, it needs collective *ijtihad* in State and society.

Area of independent legislation

Through the institution of *Ijtihad*, it constitutes the law, state machinery, and procedural setup and judicial system have been organized in an Islamic way so that they can serve the purpose of *Sharī'ah* to establish Islamic law with its true sense while implementing all of its injunctions.

Establishment of the institution for *ijtihād* in the Islamic state

Several methodologies have been recognized in the Islamic legal paradigm whereby *ijtihād* acquires the force of law by the Muslim government. For *ijtihād* in a given problem, the injunction a mujtahid may pertain and, in this application,, he makes an extreme effort to get guidance for the situation that he knows. A person does not know, and without effort wants to achieve any desired goals, this specific process will never flourish and need change by way of achievement. According to *Sharī'ah* injunctions, however, provided the qualification and capability required for this purpose should be achieved for a mujtahid and also the circumstances demand new clarification of Islamic Law through *ijtihād*. The founding of such an institution of *ijtihād* and its practices may only be done under the Islamic state.

Syed Abul Ala Maududi states "for acquiring the force of law Muslim government may adopt a piece of *Ijtihad*, as its law and an institution may be constitutionally empowered in an Islamic State to legitimate and it may enact a particular piece of *ijtihād* in the form of law".⁶

Allah Almighty commands in the Qur'ān:

“Allah has promised those of you who believe and do righteous deeds that He will surely bestow power on them in the land even as He bestows power on those that preceded them, and that He will firmly establish their religion which He has pleased to choose for them, and He will replace with

security the state of fear that they are in. let them serve Me and associate none with Me in my Divinity. Whoso thereafter engages in unbelief, such indeed are the ungodly”.⁷

Ijtihad – as a tool for Reformation in the modern world

Islamic Law provides the complete set of laws and their principles for life, but human life is changeable due to new challenges and issues that keep on arising. Therefore, for the solution of contemporary problems and issues, combined efforts of ijtihad are the primary requirement of the present day. There is absolutely no need for ijtihad when definite injunctions of the Qur'ān and Hadith are explicitly defined.

Concerning new issues and inventions, many modes of thought and contemplation have come to the surface, and scholars of different schools of thought based on ijtihad and deliberations on the lines of their own making. These different modes of fatawa and ijtihad are not the product of modern times and only these traditions have been the practice for a long. In the past Ulama and jurists had based ijtihad on the principles laid down on their own. Ijtihad can be done on such modern-day issues for which no clear commandments are given in the Qur'ān and Hadith literature⁸.

Shariah directed Muslims ruler to use their conclusion by the changing circumstances and needs of the situation. For this, as the advantage of the whole ummah lies in the activity of ijtihad, human society is developing and human actions, activities, and relationships are increasing and expanding, therefore, the process of ijtihad is responsible for catering to all the needs of the human society and to provide answers to all questions as emerging challenges. Without the process of ijtihad in a Muslim Society, many human activities are difficult to emerge in the sphere of an Islamic

society to reinterpret (but within some limitations), which can give them suitable answers concerning emerging challenges.

To the establishment of sustainability in the social sphere of life, collective *ijtihad* is recommended that State establish institutions for *ijtihad* that could serve and exercise their functions for the guidance State to establish *Sharī'ah*. The state institution exercising Collective *Ijtihad* prepared for meeting the challenges for the establishment of Islamization of Laws in Pakistan.⁹

Islamization of Laws in the Islamic Republic of Pakistan

The Islamic State of Pakistan is a unique state that was created on ideology rooted in the religion of Islam. The ideology of Pakistan is the Ideology of Islam and the implementation of Islamic teaching. Allama Alau din Siddique writes “ideology of Pakistan means that Islam is imposed here and maybe powerful than nations, parties, and masse”. With the existence of Pakistan through its constitution, an idea was formed that Parliament should have that right of *ijtihad* and it should be given the right of legislation concerning all religious matters¹⁰

The Preamble of the Constitution of Pakistan (Objective Resolution)¹¹ guides and make it possible for Muslims to spend their lives following the teachings of the Quran and Sunnah,

individually or collectively based on the commandments of Allah Almighty in the Qur'ān:

“Believers! Obey Allah and obey the Messenger, and those invested with authority among you, and then if you were to dispute among yourselves about anything refer it to Allah and the Messenger if you indeed believe in Allah and the Last Day; that is better and more commendable in the end.”¹²

Concerning the issue of ijthad the poet and philosopher of Pakistan Allama Iqbal said:

“The growth of republican spirit and the gradual formation of legislative assemblies in Muslim lands constitute a great step in advance. The transfer of the power of ijthad from the individual representation of schools to a Muslim legislative assembly which, because of the growth of opposing sects, is the only possible form of ijma can take in modern times, will secure contributions to the legal discussion from a layman who happened to possess a keen insight into affairs.”¹³

Issuance of *fatawa* in Pakistan is not ordered by the state official. It is confidentially and individually accomplished by different organizations and academies. As far as spiritual authorized organizations are concerned, there is the agency of Religious Affairs in Federation and provinces, but they are not *fatawa* administrations. Council of Islamic Ideology is a legitimate body that directs and makes recommendations for the government on Islamic legislation. This council does not pronounce fatwa officially, but it may never compromise on giving the right of ijthad as learned Muslim Scholars, who have a thorough knowledge of ijma and Qisas and adherence to the Qur'an, Sunnah, and Fiqh.

Federal Shariah Court- its role of Ijthad in Islamization of Laws

Islamization of the Pakistani legal system under Shariah is an important process. Along with the Supreme Court and High Courts of Pakistan, the Federal Shariah Court (FSC) significantly administers Islamic law in Pakistan.¹⁴

The Constitution empowers Federal Shariah Court to make improvements in law, which consider revolting to the injunctions of Islamic Law. The Federal Sharia Court was established to articulate the Islamization of laws

in Pakistan. Shariah Court explicitly doing its significant role¹⁵. There are many laws, which are repugnant to Islam, by applying Ijtihad the laws of Pakistan under the principles of Shariah so far are converted and established by the Federal Shariah Court.

The jurisdiction and authority of Federal Shariat Court in investigating the laws under the Shariah principles is unique and exclusive whose main function is that the Court examines and decide whether any statute law or provision of law is offensive to the commands of Islam or not and if the Court decides it set out in its decision¹⁶.

Federal Shariah Court has authority to acquiescent laws which could be unified through legislative alterations. Its purpose is bi-functional in the sense that Court has any obsessive force and that is the motive why the exclusiveness, distinctive powers, and main role of this Court in the procedure of Islamization is recognized and highlighted to a very high level¹⁷. Thus, it is obvious that only the Federal Shariat Court has exclusive obligatory powers as a vital institution for the true application of Islamic commandments.

The Council of Islamic Ideology

The Council of Islamic Ideology is created through the Constitution of Pakistan in 1973 for examining and defining the cases for Islamization of the status of laws the Council has not been granted any required powers¹⁸ for the implementation of legislation of Shariah rather it is an advisory body that can put forth recommendations to the government.

Factors that affect Islamization of Laws in Pakistan

Objective Resolution was one of the greatest achievements after the creation of Pakistan which was based on the Ideology of Islam in this direction of implementation of Shariah through Ijtihad in Pakistan.

Unfortunately, many factors are involved in the nation that becomes the cause of non-exercise and non-implementation of the true sense of Shariah in Pakistan. This situation generates a need to request the application of Shariah¹⁹. There are many efforts done at different stages, but real progress is not made. Formulation of the elementary assembly of the Pakistani Constitution is still odd to the Courts of Pakistan

Secular Mindsets and Ineffective Governments

Pakistan was created with the ideology based on the establishment of Shariah in an independent state and the Muslims live their lives according to the commands of Islam. Unfortunately, after the achievement of the ideological state of Pakistan, the object has been failed to achieve due to secular minds and ineffectiveness, and unstable political governments. The objective resolution and constitutions have been formed in a hurry that has failed to legislate Shariah laws.

The notion of parting of politics from ethics and religion has been modelled in the constitution to make it secular which creates numerous problems. The State avoided Islamic principles and some liberal and secular minds wanted to do ijtihad on the contemporary issues according to their wishes. The importance of their struggle is not more than independent opinion-making. The secular attitude creates the place of personal view over collective ijtihad which is different from the requirements and Injunctions of Islamic law for the establishment of the Institution of Ijtihad. Need of studying Islamic law Shariah required principles of its fulfillment terms of language, research in religious matters in harmony to the rulings of Quran and Sunnah. Secular efforts cannot produce anything productive rather intellectual vagueness and perplexity of ideology. This kind of individual effort done by modernists is not acceptable to the Muslim

intellectuals and jurists which makes the institution of *Ijtihad* weaker in Pakistan.

Another factor relates with the conservative jurists based their *ijtihad* or *fatawa* on principles do not realize the importance of modern issues, similarly modern educated have no depths with the religious sciences. This clash and estrangement between secular and conservative *mujahideencetes* confusion in the legislation of Islamization of laws in Pakistan which makes it a problematic situation. This fact clarifies the frequency of inactivity in the area of jurisprudential investigation and inspiration in the Islamic domain.

an important reason relates to the unstable political administrations and their institutions who do not take any effective revolutionary role in the development of the Institution of *Ijtihad*. Government innovatively and reinterpretative effort is undertaken to disruption this knowledgeable chaos, the governments due to their benefits create hurdles in the application of such efforts or most of the time recommendations from the *Ijtihad* organizations put aside. it is the concern of the rulers to keep this process of *ijtihad* alive and manage the institution of *ijtihad* in the Islamic State.

Religio-Secular Education and Lack of Religious Leadership

There has, indeed, grown-up a number of the lay intelligentsia who feel the need for Islamic interpretation in modern terms and its application to the changing society, simply because in Muslim societies not only all sort of modern ideas are disseminating through centers of modern education but also rapid technological developments are taking place which is bringing vast and Government due to poor policies could not establish the proper institution for *Ijtihad*.

As respects the Muslim spiritual headship, it has in no way progressed well, because our religious institutions are tangled to the knowledgeable atmosphere of the fifth century, as a consequence of which they have not been able to produce such leaders of Islamic thought and achievement as could be capable of organizational dealings of a modern state in the light of Islamic values. This is the situation predominant throughout the Muslim world and is certainly a very factual hindrance facing the Islamic countries in their march towards the area of the Islamic revitalization.

In Pakistan, some religious minds have reduced ijtehad. It is not known whether the Ulama have any ulterior motives behind this stand or not, but once the jurisdiction is hounded by the court on the legislature to interpret in the society, then the laws will have to be substantially changed and will acquire a form and content with which the Ulama will find themselves unfamiliar. These people do not agree on many points raised by the modern scholars and believe that the modern scholars have come to regard expediency as the only obligation to which public affairs should be subjected and if, given the authority to change the law, they will change even the fundamental principles, in which the unity and existence of the Muslim Ummah are rooted.²⁰

It is in this mode that the jurisprudential exertion, done a hundred years ago under the demands of its own time, is considered adequate to provide to the needs of contemporary times with all its chief and slight details. A universal religious traditional mentality considers it as ultimate and absolute juristic works as the Holy Quran and Sunnah compelling even petty alterations with it or even its reinterpretation.

Such conventional views have led spiritual researchers to be unresponsive to the understanding of receiving up-to-date education. Their

understanding of attaining Islamic education is extremely rooted in the early curricula that address the mandate of those times. Having been furnished with such knowledge today, one cannot progress and respond to the serious faculty to understand the recent complex problems and their prominence. As a result, their scholarly skills almost lose their significance and usefulness in the face of solutions to the contemporary multifaceted. Due to this basis, Islamic thought cannot move towards the area of expansion. The basic dilemma arises from the element that any Government of the day has to run the state as associate of the community of modern states, while the religious groups at the outset made it clear that their idea of running an Islamic state is patterned on the Islamic state of the seventh century. The Fundamentalists exactly demanded that the traditional law of Islam must be applied as it occurred in the primitive ages.

Limitations of Federal Shariah Court and Council of Islamic Ideology (CII)

The Pakistani courts according to the 1973 Constitution are independent in their decision making but unfortunately, no independence of judiciary can protect the constitution. The reason behind this is Pakistan's judicial system is based on the contemporary systems that prevailed in the world. In Pakistan, the laws were taken from the laws enacted at that time, with time Governments tried to make laws according to Shariah but the Judiciary and Courts have been undermined in Pakistan as they are subject to pressure non-democratic rule in the country. Legal experts argue this action is irreparable harm to Pakistan's judiciary in different eras.

i) Jurisdiction of the FSC is partial; most laws are out of its realm; it could take up petitions only in case of Hudud matters. Its jurisdiction is limited to deciding about the current rules. The only relief is that if within the time

frame given by FSC, its anticipated legislation is not enacted, or an appeal is not filed in Supreme Court (against FSC's decision), then the Shariah-repugnant part of the law under question, would become extinct.

ii) It could only deal with a rule or its integral, but not to trace the supervisory actions.

iii) The appointment of the judges, their transfers, demotions, etc by the government is not only against the independence and freedom of the Judiciary but also frames disruptive and whimsical regulations in the decision of any case.

iv) The decision of the court is not the final verdict; it can be challenged in the Supreme Court. It has no powers to make intervening rulings; it shows that the court was powerless²¹.

The scope of constitutional jurisdiction of the Federal Shariat Court is narrow. the Federal Shariat Court has to determine and find out whether a specific legislation is offensive to Islamic Commands or not by not only in contradiction of explicate dormant but also by the judgement of the Muslim jurists. The jurisdiction of the Federal Shariat Court is limited to examining and determining the query of whether or not any law or endowment of law, convention, or usage is offensive to Orders of Islam and does not enlarge upon its virtues and shortcomings.

The foremost constraint starts with the roles of the Ideology' which are principally optional and recommendatory in nature and its advice or recommendation is not self-executor. The Council of Islamic Council of Islamic Ideology is only an unproductive counselling body. It works ineffectively, whereas it should be made collaborating, constitutionally and governmentally, with all the consultative bodies, law imposing agencies. Most of its recommendations have been labelled, in a recent study as

declining and anti-modernization and are either disallowed or kept in abeyance by the consultants.

The consultative council has neither association with any policy-making body nor any strategy developing and implementing institution ever concerned to help from the services of the Council²². There is a need that the Islamic Ideology Council should be consulted by a Constitutional Commission. consisting of lawful professionals, mature and honest representatives, and distinguished religious scholars, to bring alterations of Islamic laws through *Ijtihad* in the Islamic provisions of the constitution.

Suggestions

Most of the ulama limit the exercise of *ijtihad* to experts who have only knowledge of the Quran, Hadith, and fiqh. There is a need of making an organization of *ijtihad* in which educated scholars are allotted who have an inclusive series of contemporary knowledge in economics, sociology, and worldwide state affairs, so that interpretation of the text may not be confined to the legal scholars but open to those with imaginative thoughts.

Muslim scholars and religious leaders have a particular responsibility and duty to lead a restoration of the organization of *Ijtihad* in their Islamic State. Muslim scholars should have the liberty to think artistically while still being faithful to the manuscripts, and their new clarifications could motivate new thinking among the more traditional religious formations in Muslim republics.

The political will and determination are required for the implementation of *ijtihad* as an institute properly working in Pakistan. This should be expressed at all levels, at the government level as well as by the institutes. This will be possible only if there is a revolution in and of leadership'.

The method of implementation of ijtiḥād in its true sense is to give empowerment to the council of Islamic ideology and the federal Shariah Court. The Muslim Judges and learned scholars should be increased and its jurisdiction prolonged to cover all laws to be reconsidered scrutinized and reexamine.

Restriction on the present-day practice of ijtiḥād on new issues in the modern world is imposed by the religious establishment and by oppressive governments. Democracy and liberty of institution and manifestation are essential to the practice of ijtiḥād and the effective understanding of Islam and modernity.

Reforms in educational systems are a very essential tool, both for religious as well as secular education should be provided in a useful manner which makes to fulfill the requirements of the present world.

Conclusion

Ijtiḥād is a legislative function as it formulates laws for the first time. All the rights and duties for Muslims under Islamic law are determined by the decisions of a mujtahid that belongs to the legislature under Pakistani law. The doctrine of ijtiḥād provides the basis for the legislative activity of the mujtahid. The process of Islamization of laws will remain incomplete until the legislatures in Pakistan brings fully under the purview of the doctrine of Ijtiḥād. the legislature cannot meet the requirements of ijtiḥād concerning its members until it must be an institution. The legislature must be supported as an institution for the performance of collective ijtiḥād. The justice will be implemented, and rights will be secure only when the Islamic theory of legislation based on ijtiḥād is developed for modern times.

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