



University of
South Australia

International Centre for Muslim and non-Muslim Understanding

WORKING PAPER



Working Paper Number 13

Role of the Council of Islamic Ideology in the Islamisation of laws in Pakistan

Written by: Muhammad Khalid Masud

Nazia Ejaz ▲
Red City, 2013
120 x 90 cm
Synthetic polymer
paint on canvas

The University of South Australia's
International Centre for Muslim and
non-Muslim Understanding is funded by
the Australian Government Department
of Education and the South Australian
Department of Premier and Cabinet.

International Centre for Muslim and non-Muslim Understanding

Role of the Council of Islamic Ideology in the Islamisation of laws in Pakistan

Muhammad Khalid Masud¹

MnM Working Paper No 13

The Council of Islamic Ideology was established on 1 August 1962 as an advisory institution. Article 227 of the 1973 Constitution of Pakistan reaffirmed its 1962 objectives in the following words:

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

The article clarified that nothing in this part shall affect the personal laws of non-Muslim citizens or their status as citizens. Articles 228 to 230 were dedicated to define its composition, functions and procedure.

The council began reviewing the existing laws in 1974 and has been submitting its annual reports since 1977. It has completed its review of all the existing laws from 1726 to the present day and has published more than 90 reports so far. It submitted its final report in 1996. Having examined thousands of laws, the council has found less than 5 per cent of them repugnant to Islam and has recommended relevant amendments. Had the parliament deliberated the contents and approved these reports the main objection that most laws in Pakistan are un-Islamic would have been removed. According to article 230(4) these reports should have been laid for discussion before both Houses and each Provincial Assembly within six months of receipt, and after considering them Parliament and the Assembly should have enacted laws within a period of two years of the final report. Sadly, however, none of the reports of the council have ever been placed before the House.

During my tenure as Chairman of the Council from 2004 to 2010, only two recommendations reached the Parliament while the third was blocked by the government. The first recommendation related to a Hasba Bill forming an alliance of six religious political parties (MMA) proposed in 2005 to ensure the implementation of Sharia in the North West Frontier Province, now KPK. The governor of the province referred the Bill to the council for its advice. The council observed that the Bill proposed a huge organisation employing hundreds of religious scholars for most of the matters for which laws

1 Judge of the Shariat Appellate Bench, Supreme Court of Pakistan. This paper was presented at the Pakistan Summit: Disentangling the Politics of 'Crisis': The Pakistani State(s), Governance and Culture from Within, International Centre for Muslim and non-Muslim Understanding, Adelaide, 6 July 2015.

and authorities already existed. Furthermore, the institutions of Ombudsmen were functioning with lesser budgets in other provinces. More significantly, some provisions of the Bill were contrary to the fundamental rights guaranteed in the Constitution. Eventually, the Bill was referred to the Supreme Court, which declared it unconstitutional.²

The second recommendation was about the Hudood Ordinance 1979. Hudud is an Islamic legal term referring to crimes for which fixed penalties have been prescribed in the Qur'an and Sunna. Islamic law distinguishes Hudud from Tazir penalties, which are not fixed and left to the discretion of the judges and law makers. Hudood Ordinances pertained to four offences, namely zina (extramarital sex), qazf (false accusation of zina), theft and consumption of alcohol. Several court judgments, analytical reviews and reports by commissions appointed by the Government of Pakistan had pointed out flaws in this Ordinance. The most controversial was the law about rape. It was distinguished from adultery but still considered fornication. No legal distinction was provided in the criminal procedure. Consequently, a victim of rape was treated in the same way as her accuser and she had to produce four bona fide witnesses to prove her case. She usually ended up as an offender of zina because her complaint turned into a confession.

Continuing its review of existing laws, the council began examining Hudood Ordinance 1979 in 2005 and found most of its provisions repugnant to the teachings of the Qur'an and Sunna.³ The council proposed a thorough review. This proposal was vigorously opposed by religious groups in media debates and street demonstrations. A number of groups who condemned Hudood Ordinance as an unjust law supported the council. While discussing the council's recommendations, some members of Cabinet proposed a Committee of the Ulama to examine the council's recommendations. The council clarified that it was the only constitutional body to advise the government and declared that all of its members would resign if its recommendations were placed before the Ulama Committee instead of the Parliament. The Government of Pakistan finally proposed the Women Protection Bill, which was passed by the Parliament in 2006. The Women Protection Act moved all the offences of the Tazir category in the Hudood Ordinance to the Penal Code so that regular criminal procedure could be applied. Rape was also moved to the Penal Code, shifting the burden of proof from the victim to the state and allowing evidence other than four witnesses as required by the Hudud laws.⁴

The third recommendation pertained to a wife's right of divorce. The council recommended that wives should be allowed the right of divorce equal to that of husbands. Divorce initiated by the wife

² Makhdoom Ali Khan, 'Legality of a Hisba Bill to Introduce an Islamic Ombudsman in the North-West-Frontier Province', *Yearbook of Islamic and Middle Eastern Law*, Vol. 11 (2004–2005).

³ Council of Islamic Ideology, *Hudood Ordinance 1979, an Interim Report* (Islamabad, 2006).

⁴ Martin Lau, 'Twenty-Five Years of Hudood Ordinances: A Review', *Washington and Lee Law Review* 64(4) (2007), p 1292.

should come into effect after three months unless there are other disputes between husband and wife. The recommendation generated a heated debate in the public and the media. The religious argument was that Sharia gave only the husband the right to divorce; women had no such rights. She could ask for Khul' divorce but only on payment of compensation and provided the husband consented. She could go to the court for judicial divorce on the grounds specified in Dissolution of Muslim Marriages Act 1939. No such restrictions applied to the husband. The government blocked council's recommendations and promised religious groups to change the composition of the council.⁵

It is significant to understand the issues behind this debate. Apart from the politics of Islamic law, on which I shall comment later, difference of opinion arose from at least three perspectives. First, from the perspective of validity. Who has the authority to make laws? The state or the Ulama? Second, from the perspective of change and reform. Is Sharia as divine law mutable or immutable? Third was the difference in the method of interpretation. From the perspective of authenticity should the interpretation of scriptures be literal or contextual?

To answer these questions briefly, I would like to suggest that theoretically Muslim jurists have never allowed the ruler or state to make Sharia laws since the early Abbasid caliphate who tried to introduce their own theology through their courts. It was mainly in case of controversy among the jurists that the ruler or state had the right to choose one of the opinions. Historically, however, Islamic penalties were rarely enforced in South Asia. Since Mughal emperor Akbar's failed attempt to claim the right of legislation or interpretation, the Ulama had been opposed to state interference in Sharia. It was under colonial rule that the state began legislating in Sharia matters, personal and criminal laws. The Ulama accepted it as an exception under a non-Muslim ruler. But it was not possible after independence. There was, however, one big difference. The Ulama recognised the role of the state in enforcing Sharia.

Regarding the perspective of immutability of Islamic law, the emphasis on continuity and perception of change as imperfection has stressed that Islamic law is perfect, complete and comprehensive. It denies any change in this law. The modern concept of tradition also reinforces this perception. However, the fact that the jurists have always differed with each other, the fact that there have been and are several schools of law, and the fact that the doctrine of Taqlid adherence to one of these schools protects the right to differ demonstrates change, diversity and plurality in Islamic legal thought.

⁵ For details, see Muhammad Khalid Masud, 'Interpreting Divorce Laws in Pakistan: Debates on Shari'a and Gender Equality in 2008' in Rubya Mehdi, Werner Menski and Jørgen S. Nielsen (eds), *Interpreting Divorce Laws in Islam* (Copenhagen: DJØF Publishing, 2012), pp 43–61.

As to the method of contextual interpretation, the Hanafi and Maliki schools are good examples as they recognise the role of social practices and local customs in Mecca, Medina, Kufa and Yemen in the formative period of Islamic law. They also recognise the rule that laws based on custom change when the customs change. The question has arisen more pointedly in periods of sea change. In this situation a trend called Islamic modernism has been suggested, historicising Islamic law. They argue that slavery, patriarchy, polygamy and legal sexism were not introduced by Islam. The jurists treated them as natural principles of social organisation and cohesion. It is only in modern times that weakness, discrimination and injustice inherent in these principles have come to be recognised. The jurists insisted on these principles to protect social order.

Digging deeper into the historical contexts of pre-Islamic Arab society we learn more about the formative period and origins of Islamic law. One finds reference to such social practices in the Qur'an. We can appreciate this information only if we take the Qur'an as discourse on reform, not if we take it as a code of law. For instance, the Qur'an mentions that an adulterous male can marry only an adulterous female. Quite obviously, it cannot be a law because the Qur'an would not promote extramarital sexual relations. Reading along with other verses and the information found in the Hadith and tafsir literature, we find that sexual relations that the Qur'an proscribed as zina not only existed in Mecca, Medina and elsewhere but were also recognised as valid forms of social organisation. There were several forms of these relations including the houses that hoisted flags. It created disputes about children born out of these relations. One solution was the profession of qiyafa experts who decided to whom the child belonged. The other method was to allow marriages among such children. Some families were known for offering their slave girls for such relations and earned money. There were disputes about such practices as well. Sometimes slave girls complained and sometimes families accused them of such relations because of the status of the child-bearing slave girl.

The Qur'an introduced reforms by providing clear rules about marriage and divorce. The Qur'an required four witnesses to prove the accusation of zina. This rule was more to protect the institution of marriage because if a married woman was accused, the accuser had to provide four witnesses. Muslim jurists took it as a general rule and required it in case of rape as well. The Qur'an also required Muslim women to cover themselves so as to be distinguished from those who were engaged in such practices. The Qur'an called it the tabarruj (immoral exposure) and meant to attract people for such relations. The Qur'an prescribed covering the body so that Muslim women are identified differently and not harmed.

The Qur'an also explained in length the procedure of divorce, introducing reforms in the existing practices. It was in principle a process of mutual decision that defined marriage as 'holding on equitable terms' and divorce as 'separation with kindness'. Muslim jurists understood and interpreted

these verses in the existing social context. The Islamic legal construction of women's right of divorce is a good example. The Quran prescribed that when a husband and wife feared that they could not fulfil the obligations of marriage they can separate with kindness. The husband must not force her to stay and should not demand compensation. How can a husband do that after such intimate relations? The Qur'an does not mention the term Khul' but since there was a pre-Islamic form of divorce called Khul' in which the husband divorced the wife on her demand but demanded the return of gifts and property, the jurists adopted that institution of divorce. In modern debates Khul' is usually regarded as a form of divorce that a Muslim woman is allowed to initiate. I dwelt longer on this point to explain the issues in the debate and also to illustrate the social construction of Islamic. What I am suggesting is that we need to historicise Islamic law in order to reconstruct it for the present needs.

To my knowledge, except for a few of such recommendations that I mentioned, no report of the council has been ever officially placed before the Parliament. It is sad but no explanation for this remiss is to be found. In view of my experience I can suggest three reasons. First relates to the composition of council, which has increasingly shifted its image from a law reform institution to a body of religious clerics. Second pertains to the method of Islamisation of laws and the council's role in it. The third reason relates to the global debate over Sharia and Islamic State.

Regarding the first reason about the composition of the council, members in the beginning mostly belonged to the judiciary and the legal profession. Since the 1970s, however, members have been selected largely from religious groups. Recent constitutional amendments have reduced the number of members from the judiciary, stressed sectarian representation and raised the number of religious scholars. The impact of such changes has been a dominant religious stance in its composition and function. The present image of the council is largely that of Ulama Council. It illustrates how the various governments found reform of laws politically risky and have therefore avoided this agenda.

The second reason has to do with the growth of religious opposition to reforms in traditional Islamic laws. It has also brought a paradigm shift in the method of Islamisation of laws. Let me explain this point. Opinions about the method of Islamisation of laws in Pakistan have remained divided. The apparent intent of the framers of the Constitution has been to count a law as Islamic if it is not contradictory to Islamic teachings. Clause (2) and (3) of article 230 that require the council 'to advise whether a proposed law is or is not repugnant to the Injunctions of Islam', and 'To recommend measures for bringing existing laws into conformity with the Injunctions of Islam' are understood to mean that an existing law is Islamic if it is not repugnant to Islam. It also confines the scope of injunction of Islam to the Qur'an and Sunnah. It is popularly known as the repugnancy clause. Religious groups, on the other hand disagree with this method. They define Islamisation as

conformity with the opinion of the jurists or Fiqh of the sects. They took this position against the Muslim Family Laws Ordinance in 1961 that departed from Fiqh on several points.

It was All Pakistan Women Association's campaign against polygamy that successfully produced Muslim Family Laws Ordinance 1961. Pakistani society has remained divided since this legislation. While the reformist groups supported these reforms the religious groups opposed them. Reformists were known as Islamic modernists who distinguished between Fiqh and Sharia. To them Sharia means the Qur'an and Sunna and Fiqh refer to the jurists' opinions. Islamic modernism goes back to Sayyid Ahmad Khan in the nineteenth and Muhammad Iqbal in the twentieth century. They called respectively for new Muslim theology and new Islamic jurisprudence. Sayyid and Iqbal denied the existence of a contradiction between reason and revelation, between science and religion, and between modernity and Islam. Iqbal stressed the need for collective Ijtihad and recommended parliament as a modern institution. Ijtihad and Ijma' are combined. He also recommended Abu Ishaq al-Shatibi's Maqasid al-Sharia as an inductive method of legal reasoning that invoked higher objectives of Islamic law. Reforms in Islamic law in Pakistan, particularly Muslim Family Law 1961, employed the methodology of Islamic modernism. Reinterpreting the Qur'an and Sunna they recommended registration of marriages, restrictions on polygamy, child marriage and triple divorce and so on.

The traditional and conservative groups opposed these reforms as un-Islamic because they deviated from the views of the religious schools. These groups insisted on implementation of Fiqh or traditional views as the true enforcement of Sharia. This method of Islamisation of laws in Pakistan triumphed in 1979. It introduced state collection of Zakat, reform of banking laws and introduction of Hudood criminal laws. These legislation were mainly based on this method of implementation of Fiqh. The Council of Islamic Ideology had a pivotal role in this process, especially in drafting most of the laws.

In order to accommodate these laws into the existing legal and judicial system, amendments were made in the Constitution, new judicial institutions like the Federal Shariat Court and Shariat Appellate Benches were constituted and new judicial procedures like the Qanun-e Shahadat Act 1984 were introduced. This complicated the matter further and controversy over these issues gave religious groups an opportunity to declare existing laws and institutions un-Islamic and to call for full enforcement of Sharia.

The third reason pertains to the global trend known presently as the new paradigm of law and empire that stands for an absolutely powerful state with restricted rule of law. It coincided with the political Islam theory of Islamic State. The period since 1979 has seen Islamisation acquiring several new meanings. Important events in 1979 like the Iranian revolution and Islamisation of laws in Pakistan,

the Sudan and elsewhere raised high expectations among Muslims, whereas the siege of Mecca and the CEDAW convention brought anxieties. Establishment of Islamic universities in 1980 in Pakistan and other countries in Asia and Africa initiated by the movement for Islamisation of knowledge stressed the differences between Muslims and others but also the clash of values. Unipolar global politics also defined Islamisation of laws in terms of political Islam. Traditional religious groups emerged as powerful political parties who joined hands with movements for an Islamic state based on the concepts of sovereignty of God and supremacy of Sharia.

In Pakistan, Sufi Muhammad's movement for the enforcement of Sharia arose in 1992 and turned into an armed struggle in 1994. It confronted the Pakistan Army, closing roads for three days. The movement was suppressed with much difficulty by conceding to Sufi's demands and signing an agreement introducing the Qadi system in specific areas. Meanwhile in 1995, the Taliban had established an Emirate or Islamic state under the leadership of Mulla Umar. Sufi Muhammad supported this state and sent thousands of volunteers across borders to join Mulla Umar. Mulla Umar declined and these volunteers were stranded on the borders of Pakistan and Afghanistan. Sufi Muhammad was jailed in 2001. During Sufi's imprisonment his nephew Mulla Fazlullah assumed leadership of the movement. Sufi Muhammad's organisation was banned in 2001 as a terrorist outfit. Fazlullah is the present Amir of Taliban in Pakistan. Sufi Muhammad was eventually released in 2008 when he renounced violence. The provincial government in the northern areas resumed dialogue in 2009 and agreed to revise existing Nizam Adl regulations. Negotiations with Sufi Muhammad, however, failed. In one of the press interviews Sufi Muhammad condemned democracy, Constitution and Parliament as un-Islamic and infidel.

Earlier in 2012, Ayman al-Zawahiri of al-Qaeda had denounced the Constitution of Pakistan in his book *al-Subh wa'l Qindil*⁶ as un-Islamic and justified this violence.

Pakistan is an un-Islamic country whose Constitution is also un-Islamic and has some fundamental and dangerous conflicts with Islamic Shariah. It has revealed upon me that Pakistan's Constitution is a product of the same Western mindset that believes in people's right to rule and make laws and no doubt this ideology is clearly conflicting with the faith ordained by Islam.

Addressing the Ulama in Pakistan, Al-Zawahiri urges them to refute the 'Islamic illusion of Pakistan'.

⁶ Sheikh Ayman Al-Zawahiri, *Sapeeda e Sehar aur Timtimata Charagh*, trans. Maulana Abd al Salad (Idara e Hitteen, 2009), pp 16–17, <http://www.box.net/shared/1llz6ogyap> (accessed 4 October 2012).

I am astonished at how Pakistan's leading and learned Islamic scholars became victim of this deception and supported and commended this Constitution that led to its approval. ... But I am extremely amazed by the behavior of our learned friends who have not been able so far to come out of 'Islamic illusion' of Pakistan's Constitution and continue to harp on the same string of possibility of enforcement of Shariah based on false constitutional and political promises.

Refuting al-Zawahiri, Mawlana Ammar Nasir argues that the book was written to assure the rebels fighting against the government of Pakistan that they were on the right path.

Zawahiri's objective in writing it [this book] is not to present an alternative strategy to enforce Shariah or to convince the Pakistani people to adopt options other than democracy; he has simply tried to gather public support for the tribal militants fighting against the state.⁷

While Sufi Muhammad and Mulla Umar renewed their condemnation of violence, terrorism and militancy in Pakistan in 2014, they continue to call for the enforcement of Sharia. In a recent letter written in April 2014 to Mawlana Sirajul Haq, the newly elected Amir of Jama'at Islami, Taliban leader Umar Khalid Khurasani justifies this violent path: 'Shariat could not be enforced in the past 66 years in Pakistan by means of constitutional struggle. Now, there is no other way than armed struggle to achieve this this objective.'

Consequently, opinions continued to be divided about how to deal with the Taliban, who challenged the writ of the state by continuous acts of terrorism, suicide bombing, destruction of schools, mosques, temples, churches and graveyards. Some religious groups and political parties still insisted on dialogue with the Taliban. The Government of Pakistan constituted a committee to start these dialogues with the Taliban. These dialogues failed. Conflicting statements have been made explaining the deadlock and failure of talks between the Taliban and the government. In his recent book published in 2015, Samiul Haq, who claims to be the father of the Taliban and who was a member of the Dialogue Committee along with members of Jama'at Islami and Red Mosque group, links the failure of this dialogue to the end of the Islamic State in Afghanistan as a war of ideology between the US and Afghanistan. Samiul Haq describes Islamic State as a struggle for peace against hegemonic western ideology. According to him,

⁷ Maulana Muhammad Ammar Khan Nasir, 'Is Pakistan's Constitution Based on Disbelief? A Critical Review of Ayman Al-Zawahiri's Book *Al-Subh wa' Al-Qindil*' in Safdar Sial (ed.), *Critical Ideologies: A Debate on Takfeer & Khurooj* (Lahore: Narratives, 2012), pp 169–178.

The Islamic government in Afghanistan [in 1995] was a manifestation of the creator of the world and it offered the world an alternative better than the concepts of Western capitalism and democracy. There was no other option was available to the US, but to work for the destruction of Afghanistan.⁸

Samiul Haq dismisses the notion of the need for reform in Islamic law. He believes that Muslim women enjoy more rights than others. The problem arises from non-implementation of Sharia.

To summarise, I would underscore the complexity of debates over Islamic laws. It began attracting academic attention in the early twentieth century. The orientalist approach treated Islamic law as a rare species surviving in the era of nation-states and international law. However, failure of predictions about the disappearance or marginalisation of Sharia made scholars like Emile Tyan⁹ and Joseph Schacht¹⁰ look deeper into the nature, history and structure of this legal system. Although major theses of these scholars about the origin, history and nature of Islamic law have been questioned by the later generation of scholars like Wael Hallaq, debates about whether Islamic state is a viable or an impossible system continue.

In his latest work, *The Impossible State* (2014), Wael Hallaq argues that the 'Islamic state', judged by any standard definition of what the modern state represents, is both impossible and inherently self-contradictory. Comparing the legal, political, moral and constitutional histories of pre-modern Islam and Euro-America, he finds the adoption and practice of the modern state to be highly problematic for modern Muslims.¹¹ Hallaq builds his argument on an academic yet essentialist understanding of inherent contradiction between 'pre-modern' ('paradigmatic') Islamic law and the modern state.

Like Samiul Haq, Hallaq argues that Islamic law and the modern state are in an inevitable conflict with each other. Hallaq and Samiul Haq both overlook the change and continuity in the theories and practice of Islamic law and pragmatic Muslim approaches in political and legal theories. They also tend to ignore the overall recognition of the role of the modern state in Muslim legal thought. They fail to notice the compatibility of Islamic law with changing times and see it merely floating in a timeless space.

Hallaq's pessimism pertains more to the modern state than to 'paradigmatic Islamic governance' because he finds self-contradictions 'primarily grounded in modernity's moral predicament'. He

⁸ Samiul Haq, *Afghan Taliban War of Ideology, Struggle for Peace* (Islamabad: Emil, 2015), p xv.

⁹ Emile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Paris: éd. Sirey, 1938).

¹⁰ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964).

¹¹ Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2014), back cover.

describes his book as ‘an essay in moral thought even more so than it is a commentary on politics or law’. Accordingly, he finds the modern Muslim state reflecting the crisis of modern Islam but also implicating the moral dimensions of the modern project. He finds the form perceptions of ‘sovereignty’ and ‘rule of law’ in Islamic governance different from the modern state and hence concludes that ‘Islamic governance is unsustainable, given the conditions prevailing in the modern world’.

To conclude, Islamisation of laws in Pakistan has been severally explained as a revival of Islam, as the implementation of the vision of Pakistan formulated as Objective Resolution in 1949 passed by the Constituent Assembly soon after its independence in 1949. It is justified as a requirement of Sovereignty of God and Supremacy of Sharia as principles of Islamic State laid down by groups of religious scholars in 1952. It is described as a policy of the state in the 1973 Constitution. Continuing controversy on all these points has problematised Islamisation of laws in several different ways. On the one hand, it is viewed as an issue of reformation in the religious history of Islam, an expression of Muslim nationalism, and a characteristic of Islamic State. On the other hand it is considered a cause of the rise of fundamentalism and extremism, violation of the principles of democracy and secularism, and lately as a law and empire project.

Problematisation of Islamic law in these terms does not take into account the legal, political and social dynamism of Muslim societies. Essentialised definitions of modernity, state and law are a great hindrance to our understanding of the continuous unfolding of legal and political phenomena. The Islamic modernist approach towards historicising Islamic laws helps understanding modern dynamism. However, continued fascination of modern people with empire paradigm of law and state is compelling western political thought to ideas of state exception.

Muslim political thought has also returned to the idea of the global caliphate with nostalgic vigour. Advancement in political science, anthropology, social theories, social history, social psychology and other disciplines provide deeper understanding of law, state and society. Benefiting from these tools we can practice some archeological research in the origins of legal theories and reconstruct laws that respond to present day needs.