

ENFORCEMENT OF SHARIAH ORDINANCE 1988: SOME CRITICAL OBSERVATIONS

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Jammat-e-Islami, Pakistan

July 1988

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Islam is the *raison d'être* of Pakistan and its historical destiny. This national goal can be achieved, not by one more announcement but only through the implementation of the Shari'ah in individual and social life, resulting in the establishment of the Islamic social order. Popular demand for the enforcement of the Shari'ah has been prompted to seek for a radical change in the present state of affairs through practical enforcement of Islamic teaching in the country.

Present Position of Shari'ah

Although there has been a lot of talk about the establishment of the Islamic order and the enforcement of the Shari'ah very little progress has really been made in this direction. The Constitution of 1973 laid down that there shall not be any legislation repugnant to the Qur'an and Sunnah and that all existing laws shall be brought in conformity with the Injunctions of Islam (Article 227). A Council of Islamic Ideology was formed to assist the Government in this process.

In 1979, Chapter 3-A was added to the Constitution by Constitutional Amendment Order 1979, substituted by Constitutional (Amendment) Order, 1980. This provided for the establishment of a Federal Shariat Court to examine and decide *suo moto* or on the request of any citizen of Pakistan or the Federal or Provincial Government "whether any law or provision of law is repugnant to the provisions of Islam or not?" However, a number of fundamental laws were excluded from the jurisdiction of the Federal Shariat Court, including the "Constitution, Muslim Personal Law, any law relating to the procedure of any court or tribunal or until the expiration of ten years from the commencement of this chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure" were specifically excluded from its jurisdiction [Article 203-B (c)]. This drastically limited the jurisdiction of the court. The ineffectiveness of this institution was aggravated by the fact that it did not have the right to provide relief or issue injunctions to stop any violation of the Shari'ah. The constitution and the terms and conditions under which the Judges of the Federal Shariat Court were appointed were also at variance with the fundamental principles of the independence and integrity and judiciary both from Western and Islamic points of view.

In March, 1985, Article 2-A was added to the Constitution laying down that "the principles and provisions set out in the Objectives Resolution are made substantive part of the Constitution."

The above three provisions provided for three channels for Islamization. According to the first provision codification of Islamic laws should have taken place and revision and modification of laws presently obtaining in the country should have been made from an Islamic perspective. Unfortunately the progress in this direction has remained extremely disappointing. While the Islamic Ideology Council has suggested drafts of over a dozen laws based on Islam and has also made

specific recommendations about over 200 existing laws identifying changes and modifications needed to bring them in conformity with the Shari'ah not a single proposal of the Islamic Ideology Council had been translated into law during the last nine years - 6 years under Martial Law and 3 years under Civil Government. All this material is lying pending with the Ministry of Justice & Parliamentary Affairs.

The second channel i.e., the Federal Shariat Court too has remained rather ineffective for a number of reasons. Even if the inherent weaknesses in the structure of the court are ignored for the time being, the court remains ineffective because of its limited jurisdiction, because of its inability to give relief to the aggrieved party, and finally because of the step-motherly treatment meted out to it by the Government. The court has announced some very good decisions but very few of them have really been implemented. The Government has gone into appeal in respect of over 50 per cent of the cases decided by the court and most of them are pending with the Supreme Court for the last several years. The result is that the decisions of the Federal Shariat Court could not make any real impact towards Islamization of laws in the country.

The third channel was opened up in 1985 and three very important cases were decided by the High Courts of Sind and Punjab by invoking this jurisdiction. Considering the total corpus of law, the contributions made by the High Court's under this article remained very limited.

What the Private Shariat Bill tried to achieve?

In view of the above, it was felt that a major change in the strategy for Islamization of laws and life was needed. First, the Constitution should categorically state that Shariat is the supreme law of the country and not merely "a source for law". The declaration of the Shari'ah as the law of the land would once for all settle the issue that Shari'ah is the supreme law and that any other law, custom, usage, transaction would become void if it is not in conformity with the Shari'ah. That is why the Private Shariat Bill introduced in the Senate in its clause 3 laid down that "Shari'ah as the supreme law in Pakistan shall have effect notwithstanding anything to the contrary contained in any other law or custom or usage or transaction or dealing between any parties." In fact this provision should have been incorporated in the Constitution. The Shari'ah Bill stipulated that necessary changes in the Constitution would also be made to make the Shari'ah supreme law of the land. In the proposed 9th Constitutional Amendment this concept was accepted in principle although the wording adopted was such that a lot of dilution had taken place. Even that diluted version was never endorsed by the National Assembly and the Bill stands lapsed with the dissolution of the Assembly.

The Private Shariat Bill also lay down that the jurisdiction of the Federal Shariat Court should be widened to cover all laws obtaining in the country including the constitutional, civil, military and procedural laws. This was a revolutionary step and would have affected the entire gamut of life, major parts of which have always been very cleverly kept outside the jurisdiction of Qur'an and Sunnah.

The Private Shariat Bill also provided for a self-executing mechanism for enforcement of the Shari'ah by making the judiciary responsible for its implementation in all respects i.e., to see whether a law is in conformity with the Shari'ah or not (to be done by the Federal Shariat Court) and to see whether any action or order or practice is in contravention of the Shari'ah or not? This latter function was given to all the superior courts of the country so that enforcement of Shari'ah would not exclusively depend upon codification of laws but could also be achieved through the judicial process. The Shariat Bill did emphasize the need for expeditious codification of the laws but did not make enforcement of the Shari'ah dependent on that. That was the original contribution of the Shariat Bill. In other words, the process of enlargement of the jurisdiction of judiciary, which was initiated by article 2-A, could have been perfected with the adoption of the Private Shariat Bill introduced in the Senate.

Finally, the Private Shariat Bill also laid down the principles of accountability of the executive including that of the highest authority before the Shari'ah and before the judiciary. It provided for the protection of human rights as given by the Shari'ah and also emphasized the need to ensure that the economic system of the country, its educational system and the information policy were in conformity with the Shari'ah. Similarly all actions of the Government or any governmental agency were made open to judicial review on the basis of their conformity or otherwise with the Shari'ah. This represented a radically different approach and ensured gradual enforcement of the Shari'ah in all walks of life. The Private Shariat Bill promised revolutionary changes in the legal, social and economic system of the country, ensuring effective implementation of the injunctions of the Qur'an and Sunnah and the inauguration of a new era in which all citizens of the country could have benefitted from the blessings of Islamic justice.

Why the Shariat Ordinance is unacceptable?

It is in the light of the above discussion in which an effort has been made to identify the problems involved in the enforcement of Shari'ah that the achievements and failings of the Presidential Ordinance on the enforcement of Shari'ah should be evaluated. The President appointed a committee under the chairmanship of Dr. Abdul Wahid J. Halepota to prepare a draft of the ordinance. The draft of the committee was presented to the President on 5th June, 1988 and was considered by a group of scholars under the chairmanship of the President from 6th to 9th June, 1988. It is alleged that the Enforcement of Shari'ah Ordinance, 1988, is based upon the report of this group but a closer examination of the report of the Halepota committee dated 5th June, 1988, and the text of the Enforcement of Shari'ah Ordinance, 1988 shows that they are at variance from each other on almost all critical issues. I am constrained to say that the Enforcement of Shari'ah Ordinance 1988 fails to provide for effective machinery for the enforcement of Shari'ah and as such is unable to fulfill the objectives for which the Private Shariat Bill was introduced in the Senate. I shall point out major weakness of the Ordinance:

Shari'ah: Supreme Law or Just Source of Law?

1. The most important issue is that the Shari'ah must be accepted as the supreme law of the country. This has been conveniently skipped by the Ordinance, What has been done is a re-hash of what was already there in the Constitution. Clause 3 of the Private' Shariat Bill has been totally ignored. So is the Halepota Committee Report which also provided for the following:

"Clause 3 Supremacy of Shari'ah shall be the supreme law of Pakistan and shall have effect notwithstanding anything contained in any other law, custom or usage."

The final draft agreed to between the President and the Review Committee on Shariat Ordinance and signed by the participants on 9th June also contains this clause with one concession i.e., "to be enforceable in the manner stated hereunder". In my humble view the Ulema should not have made this concession. But the "final" or totally distorted form in which this clause has come is totally ineffective. The provision in the Ordinance is as follows:

"3. Supremacy of Shari'ah:-

Shari'ah shall be the supreme source of law in Pakistan and Grund Norm for guidance for policy making by the State and shall be enforced in the manner and as envisaged hereunder."

This means that the "supreme law" as demanded by the Ulema and as agreed with the committee has been turned into a "supreme source of law" and even that can be given effect only in the manner and as envisaged in this Ordinance. That really renders the whole exercise meaningless.

Executive Actions and Orders outside Shari'ah Review

2. In clause 4, provisions have been made for the examination of the question of conformity or otherwise of laws with the Shari'ah but no mechanism has been suggested anywhere for examination of the policy or of executive actions and orders. The Private Shariat Bill had provided for that in clause 4 and the draft Ordinance suggested by the Halepota Committee had in a rather complicated manner, provided for that in clause 5 giving additional jurisdiction to the Federal Shariat Court for cases involving violation of Shari'ah. All this has been totally skipped in the Ordinance. It is unfortunate that the participants in Review Committee also seem to have surrendered on this point.
3. Clause 4 deals with the issue of courts to decide cases according to the Shari'ah but no positive legal obligation has been created anywhere to oblige the courts to decide according

to the Shari'ah. Presently articles 4, 5, 8 and 199 of the constitution spell out the jurisdiction of the courts. Nowhere in these articles has supremacy of the Shari'ah been laid down. It was therefore necessary that the obligation of the judiciary to decide in accordance with Shari'ah should have been made part of the Law. This has not been done although the Private Shariat Bill provided for it.

No Time Limit for Decision or Appeals

4. It has been provided that Federal Shariat Court as well as the High Courts shall decide a question relating to conformity with Islam or not within 60 days, which is a good provision. The fact, however, is that there has never been any complaint about delay in the functioning of the Federal Shariat Court. The real problem arises when appeals against the judgment of the Federal Shariat Court remain undecided for long periods. The decisions of the Federal Shariat Court have been rendered ineffective because in most of the cases the Government instead of implementing its decisions, has gone in appeal against them, and the cases are pending for years in the Supreme Court. But no time limit for decision in case of appeal has been provided anywhere. This means that even if the Federal Shariat Court or High Court has decided a case expeditiously there can be un-ending delays at the appeal stage. It was therefore necessary that a time limit must have been laid down for decision on appeals as well.

Cases to Continue Despite Repugnance to Shari'ah

5. The Private Shariat Bill, as well as the draft of the Halepota Committee, had provided that whenever any question had arisen before a court that a provision of law is repugnant to Shari'ah, and the court if satisfied that the question needs consideration; it:
 - a) Shall not proceed with the case; and
 - b) Shall make a reference to the Federal Shariat Court.

This was extremely important because once the question of repugnancy to Shari'ah has arisen such a case must not be decided till this issue is resolved. But according to the so-called Enforcement of Shari'ah Ordinance, 1988, the Court shall proceed with the cases and there is no bar on it to decide under a law whose repugnancy to Islam is claimed. Can this be called enforcement of Shari'ah? The same is true to cases referred to the High Court under jurisdiction created under clause 4, sub clause 3.

Principles of Interpretation of Shari'ah not provided.

6. Ulema and other scholars were extremely worried that the definition of Shari'ah as contained in the Constitution is susceptible to misinterpretation by persons who lack deeper

knowledge of the values and principles of Islam. That is why it was necessary that it should have been made very clear that while Shari'ah means the injunctions of Islam as laid down in the Qur'an and Sunnah, the interpretation of these injunctions would be according to the accepted principles of Islamic jurisprudence. The Private Shariat Bill provided in clauses 2 and 9 those principles of interpretation in an elaborate manner. The Halepota Committee report abridged those principles of interpretation by laying down in the form of an explanation that "In interpreting the Shari'ah the recognized use of interpretation of the Holy Qur'an and Sunnah shall be observed and regard shall be had for guidance, inter alia, to the expositions and opinions of recognized jurists of Islam" [Clause 2-(c)]. The document on which the participants have signed on 9th June contains this definition in clause 2.

This proviso was extremely essential for the definition of Shari'ah. It was a major objective of the Private Shariat Bill that avenues for taking liberties with the injunctions of Islam be closed. Unfortunately the Enforcement of Shari'ah Ordinance has totally neglected this aspect and as such left the possibilities of misinterpretation, distortion and deviation unchecked. This was all the more necessary in view of the fact that most of the Judges in the country are the product of a system which did not provide for thorough education and training in Islamic law and jurisprudence and there is no provision in the law ensuring the presence of Ulema on the three- member benches of the High Court's authorized to examine laws under clause 4(3).

7. The Private Shariat Bill as well as the draft ordinance suggested by the Halepota Committee had provided that the judiciary should be in a position to examine all laws on the criteria of Shari'ah. The June 9 document also categorically includes procedural law relating to all judicial matters including formation of Tribunals. In the Enforcement of Shari'ah Ordinance the entire field of the Constitution as well as the procedural laws has been excluded from the jurisdiction of the Shari'ah. Even if the limitation in respect of Constitution is conceded on technical grounds why the procedural law has been excluded is unexplicable. Does it not suggest that the very judicial process through which the Shari'ah is to be examined has been deliberately excluded from the suzerainty of that very Shari'ah. The exclusion of law and procedure of Tribunals also strengthens the suspicion that rule through tribunals, an important instrument of arbitrary powers, has been cleverly kept outside the jurisdiction of Shari'ah. This amounts to avoidance of Shari'ah and not its enforcement.

Contradictions on fiscal matters

8. The procedure laid down for the examination of fiscal matters leaves much to be desired. Built into the mechanism are prospects of delay and deviation. The Government has been given the right to delay the enforcement of decisions of High Courts for almost nine months and also to further delay by resort to appeal tactics. All international financial dealings have been unconditionally excluded from the jurisdiction of the Shari'ah. Similarly, in the name of

"fulfilling all existing obligations" all amount of Riba accumulated in the past have been sanctified, despite explicit injunctions of Shari'ah to the contrary. The Qur'an makes it very clear that Riba in all forms is forbidden and claim from Riba-based loans taken or given in the past was confined to the principle amount only. Prophet Muhammad (peace be upon him) on the occasion of the last pilgrimage made an unequivocal declaration that in respect of all dealings involving past claims nothing more than the principal could be had. No claim could be made for the accumulated Riba. He said that all traditions of Jahaliyya are trampled under my feet and declared on behalf of his own family that Riba of the past was waved and only the principle could be claimed in the future. In an ordinance claiming to "enforce Shari'ah" at least two clear provisions have been made in clauses 13 and 14, which amount to explicit departures from the Shari'ah.

Expeditious Codification: A Farce

9. The Private Shariat Bill as well as the draft of the Halepota Committee report provided for early codification of Islamic laws. The report made a very concrete suggestion in clause 19 under the title "Expeditious Codification of Islamic Law"; viz:

"(1) The President shall, within thirty days from the commencement of this Ordinance, appoint a committee of experts, in consultation with the Council of Islamic Ideology, to prepare draft laws incorporating various provisions of Shari'ah not embodied in any statute, arranged subject-wise, to be submitted to the competent legislature for enactment.

(2) the committee referred to in sub-section (1) shall complete its task within a period of one year of its appointment."

This could have been a very effective instrument for codification of the laws. The scope of this committee could have been widened by channeling through it all the amendments that have already been suggested by the Federal Shariat Court and the Islamic Ideology Council. But, regrettably this useful provision has been dropped and replaced by the following provision in clause 12 of the Ordinance:

"12. Expeditious codification of Islamic Law:-

- (1) The Council of Islamic Ideology shall take urgent steps to fulfill its functions as envisaged by sub clauses (c) and (d) of clause (1) of Article 230 of Constitution.
- (2) The State shall take early steps to place the recommendations made to it by the Council of Islamic Ideology, before the Parliament for the purpose envisaged in clause (4) of Article 230 of the Constitution."

The Council of Islamic Ideology has already submitted in 20 volumes its reports to the Parliament but the Government has not been able to produce even one piece of legislation based thereon. The responsibility of the State, according to this Ordinance, has been confined to placing recommendations of the Council before the Parliament. While the real responsibility for not initiating legislation based on the recommendations of the Council of Islamic Ideology lies with the government. How can expeditious codification of Islamic laws take place without creating some compulsions for the Government to fulfill its responsibilities in this respect? The present formulation suggests as if the real villain is the Council of Islamic Ideology, while the fact is that the Federal and Provincial Governments have miserably failed in discharging their responsibilities in this respect.

Who shall decide Repugnance to Shari'ah?

- 10.** Clause 4 of the Ordinance suggests a new jurisdiction for the High Court in fiscal and financial matters. The benches that are expected to deal with these technical and delicate matters would not have on them persons competent in Shari'ah and Islamic economics. There is every reason to believe that the Federal Shariat Court could have been more competent to decide on these issues. Federal Shariat at Court has on its bench five judges who come from the mainstream of judiciary and three judges who come from mainstream of Ulema. (Incidentally two positions of Ulema remain unfulfilled for the last two years). There is no such arrangement in the High Courts. It is strange that Muslim Personal Law and fiscal matters have been given to the High Court's which lack an appropriate mechanism for finding out the Islamic injunctions. The Federal Shariat Court has been excluded from this jurisdiction. The more effective method would have been to widen the jurisdiction of the Federal Shariat Court as was envisaged in the Private Shariat Bill.

The Sword of Pleasure

- 11.** It is a good idea to appoint Muftis to help the judiciary but the entire thing has been left to the sweat will of the President through his "individual judgment" who shall appoint as many Muftis as he may deem fit and who shall hold office during the "pleasure of the President". Unfortunately the position of the judges of the Federal Shariat Court is no better. They can be transferred or given in any other task by executive orders. Can this ensure independence of these legal functionaries and can this be regarded in consonance with the Islamic injunctions about the independence of the judiciary.
- 12.** For Islamization of economy and education, two commissions have been proposed but these commissions have not executive powers and can do nothing to stop violation of the Shari'ah. Proposals made by the Hale-pota Committee about eh mass-media have also been ignored.

Absence of Executive Accountability

13. Clause 10 of the Private Shariat Bill and clause 7 of the Halepota Committee report had clearly written that "functionaries of the Government shall be subject to dispensation of Islamic justice and accountability" and that "all fundamental rights given by the Shari'ah would be enforceable through the judicial process" (clause 13 of the Private Shariat Bill and clause 15 of the Halepota Committee report) and that all forms of economic exploitation would be stopped and all illegitimate sources of income would be prohibited (clause 12 of the Private Shariat Bill and clause 14 of the Halepota committee report). All these have been conveniently skipped in the Enforcement of Shari'ah Ordinance.

Reflecting on these provisions of the Presidential Ordinance is bound to ask oneself whether this is the way to enforce the Shari'ah or to seek escape routes from the real enforce the Shari'ah or seek escape routes from the real enforcement of the Shari'ah? If the key provisions of the Private Shariat Bill been included in this Ordinance it would have shown some seriousness in enforcing the Shari'ah. The Ordinance, in its present form, does not give anything substantial beyond what already was there in the Constitution. Yet it has been promulgated as a substitute for the Private Shariat Bill. In fact it amounts to a clever effort to hoodwink the issue and give the impression as if the objectives of the Shariat Bill have been fulfilled by this Ordinance. Nothing can be farther from the truth. Let us be honest at least about our attitude to the Shari'ah and stop playing tricks with Allah's commands. Those who try to play with Allah's Shari'ah only invite wrath. May Allah enable the Pakistani nation to sincerely and effectively implement the Shari'ah and safeguard it from those who are trying to play with the Shari'ah.
