

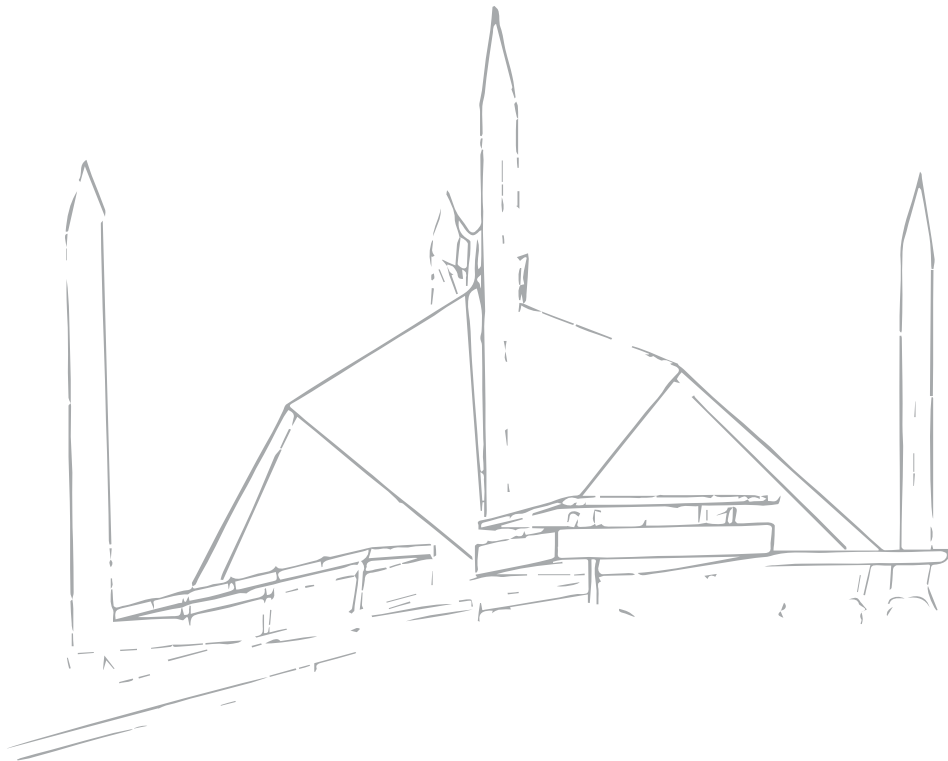


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Constitutional Islamization: A Case Study of Pakistan

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Abstract

The real objective behind the creation of Pakistan was the establishment of a country wherein the Islamic Ideology be implemented in its entirety. Due to lack of understanding of Islam, influences of Western culture, poor interpretation and lack of implementation of the underlying objectives of Islamization of Laws, Pakistani legal system has become a hybrid system with no proper demarcations. So, it is important to analyze the Constitutional provisions in the light of the underlying objectives so as to bring a balance between Islamization and Constitutionalism. The issue of Islamization is quite diversified. This paper highlights the objectives of creation of Pakistan, relevant Islamic provisions of the Constitution, the socio-legal perspective of constitutionalism and Islamization, the role of Federal Shariat Court and its exceptions in case of personal laws (Muslim Family Law Ordinance 1961 only), the critique whether Pakistan has achieved its objectives and some recommendations for the implementation of Islamic legal system. The issue of personal laws is a vast subject but it is not covered as a whole in this paper and so as the exceptions to the powers of Federal Shariat Court in fiscal and procedural laws, and the qualification of the members of the National Assembly.

Keywords: Islamization of laws, Constitution of Pakistan, Federal Shariat Court, Islamic State.

1. Introduction

Pakistan, an Islamic State formed under the Two-Nations' Theory and the only State formed under the Islamic Ideology forming its foundation for State legitimacy, incorporated Islamic provisions in the Constitution ensuring the principles of faith but failed to understand, interpret and implement the underlying objectives due to politically compromised system, instability, gender disparity and democracy. Law is an instrument to implement the state's ideology. Pakistan has a plural legal system in which laws are derived from *shari'ah* as well as secular laws and even International Human Rights Law. The problem of Islamization of Laws in Pakistan is the implementation of *shari'ah* in its original form, rather Islam is understood and implemented as visualized and interpreted by the religious leadership, which failed to bring positive outcomes and revolutionary reforms in the emerging challenges. Therefore, it is equally important to

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understand the concept of Islamization and liberal democracy; the objectives, significance, utility and the vision of the Founders of Pakistan; and the state of Islamic supremacy clauses in the Constitution so as to bring a balance between the Constitutionalism and Islamization.

2. The purpose of an Islamic State

Islamization or Islamification is the process whereby the States bring their State system in conformity with the principles of Islamic State. It means that the State follows the Islamic Ideology, so that the structure and functions of the State to be conducted according to the rules and regulations provided by the basic principles of Islam.

The Holy *Qur'ān* clearly mentions the purpose of sending Prophets was to create conditions in which masses are assured of social justice principles prescribed by Allah Almighty. Allah Almighty says in the Holy *Qur'ān*:

“Indeed we sent our Messengers with Clear Signs, and sent down with them the Book and the Balance that people may uphold justice...¹” (57:25)

In another verse Allah Almighty has provided the guidelines for the establishment of an Islamic society:

“(Allah will certainly help) those who, were We to bestow authority on them in the land, will establish Prayers, render Zakah, enjoin good, and forbid evil. The end of all matters rests with Allah”.² (22:41)

Emphasizing on justice, Allah Almighty has said in another verse:

“You are now the best nation brought forth for mankind. You enjoin what is right and forbid what is wrong and believe in Allah. Had the People of the Book believed, it is better for them. Some of them are believers but most of them are transgressors”.³ (3:110).

¹ Ansari, *Towards Understanding the Quran*, p.821.

² Ibid., 502

³ Ibid., 85-86

3. Islamization under the Constitution of Pakistan 1973

Constitutionalism is the idea without which no State can survive whereby the powers of the government are limited by the Law, and that its authority or legitimacy depends on its observing these limitations. The Constitution is the document framed by the government itself. The interesting aspect is that the government is fully empowered to frame its Constitution while the Constitution provides the limitations of the powers of the government⁴.

The official name of the Constitution of Pakistan is 'The Constitution of the Islamic Republic of Pakistan'. The name in itself provides the ideological structure of the State.

The Constitution is a socially binding contract which forms rights and obligations between the State and its objects. It is universally accepted principle that the Constitution is the Supreme law of the land which provides for guarantee of peace, welfare and amity of the people, subject to the rights and obligations, against all forms of exploitation, socio-economic justice and principles of good governance, transformed in the principles of policy, to make the document as the living instrument, sufficient to cater for the present and future requirements of the nation.⁵ The Constitution establishes various institutions, apparatus of government, defines relationship between individuals and the State, between Federation and its provinces and various organizations of the State.⁶

The second feature of the Constitution of Pakistan is its Islamic nature. Pakistan is named as "Islamic Republic of Pakistan"⁷, this name has direct nexus with the very reason and object of the creation of Pakistan, which is reflected in the Preamble, "wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah"⁸. This was the background of the very creation of the Muslim State in the form of Pakistan. Article 2 of

⁴ Stanford Encyclopedia of Philosophy, *Constitutionalism*.

<http://plato.stanford.edu/entries/constitutionalism> last visited December 28, 2018.

⁵ Mazhar Ilyas Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, (Pakistan: Imran Law Book House, 2013), 1:127.

⁶ *Ibid.*, 129.

⁷ Article 1(1), *The Constitution of the Islamic Republic of Pakistan, 1973*.

⁸ *Ibid.*, Para 5, Preamble.

the Constitution of Pakistan 1973 declares Islam to be the State religion. It is an important feature of an Islamic State that it should be an ideological State. It extends its citizenship to those who are its residents or who have migrated in the State. It is not an extra-territorial state as is mentioned in the Holy *Qur'ān*:

“Surely those who believed and migrated and strove hard in the way of Allah with their possessions and their lives, and those that sheltered and helped them --- they alone are the true allies of one another. And those who believed but did not migrate (to Dar ul Islam), you are under no obligation of alliance unless they migrate. And should they seek help from you in the matter of religion, it is incumbent on you to provide help unless it be against a people with whom you have a pact. Allah is cognizant of all that you do.”⁹ (8:72)

The ideology of Pakistan is based on Muslim nationhood which resulted in the partition of the Sub-Continent under Two-Nation's Theory. Pakistan owes its origin to the belief that Muslims are a nation, an ideological community and it is the requirement of their religion that they establish a State where they can lead their lives according to the Islamic Injunctions, their own culture and traditions. The Constitution provides full opportunity to its residents to lead their lives in accordance with the Injunctions of Holy Quran and Sunnah.

The other side of this concept is highlighted in the case, *Niaz Ahmed vs. Province of Sindh* whereby the *Sindh* High Court observed that Article 2 is only the declaration clause showing a fantasy of Islamic symbol. The language of Article 2 does not impose any obligation on the State to follow Islamic Law as the foundation of its State system nor does it oblige the State to make Islamic Law as the Law of the Land. “... There is, therefore, no scope for the argument that Islamic Laws are to be enforced, in their entirety by virtue of Article 2 itself”.¹⁰

Moving further, the word ‘Republic’ in the name of the Constitution of Pakistan 1973 shows the will of the people to exercise their power and authority through their chosen

⁹ Ansari, *Towards Understanding the Qur'ān*, p.266.

¹⁰ *Niaz Ahmed vs. Province of Sindh* PLD 1977 Karachi 604 at 648-49.

representatives¹¹. As Dr. *Tanzil ur Rehman* has rightly pointed out that the name as enshrined in the Constitution of Pakistan clearly states that “this part of the land will be a cradle for Islamic democracy but the rulers of this Islamic Republic, whether elected or self-imposed, neither exhibited their knowledge of Islam nor Democracy as recognized by Islam”.¹² Moreover, there is a Federal character of the State with clear division of powers between the Federation and the Provinces.¹³ The *Quaid-e-Azam* formed the Constituent Assembly of Pakistan on August 11, 1947 in which he provided some guidelines for the Constitution making of Pakistan in which he highlighted that Pakistan would have Federal in nature.

The name of our country is Pakistan, which is defined in the Article 1 of the Constitution 1973 so that the Executive authority can exercise its sovereign power within its territories.

3.1. Sovereignty and Democracy

The philosophical foundation of Western democracy is the sovereignty of the people whereby the absolute power of legislation rests in the hands of the people.¹⁴ This is not the case in Islam. In Islamic Law, the Sovereignty belongs to Allah Almighty and the vicegerency (*khilāfat*) to man. It is also reflected in the Objectives Resolution, which is the Preamble¹⁵ of all the Constitutions of Pakistan. Objectives Resolution embodies the fundamental concepts of the Constitution.¹⁶ Objectives Resolution is very important and is the sheet-anchor of the Constitution, for it reflects aspirations of the people of Pakistan as to what they want and how they want to be governed.¹⁷

The Constitution of Pakistan is a living manifestation of the will of the people of Pakistan, wherein the people had made clear

¹¹ Para 2 and 3, Preamble, The Constitution of the Islamic Republic of Pakistan, 1973.

¹² Tanzil-ur-Rehman, “Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What More is Required?”, *The Qur'anic Horizons* Volume 2: No. 3: (July-September, 1997), p.1.

¹³ Article 1, The Constitution of the Islamic Republic of Pakistan, 1973.

¹⁴ S. Abul A'la Mawdūdī, *Islamic Law and the Constitution* (Pakistan: Islamic Publications (Pvt.) Ltd., 12th Edition, 1997), p.138.

¹⁵ Para 1, Preamble, The Constitution of the Islamic Republic of Pakistan, 1973.

¹⁶ Cf. *Nizam Khan V. Additional District Judge*, PLD 1976 Lah. p.930.

¹⁷ *Mahmood Khan Achakzai and Others V. Federation of Pakistan and Others*, PLD 1997 SC 426.

that authority to govern shall be exercised within the limits prescribed by Allah¹⁸, and not by or on behalf of the people of Pakistan. This reflects two principles; firstly, that the exercise of authority shall be informed and circumscribed by the principles of Islam; and secondly, that the people of Pakistan shall play an integral role in the exercise thereof. Any action or inaction that contravened said instructions would be *ultra vires* of this authority, unconstitutional and void.¹⁹

It is pertinent to note that in the Para 1 of the Preamble of the Constitution, the words “within the limits”²⁰ is mentioned but in Para 4, the words “wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed”²¹ and in Para 5, the words “wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy *Quran* and the *Sunnah*” are conflicting in nature. If limits prescribed by Allah Almighty are to be followed, democracy cannot co-exist with those limits.

Similarly, the limitations of freedom and equality are defined nowhere in the Preamble. The Western concept of separation of religion from State functions is a secular concept which can never be a part and parcel of Islamic Legal system. Islam presupposes that all the human beings are equal and enjoy the same set of liberties and limitations. Equality should not be confused with classification. As per Islamic Jurisprudence principles, Islam promotes equality, negates discrimination but upheld classification. One of the basic principles of Islamic Jurisprudence is that reasonable classification is permissible but discrimination violates the well-known tradition of Holy Prophet SAWW proclaimed in *Khutba Hajjat-al-Wida'*.²²

Allah Almighty says in the Holy *Qur'an*:

¹⁸ Para 1, Preamble, The Constitution of the Islamic Republic of Pakistan, 1973.

¹⁹ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:179.

²⁰ Para 1, Preamble, The Constitution of the Islamic Republic of Pakistan, 1973.

Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.

²¹ Ibid., Para 4, Preamble:

Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.

²² Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:385.

“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 bestow 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”.²³ (24:55)

Moreover, Article 31 of the Constitution of Pakistan prescribes the above-mentioned directive in its Principle of Policy whereby the State is bound to take reasonable steps for its masses to lead their lives on Islamic way of living.

It is pertinent to note that Allah Almighty has used the term vicegerency and not sovereignty. Secondly, the power to rule the world rests with the whole community of believers and not restricted to any particular person or class of persons.²⁴ So it can be said that in Islam *de jure* sovereignty belongs to Allah Almighty while *de facto* sovereignty is delegation of sovereign power.

Unlike Western democracy, in an Islamic State, the relationship between the individuals and the society has been regulated in such a manner that there is a balance in them and no one is allowed to exceed the prescribed limits ordained by Allah Almighty, as is enshrined in the Holy *Qur’ān*:

“Who obey their Lord and establish Prayer; who conduct their affairs by consultation, and spend out of what We have bestowed upon them”.²⁵ (42:38)

The political system in Islam is based on three principles: *Tawḥīd* (oneness of Allah), *Risālah* (Prophet hood), and *Khilāfah* (Caliph or the ruler).²⁶

Man is Allah’s vicegerent and representative of Allah on earth to establish the Command of the Sovereign. His authority is

²³ Ansari, *Towards Understanding the Qur’ān*, p.535.

²⁴ S. Abul A’lā Mawdūdī, *Tafhīm ul Qur’ān*, (Lahore: Maktaba Tameer e Insaniyat, 1976), 3: 417-420.

²⁵ Ansari, *Towards Understanding the Qur’ān*, p.714-715.

²⁶ Jamshed Ahmad Hamid, *Human Rights in Islam and Contemporary International Law* (Islamabad: Shariah Academy, International Islamic University Islamabad, 2011), 28.

delegated one as he is bound to obey Allah and act according to the directives of Allah Almighty and establish His will on earth. Allah Almighty has said in the Holy *Qur'ān*:

“Just think when your Lord said to the angels: “Lo! I am about to place a vicegerent on earth”, they said: “Will you place on it one who will spread mischief and shed blood while we celebrate Your glory and extol Your holiness?” He said: “Surely I know what you do not know””.²⁷ (2:30)

The authority to legislate and to declare anything lawful or unlawful rests with Allah Almighty alone, as is enunciated in the Holy *Quran*:

“And do not utter falsehoods by letting your tongues declare: “This is lawful” and “This is unlawful”, thus fabricating lies against Allah. Surely those who fabricate lies against Allah will never prosper”.²⁸ (16:116)

Allah Almighty has Himself declared that those who do not follow the order of Allah Almighty while conducting justice will be among unbelievers, wrongdoers and transgressors. As He has said:

“... Those who do not judge by what Allah has revealed are indeed the unbelievers...”²⁹ (5:44)

“...Those who do not judge by what Allah has revealed are indeed the wrongdoers...”³⁰ (5:45)

“... Those who do not judge by what Allah has revealed are indeed the transgressors...”³¹ (5:47)

3.2. What is the nature of the Constitution of Pakistan 1973

The theory behind the Constitution making is that these are made and promulgated keeping in view objective conditions, socio-economic requirements, and the structure for the

²⁷ Ansari, *Towards Understanding the Qur'ān*, 7.

²⁸ Ibid., 410-411.

²⁹ Ibid., 166.

³⁰ Ibid., 166.

³¹ Ansari, *Towards Understanding the Qur'ān*, p.166.

Constitution. What is the nature of the Constitution of Pakistan 1973? The answer is addressed nowhere in the Constitution. A careful analysis of Objectives Resolution, which is the Preamble of the Constitution and later on made substantive part through Article 2A of the Constitution, when read with other provisions of the Constitution highlight features like Federalism, Parliamentary form of Government blended with Islamic provisions.³² Objectives Resolution is no more than declaration defining the ideology of Pakistan. In order to understand the basic structure of the Constitution of Pakistan 1973, other documents need to be looked into, including Objectives Resolution, Report of Constitution Committee, previous Constitutions of Pakistan, the debates of Parliament and the Amendments made in the Constitution so far. The Doctrine of basic structure of the Constitution is still an alien concept in the Courts of Pakistan.³³

In the case of *Mahmood Khan Achakzai and Others V. Federation of Pakistan and Others* (PLD 1997 SC 426) while discussing the status of Eighth Amendment made in 1985 raised the question as to the basic structure of the Constitution of Pakistan (1973) whereby it was said that this question is of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment.³⁴

Article 2A expressly instructed that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed. Protection and advancement of said principles was an integral objective and an essential feature of the Constitution. Article 2A mandated that the State shall guarantee fundamental rights, economic, political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.³⁵

More interestingly, the close analysis of Article 2A and the interpretation made by the Courts of Pakistan, it can be construed that if any Article of the Constitution is in conflict with Article 2A

³² *Mahmood Khan Achakzai and Others V. Federation of Pakistan and Others*, PLD 1997 SC 426.

³³ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:130.

³⁴ *Mahmood Khan Achakzai and Others V. Federation of Pakistan and Others*, PLD 1997 SC 426.

³⁵ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:179.

or any law inconsistent with Article 2A, it does not make that law *ipso facto* void rather the appropriate procedure is to be followed to amend that Article in accordance with the prescribed provision of the Constitution. It means that the provisions of Article 2A were never intended at any stage to be self-executory or to be adopted as a test of repugnancy or contrariety and ultimately Courts also have no power to strike down any provision of law as repugnant or contrary to Islamic Injunctions.³⁶ Article 2A can be pressed into service only when any law is in conflict with any provision of the Constitution or in cases where Judicial Review is permissible.

As stated earlier, the Preamble of the Constitution of Pakistan 1973 has become an operative part of the Constitution by virtue of insertion of Article 2A³⁷, in case of interpretation of any statute the Court should interpret those provisions in conformity with Article 2A and the *grundnorms* of human rights.³⁸ Article 8(1) enunciated the significance of the said rights by declaring that all laws, customs or usages, so far as they are inconsistent with the fundamental rights would be void up to that extent. In effect such rights, as enunciated by Islam, had been placed on a higher pedestal and enshrined as a central feature of the constitutional framework.³⁹ The Preamble also provides that the Muslims shall be enabled to order their lives individually and collectively in accordance with requirements and teachings of Holy Quran and Sunnah.⁴⁰

Allah Almighty has said in the Holy *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”.⁴¹ (4:59)

³⁶ *Hakim Khan and Others V. Government of Pakistan and Others*, PLD 1992 SC 595, 621.

³⁷ Revival of the Constitution Order 1973 (P.O. XIV 1985).

³⁸ *State V. Qaim Ali Shah*, 1992 SCMR 2192.

³⁹ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:179.

⁴⁰ Para 5, Preamble, The Constitution of the Islamic Republic of Pakistan 1973.

⁴¹ Ansari, *Towards Understanding the Quran*, p.121.

3.3. Federal *Shariat* Court

Article 227, when read with Preamble, Article 2 and 2A of the Constitution of Pakistan 1973 provides Islamic character of the Constitution of Pakistan by fully securing the independence of Judiciary and by providing that all the existing laws should be brought in conformity with the Injunctions of Islam, which is clearly spelt out as Holy *Quran* and *Sunnah*, in Article 203D (1) of the Constitution of Pakistan 1973.⁴² The scope of constitutional jurisdiction of Federal *Shariat* Court seems to be narrow. What if there is no specific provision in Holy *Quran* and *Sunnah* regarding a particular issue? In that case, it is the duty of the Federal *Shariat* Court to discover and find out whether a particular legislation is repugnant to Islamic Injunctions or not by not only against a specific provision (*Ibārat al-Naṣṣ*) but also by the opinion of the Muslim jurists (*Dalālat al-Naṣṣ*, *Ishārat al-Naṣṣ*, *Iqtidā al-Naṣṣ*). The jurisdiction of Federal *Shariat* Court is limited to examine and decide the question whether or not any law or provision of law, custom or usage is repugnant to Injunctions of Islam and does not dilate upon its merits and demerits.⁴³

It has been held by the Court in *Kaneez Fatima V. Wali Muhammad* and another that while interpreting the Constitution, enactments, rules and regulations having the force of law and examining the orders, acts, actions of Government functionaries, Authorities, Court is competent to apply well recognized principles of Islamic Common Law and such interpretation which is in conformity with Injunctions of Islam even in the fields not occupied by statutory dispensation.⁴⁴ So long as the existing statutes were not brought in conformity with Injunctions of Islam, their interpretation, application and enforcement, wherein discretionary judicial elements were involved, only that course would be adopted which is in accord with the Islamic philosophy, its common law and jurisprudence.⁴⁵

⁴² Article 203D(1), The Constitution of the Islamic Republic of Pakistan 1973:

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

⁴³ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 2:1254.

⁴⁴ *Mst. Kaneez Fatima V. Wali Muhammad and another*, PLD 1993 SC 901.

⁴⁵ Nagi, *The Constitution of the Islamic Republic of Pakistan 1973*, 1:171.

In case of *Dr. M. Aslam Khaki V. Syed Muhammad Hashim and 2 others*, the Honourable Supreme Court decided that if any enacted law is considered by anyone to be repugnant to the Injunctions of Islam, the process enunciated by the Constitution of Pakistan is to challenge the said law before the Federal *Shariat* Court under Article 203(D). This power can also be exercised *suo moto* by the Federal *Shariat* Court⁴⁶.

4. Islamization and Muslim Personal Law

The scope of Islamic Personal Laws is wide and it forms the foundation for civilization and sanctuary for the individuals. Muslim Personal Law means religious law of each sect of the Muslims based on the interpretation of the Holy *Qur'ān* and the *Sunnah* by that sect. It does not mean codified and statute law as per Article 203B(c)⁴⁷ of the Constitution of Pakistan 1973.

This paper covers the issue of Muslim Family Laws Ordinance 1961 only. Muslim Family Laws Ordinance 1961 is the most important legislation on family matters but unfortunately failed to achieve the objectives of Islamic State as it is contrary to express commandments of the Holy *Qur'ān* and the *Sunnah*. However, the Ordinance is still in force even though it is controversial. The Ordinance was the result of the recommendations of the Commission on Marriage and Family Laws⁴⁸. The recommendations of the Commission were so-called *Ijtihad* and a futile exercise, which has caused chaos in the social setup in case of Muslim marriages particularly in Polygamy, *Talāq* issues and even in inheritance issues by deviating from the Injunctions of Islam. In Islamic Law, polygamy is allowed while in the Ordinance it has been made conditional with the permission of the first wife⁴⁹. Similarly, *Talāq* would be effective after 90 days which is totally un-Islamic⁵⁰. The succession to orphaned

⁴⁶ *Dr. M. Aslam Khaki V. Syed Muhammad Hashim and 2 others*, PLD 2000 SC 225.

⁴⁷ Article 203B(c), The Constitution of the Islamic Republic of Pakistan, 1973:

(c) "Law" includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law, any law relating to 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.

⁴⁸ Preamble, Muslim Family Laws Ordinance 1961.

⁴⁹ Section 6, Muslim Family Laws Ordinance 1961.

⁵⁰ *Ibid.*, Section 7.

grandchildren is also contradictory to Injunctions of Islam⁵¹. The dilemma in Pakistan is that the legislators have failed to drag their attention to this very subject and a controversial law has been implemented, which is not even comprehensive in nature leaving behind many controversies and ambiguities resulting in a weak sociological family structure.

Moreover, the Ordinance has the overriding effect as there is a blanket provision incorporated in the Ordinance which implies that any law or custom or usage stands impliedly repealed by the provisions of the Ordinance, in respect of matters specified therein, if it is found to be inconsistent with the same⁵². Does the term “Law” used in the Ordinance include Islamic Law also? Though the term “Law” is defined nowhere in the Ordinance but for the sake of Personal Laws, Article 203B(c) of the Constitution of Pakistan 1973 can be looked into.

Moreover, this law cannot be challenged on the ground that it infringes fundamental rights of the citizens to profess and practice their religion under Article 20⁵³ of the Constitution. Under the Constitution of Pakistan 1973, any provision of the law can be challenged to the extent that comes into conflict with Article 2A but the *vires* of the Muslim Family Laws Ordinance 1961 cannot be challenged by virtue of Article 8(3)(b) read with First Schedule, Item 3 of the Constitution.

It has been held in *Mirza Qamar Raza V. Tahira Begum*⁵⁴ that protection of provisions of Muslim Family Laws Ordinance by Article 8(3)(b) from application of Article 8(1)(2), does not extend to make it immune from challenge on touchstone of Objectives Resolution. Any provision of the Ordinance can be challenged to the extent that it is in conflict with the Preamble of the Constitution.

The jurisdiction of Federal *Shariat* Court in this regard is also barred by the Constitution. Jurisdiction of Federal *Shariat* Court to

⁵¹ Ibid., Section 4.

⁵² Ibid., Section 3.

⁵³ Article 20, The Constitution of the Islamic Republic of Pakistan, 1973.

Subject to law, public order and morality,

a. Every citizen shall have the right to profess, practice and propagate his religion; and

b. Every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

⁵⁴ *Mirza Qamar Raza V. Tahira Begum*, PLD 1988 Kar. 169.

examine any law, custom or usage having the force of law on the touchstone of its repugnancy to Holy *Quran* and *Sunnah* is curtailed by Article 203B(c) which excludes the Constitution, Muslim Personal Laws, fiscal laws and procedural laws from its scrutiny. Since ten years have been expired, so now the Federal *Shariat* Court is empowered to examine the repugnancy of fiscal laws relating to the levy of taxes and fees etc. This paper is confined to Personal Laws and further specified to Muslim Family Laws Ordinance 1961 only, therefore, other aspects are not covered in this research.

Now, if Article 227 and Article 203B of the Constitution of Pakistan 1973 are compared, it will make this concept clearer. Article 227 is enforced by the Council of Islamic Ideology, whereas Article 203B is enforced through the Courts. In Article 227, the scope and sphere of the Council of Islamic Ideology is very wide whereas in Article 203B, the jurisdiction of the Courts is limited both in respect of time and subjects mentioned therein. Article 203B excludes the scrutiny of Muslim Personal Law whereas there is no such bar on Council of Islamic Ideology as per Article 227. If both of these Articles are read together it can be construed that all the laws dealing with the Muslims, which fall under the category of "Muslim Personal Laws", whether they are Divine or statutory laws, those cannot be examined on the ground of repugnancy to Injunctions of Islam by the Federal *Shariat* Court and the *Shariat* Appellate Bench of the Supreme Court, rather they fall under the ambit of Council of Islamic Ideology.

5. Is Pakistan an Islamic Welfare State?

The concept of Welfare State in Islam provides principles so that the mankind can fashion their lives according to the principles of social behavior revealed by Allah Almighty while the Western concept of State is the relationship between the man and the State and man with man. According to the *Qur'ān*:

"Those whom you serve beside Him are merely idle names that you and your fathers have fabricated, without Allah sending down any sanction for them. All authority to govern rests only with Allah. Allah has commanded that you serve none but Him. This is the

Right Way of life, though most people are altogether unaware".⁵⁵ (12:40)

"Surely your Lord is none other than Allah, Who created the heavens and the earth in six days, and then ascended His throne, Who causes the night to cover the day and then the day swiftly pursues the night, Who created the sun and the moon and the stars making them all subservient to His command. Bless is Allah, the Lord of the whole Universe".⁵⁶ (7:54)

"And pray: "My Lord! Cause me to enter wherever it be, with Truth, and cause me to exit, wherever it be, with Truth, and support me with authority from Yourself"". ⁵⁷ (17:80)

The Constitution of Pakistan 1973 not only provides protection of fundamental rights but also the principles of policy subject to the available resources⁵⁸, the State *inter alia* is bound to promote observance of the Islamic moral standards⁵⁹, make provision for securing just and humane conditions of work⁶⁰, secure the wellbeing of the people *inter alia* by raising their standard of living and ensuring equitable adjustment of rights between employers and employees⁶¹, provide for all citizens, within available resources, facilities for work and dequate livelihood with all reasonable rest and leisure⁶², provide for all persons, in the service of Pakistan or otherwise, social security by compulsory social insurance or other means⁶³ and provide basic necessities of the life for all citizens as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment⁶⁴. These principles are backed by the principles of an Islamic state.

Islamic Welfare State should take all steps for its subjects to live their lives according to Islamic norms and in obedience to Allah Almighty. The State is also bound to educate its masses according to Islamic teachings thereby establishing a system

⁵⁵ Ansari, *Towards Understanding the Quran*, 347.

⁵⁶ Ibid., 227.

⁵⁷ Ibid., 429.

⁵⁸ Article 29(b), The Constitution of the Islamic Republic of Pakistan, 1973.

⁵⁹ Ibid., Article 31(2).

⁶⁰ Ibid., Article 37(c).

⁶¹ Ibid., Article 38(a).

⁶² Ibid., Article 38(b).

⁶³ Ibid., Article 38 (c).

⁶⁴ Ibid., Article 38(d).

having collective benefits so as to eradicate evil and to promote virtue and goodness⁶⁵.

Islamic Welfare State is also under an obligation to establish a society which is free from exploitation wherein social and economic justice is guaranteed to its citizens. Under Article 3 of the Constitution of Pakistan 1973 the State is obliged to ensure the elimination of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work. Article 38 of the Constitution contains an important Principle of Policy that the State should secure the well-being of the people by raising their standards of living and by ensuring equitable adjustment of rights between employer and employees and provide for all citizens, within the available sources of the country, facilities for work and adequate livelihood and reduce disparity in income and earnings of individuals.

The purpose of Muslims of Sub-Continent for attaining independence was to order their lives according to the Islamic principles. But after attainment of independence Pakistan has failed to achieve this very objective as they have failed to adopt the Islamic way and enforcement of Islamic Law in the State. The State is being run on alternate lines by avoiding Islamic principles, which is not less than a national apostasy. The concept of separation of politics from morality and religion has posed numerous problems rather than solving the issue.

Muhammad Iqbal has also commented on this issue in his famous book, *Reconstruction of Religious Thought in Islam*, as under:

“Humanity needs three things today --- a spiritual interpretation of the Universe, spiritual emancipation of the individual and basic principles of a universal import directing the evolution of human society on a spiritual basis... Believe me Europe today is the greatest hindrance in the way of man’s ethical advancement. The Muslim, on the other hand, is in possession of these ultimate ideas on the basis of revelation... Let the Muslim of today appreciate his position, reconstruct his social life in the light of ultimate principles and evolve

⁶⁵ Ibid., Article 31.

that spiritual democracy which is the ultimate aim of Islam".⁶⁶

6. Has Pakistan achieved its purpose of Independence?

The glance of Constitutional history of Pakistan reveals that our political leaders could not frame a Constitution in accordance with the principles enshrined in the Objectives Resolution. Rather they promoted bureaucrats and imbalance of trichotomy of powers due to wrong policies putting the State into trouble and anarchy.

It has to be taken into consideration that Pakistan was made in the name of Islam, it means that the legal system, ethical norms and social, political and economic order then was not Islamic. The British rule brought vital changes in the legal system to make it de-Islamized. When Pakistan came into being, it was one of the major challenges to practically fulfill the independence resolution and make the system Islamized. Obviously it could not have been done abruptly rather gradually and systematically. For the permanent change, it is necessary to have it free from all extremist bias and unbalanced approach. In order to promulgate Islamic Law in Pakistan, there is a need to demolish the entire legal system of the State. This is not possible to bring forth any parliamentary reform in the presence of current political and economic condition of the State; security upsets; and international challenges; moreover, the mindset of the social sector has now become quite secular. It is a stupendous task and demands a good deal of hard and systematic work.

Conclusion

Pakistan was made in the name of Islam but the purpose was to implement the principles of Islam in compatibility with the modern, educated and enlightened leadership. As a result, those principles were incorporated in the Constitution but there is a need to bring the balance between the Islamic principles and the modern legal theory after analyzing the whole legal system and highlighting the deficiencies so as to extract viable solutions of the problems based upon justice, compassion, tolerance and peaceful coexistence.

⁶⁶ Muhammad Iqbal, *Reconstruction of Religious Thought in Islam*, (Lahore: Kitab Bhavan, 2000), p.183-189.

Recommendations

The first and foremost need of the time is the reorientation of our educational system. The present educational system is clearly divided into two kinds of educational institutions: the religious *Madarasahs* and secular educational institutions e.g. schools, colleges and universities. Unfortunately, none of them are meeting the educational standards so as to produce youth to run to modern Islamic state. There is a dire need to reform the education system and implement uniform curriculum with strong focus on Islamic teachings, morals and ethical values and Islamic culture and traditions so as to bring change in the existing mindset of the people and help in human capital formation and producing responsible citizens. The education system should also provide moral and intellectual training in strict accordance with Islamic Ideology at the grass root level.

Education is a basic need of every society but due to poor accessions; physical, cultural, religious and financial barriers; gender inequality; poverty; child labour and lack of uniform curriculum, qualitative teaching methodologies and less focus on Islamic Education, the situation analysis in Pakistan is alarming, there is a need for innovative solutions, harmony and removal of barriers, so as to combat poverty, raising productivity, living standards and personality development (*Tarbiya* and *Tazkiya al-Nafs*) of citizens to cater the existing challenges.

The Education is the core objective of Islamic Law and is a backbone of any civilized State. The reforms are required in accordance with the ideological structure of Pakistan by not only improving the infrastructure but also realization of responsibilities of all the sectors for the physical, spiritual, intellectual, social, and mental development of the children. Along with the implementation, well-defined monitoring and evaluation system of accountability is also required at both Federal and Provincial levels. After Eighteenth Amendment by insertion of Article 25(a), free and compulsory education for children aged 5-16 presumably till matriculation has now become a fundamental right and State responsibility and falls under the Provincial subject-matter. A close insight to National Education Policy 2017-2025 provides that the said policy seems to be far better and practicable, effective, viable and sustainable. Without proper implementation and accountability, which is a core problem in Pakistani legal system, this policy will also fail like previous

policies and will bring no or less outcomes resulting only in financial and administrative burden on the State?

As stated earlier, Islamic legal system is not in force more than 1.6 century or so. The present legal system was introduced by British rulers; major legislation is still the same, making our system stagnant and outdated. The glimpses of British influence on our system for such a long time has brought radical changes in our moral, cultural, social, economic and political life and has totally removed Islamic ideals from our lives. There is a considerable hard work and proper strategy is required to bring the reforms in this regard.

If, for instance, it is presumed that it were possible to change the legal system of the state, then the prevailing trend will take the legal structure and the social structure apart resulting in hostile environment. So the only strategy is to bring gradual and effective changes in such a manner that the balance between the moral, educational, social, cultural and political structure is maintained. When Islamic environment will be created gradually, Islamic state will automatically come into existence and Islamic laws will be adhered in the natural course. In the current scenario, building an Islamic environment is in itself an issue which is extremely difficult in the presence of international as well as national challenges. For this reason, the strategy needs to be practically implementable, effective, clear and definite while keeping in view the strategies followed by Holy Prophet (PBUH). In the first instance, educating the masses will result in change in mindsets of the masses and would help in creating demand for the Islamic legal system. When surrounding environment would be Islamic, masses will not retaliate with the upcoming changes in the Legal system. When masses will start following Islamic cultures and traditions, and principles of faith, they would ultimately avoid corruption, injustice, unethical practices, and unfair dealings resulting in moral, cultural and socio-economic development in the State.

In order to enforce Islamic law, the reforms in the judicial system are also required. The prevailing judicial system backed by the legal system is a man-made law and is secular in nature, which is full of lacunae, causing injustices and keeping us away from our faith.

Mere insertion of Objectives Resolution in the Preamble of the Constitution and the article of the Directive principles to the effect that no legislation will be made against the Holy *Qur'ān* and the

Sunnah does not serve the purpose of a true Islamic State. There is a need of sound, modern, educated and enlightened leadership with confined objective principles and broad vision to establish Islamic legal system in Pakistan. The government should make practical steps to establish and promote the good and suppress and eradicate the evil and the practical steps need to be undertaken to mould and manage in a way that it fully conforms the Islamic way of life, both in letter and spirit.

The role of media also needs to be monitored carefully. Media can be used by the Government for the promotion of Islamic teachings and values by introducing Islamic educational programs, curtailing music and unethical, indecent and obscene shows and dramas, and promoting proper clothing and veils, incompliance of which have contributed a lot in destroying social values. A strong provision needs to be incorporated in the Constitution in this regard, stating its mechanism for the implementation also.

The Constitution needs to be amended and Article 203B(c) of the Constitution of Pakistan 1973 needs to be abrogated. The statutes on Personal Laws issues, Hudood Ordinances and fiscal laws are the backbone of any society. Our Constitution does not empower the Courts to look into their credibility and scrutiny. They should be reviewed and bring in line with the Injunctions of Islam so as to promote dignity of man, morality and respect for humanity, establish family structure as per Islamic values, establish monetary system free from *ribā* and prevention and deterrence of *ḥudūd* crimes by ensuring compliance of Divine Law.

Last but not the least, mere legislation is not important, its implementation is actually an issue. Article 203B(c) also curtails Courts to review procedural laws. Without reformation in the procedural laws, implementation of substantial laws would remain an issue. Non-implementation or partial implementation results in discrimination and reduces adherence and dignity of the laws. Legislation should be made in public interest focusing on the Ideological framework of Pakistan.
