

Islamization in Pakistan: An Analysis of the 1973 Constitution

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Abstract

The process of Islamization in the constitutional history of Pakistan always remained a crucial issue for democratic process in Pakistan. The introductions of objective resolution and Islamic provisions in the constitutions (1956, 1962, and 1973) have been considered remarkable development. The regime of General Zia-ul-Haq has continued the Islamization of the Pakistani legal system and amended various articles of the 1973 constitution. Efforts were also made during the subsequent regimes by implementing the Enforcement of Shari'ah Act and of Shariat Bill. The efforts of Pakistani leadership for the process of Islamization have large impacts on the constitutional history of Pakistan. The 1973 constitution remained a legal document not only for running the state affairs but also enabling the Muslim of Pakistan to order their individual and collective lives in accordance with the teaching of the Holy Quran and Sunnah. Still the questions of the place of Islam in the constitutions of Pakistan have been issues for decades and particularly the Islamizing of the 1973 constitution of Pakistan remained a deadlock in Pakistani politics and religious circles. This article attempts to examine the influence of Islam (Islamic Sharia) on the 1973 constitution of Pakistan.

Key Word: Islamic Shaira, Legal System, the 1973 constitution of Pakistan

Introduction

Pakistan as an independent country was founded on 14th August 1947 as a result of the partition of the Indo-Pak subcontinent. The distribution of the former British colonial territory in the independent states of Pakistan and India was according to the different religious affiliation of the population Islam and Hinduism. Religious affiliation was thus crucial in founding the state of Pakistan, which has about 97 percent of the Muslim population. Pakistan, an artistic name composed of the letters of the provinces of Punjab, Afghanistan (North West Frontier), Kashmir, Sindh and Baluchistan, means as "land of the pure".¹ Since its independence in 1947, Pakistan has experienced overall four constitutions, the interim constitution of 1947, the 1956, the 1962, and the 1973 constitution. The interim constitution of 1947 was implemented in Pakistan as a working constitution; it was a modified version of the Government of British India Act of 1935 whereas the state affairs were conducted accordingly till the announcement of the 1956 constitution. After nine years of continuously efforts, the 1956 constitution was enforced on 23th March 1956, which was the first indigenous constitution of Pakistan. The

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short-lived constitution of 1956 hardly worked just for one and half year and was abrogated on 7th October 1958 with the imposition of martial law. The military regime of Gen. Ayub Khan enforced the 1962 constitution on 8th June 1962 that worked for almost half and ten years and was abrogated by Gen. Yahya Khan in March 1969. The 1973 constitution of Pakistan was ratified by the Zulfikar Ali Bhutto on 14th August 1973, and still active in Pakistan along with twenty four amendments till March 2018.

In the first constitution of 1956, Pakistan was declared an Islamic republic. The preamble held the sovereignty of Allah over the people. Article 198 of the 1956 Constitution stipulated that new laws should not violate the instruction of Islam and that old laws should be brought into line with Islam. In 1958, President Iskander Mirza suspended the constitution and declared martial law. In the second constitution 1962 Pakistan was not initially called an Islamic republic. A constitutional amendment in 1963 reintroduced this designation. Meanwhile, a third constitution, created in 1973 under the slogan of Islamic Socialism by Zulfikar Ali Bhutto, was the only one created by an elected assembly. This is basically still valid, but has been suspended for years and has undergone extensive changes.

The 1973 constitution of Pakistan was initially a mixture of British and Islamic laws, and despite the Islamization demanded by the people and introduced in the constitutions, it was not started until the regime of General Zia-ul-Haq. Through a series of regulations, Pakistani criminal law has been amended to reintroduce Islamic criminal offenses and their tactless sentences with the introduction of Hudood Ordinance. His radical Islamization also pursued the goal of creating a common national identity in Pakistan to serve his interests in power and was not an expression of the wishes of the people. The main beneficiaries of this policy were feudal landowning families, the army and parts of the Muslim clergy. The efforts for enforcing Islamic laws in Pakistan through Enforcement of Shari'ah Act, 1991 of Prime Minister Benazir Bhutto and Shariat Bill 1998 of Prime Minister Nawaz Shairf did not produce any results. Musharraf a policy of enlightened moderation and his turns against religiously motivated fundamentalism while cooperating with the US in the war on terror faced hard challenges from the rightist political parties as well as religious movements with Pakistan.²

Islamization of Laws in Pakistan

Pakistan was initially a mixture of British and Islamic laws; with British law as its main focus and Islamic law primarily in personal matters such as inheritance law. Despite the Islamization demanded by the people and introduced in the constitutions, it was not started until the takeover of power by General Zia-ul-Haq in 1977. A highlight of this Islamization wave was the reintroduction of Islamic criminal law in 1979. Through a series of regulations, Pakistani criminal law has been amended to reintroduce Islamic criminal offenses and their tactless sentences. In addition, he created a parallel Islamic

court structure. His radical Islamization also pursued the goal of creating a common national identity in Pakistan. However, his actions served his interests in power and were not an expression of the wishes of the people. The main beneficiaries of this policy were feudal landowning families, the army and parts of the Muslim clergy.³

Under Prime Minister Benazir Bhutto, a law “Enforcement of Shari'ah Act, 1991” was passed which aimed at enforcing Islamic law in Pakistan. It states that the Sharia is governed by state law as well as that the entire law is to be interpreted in the light of Sharia law with the enforcement of the act. The Sharia was declared as the supreme law of Pakistan. It was also made compulsory for the Muslims population that “All Muslim citizens of Pakistan shall observe Shari'ah and act accordingly and in this regard the Majlis-e-Shoora (Parliament) shall formulate code of conduct for Government functionaries.” The state of Pakistan was directed for effective arrangements of the teaching and training of the Sharia, in all jurisprudence. Steps were to be also initiated for the Islamization of education system in Pakistan to “take necessary steps to ensure that the educational system of Pakistan is based on Islamic values of learning, teaching and character building”. It also aims to educate the population towards Islam and to orient the economy to Islamic principles. The document noted

“The State shall take steps to ensure that the economic system of Pakistan is constructed on the basis of Islamic economic objectives, principles, and priorities.”

A commission of experts was to be also established under the Shariat law to

“oversee the process of elimination of Riba from every sphere of economic activity in the shortest possible time and also recommend such measures to the Government as would ensure the total elimination of Riba from the economy.”⁴

The Enforcement of Shari'ah Act, 1991, was passed in Senate by two-third majority and was sent to the National Assembly for adaptation. In the meanwhile the president of Pakistan had dissolved the National Assembly and the Shari'ah Act, lapsed.

The Prime Minister Mian Nawaz Sharif, who came to power after elections in 1997, continued the Islamization of the Pakistani legal system. In 1998, Sharif submitted to the National Assembly a constitutional amendment calling for Islamic law to become the sole legal system in Pakistan. The Shariat Bill was also called the 15th amendment in the 1973 constitution of Pakistan, was introduced by the government of Nawaz Sharif on 28th August 1998, and was passed by the National Assembly on October 9, 1998. Apart from empowering the Prime Minister, the bill added 2B a new article to the constitution, which made obligation on the federal government for taken steps towards the enforcement of Sharia, to eradicate corruption, bribery, obscenity,

and to promote Zakat, Salat, justice and the establishment of an Islamic social order based “on Islamic values, of prescribing what is right and forbidding what is wrong (*amr bil ma'roof wa nahi anil munkar*)”, in accordance with the principles of Islam-the Holy Quran and Sunnah.⁵ Although this legislative initiative was approved by the National Assembly, but it was not submitted to the Senate because at that time Sharif's party had no two-thirds majority in the Senate to pass the constitutional amendment. In 1999, Sharif decreed that Sharia law should be the sole right in the provinces of Pakistan bordering Afghanistan. As justification, Sharif referred to the high crime rate there.⁶

In October 1999, Pervez Musharraf came to power through a military coup. He rescinded the constitution of 1973, which only came into force again in March 2003 - with amendments. In November 2007; he gave his constitutionally very problematic dual function as president and army chief. However at the insistence of the Pakistani opposition, the Supreme Court declared its controversial re-election as President to be lawful. Previously, Musharraf proclaimed a state of emergency in November and suspended the constitution. He had arrested many opposition figures. Musharraf plans to end this state of emergency before the elections of the national parliament and the four provincial parliaments in January 2008. Despite the illegal seizure of power and the rigid crackdown on members of the opposition, it should also be noted that Musharraf turns against religiously motivated fundamentalism and by his own admission, a policy of enlightened moderation represents. However his regime actions against Islamic Jihadi organizations and cooperation with the US in the war on terror faced hard challenges from the rightist political parties as well as religious movements with Pakistan.⁷

Most recently How Islamic the Constitution of Pakistan is, remained a roadblock in negotiations between the government of Pakistan and the Tehreek-i-Taliban Pakistan. The TTP leadership refused to hold talks with the politicians, who were considered by TTP, to be bound under an un-Islamic constitution.⁸ A recent study developed by the Chicago University titled “Measuring constitutional Islamization: The Islamic constitutions Index”, attempts to measure empirically a particular constitution's Islamicity, where the model of Islamic constitution of Al-Azhar University was used for measurement. Iran and Saudi Arabia and Pakistan were placed on the top of the ranking, and shown Pakistan a successful case for Islamizing its constitution.⁹

Islamic Shaira and the 1973 Constitution of Pakistan

The 1973 constitution of Pakistan have various Islamic provisions to promote and strengthen the Islamic values in Pakistani state and society. According to Article 1 (1) of the 1973 Constitution, Pakistan is an Islamic Republic. Art. 2 declare Islam the state religion.¹⁰ Art. 2 (A) noted that Objectives Resolution is part of the constitution according to which sovereignty over the universe belongs to Allah, and the chosen representatives

would exercise their powers as a “scared trust”. The principles of democracy, equity, freedom, social-economic and political justice, tolerance, as pronounced by Islam shall be observed. Fundamental rights including freedom of belief, faith, thought and worship shall be guaranteed. The rights of minorities to promote and profess their religions were to be guaranteed through adequate provisions.

The Objectives Resolution was passed by the Constituent Assembly of Pakistan in March 1949, and has been annexed to the Constitutions. It remained the preamble in the previous two constitutions of 1956 and 1962, and finally became part of the constitution in 1985. In Chapter 2 Principle of Policy, Article 31, Para (1) of Islamic way of life provides that measures shall be taken to enable the population to live according to the rules of Islam and to promote it, “Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.”¹¹

Article 31, Para (2) calling on the state to introduce compulsory instruction in the teachings of the Qur'an and Islamiyat for the population, to promote the learning of the Arabic language and to ensure the dissemination of the Koran error free printing and publishing. The principles of Zakat, Auqaf, and organization of mosque are also endeavored.¹² Part IX Islamic provisions: Provisions relating to the Holy Quran and Sunnah deals with the process of Islamization of Pakistani law. According to Article 227 Para-1, of the constitution, the existing law should be reconciled with the rules of Islam. Future law must not be in conflict with Islamic law.

In order to reconcile future laws with Islamic law, Article 228 of the Constitution provides that a Council of Islamic Ideology (Islamic Council) should be established. This can be consulted under Article 229, if there are doubts as to whether an intended law is compatible with Islam. Functions of the Islamic Council is underlined in Article 230, among other things, its main responsibility is to support the Islamization of law by making recommendations to the Majlis-e-Shoora (Parliament) on how the existing law can be reconciled with the demands of Islam as “the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah.”¹³

For Islamizing the existing laws and its functioning Federal Shariah court was established in Pakistan and Chapter 3 (A) was incorporated into the constitution, which regulates the composition and powers of the Federal Shariat Court under chapter 3 of the constitution. According to Article 203(D) the Federal Shariat Court examines at the instigation of a citizen, the federal or provincial government, or on its own initiative, whether an existing law is

compatible with Islamic law. Under Article 203 D (3) (b), the Federal Shariat Court cannot retroactively annul laws. Rather, the law contrary to Islamic law is (partially) void only from the date on which the decision takes effect.¹⁴ However; the examination authority of the Federal Shariat Court does not extend to constitutional law. The Federal Shariat Court examine only those laws as referred through the petition of a Citizen, the Federal or the Provincial Government, as Article 203 (1) noted “whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.” The court would forward its recommendation if found that any law is repugnant to the injunctions of Islam to the petition body, in case of the federal list the President of Pakistan and in case of the provincial list, the Governor of that province shall takes necessary steps to amend the law and bring into conformity in accordance to Islam.¹⁵

The particular problem faced by constitutional interpretation is that the Constitution as in the whole of Pakistani law - faces two different legal and value systems. The difficulty therefore lies in clarifying the relationship between the constitutional norms, which are partly due to English law, and the rules that enforce Islamic law. In particular, the inclusion of Article 2 (A) of the 1973 constitution, in according to which Objectives Resolution is part raised the question of whether Islamic law automatically takes precedence over state law.¹⁶ If there are loopholes in the law, courts draw and enforce Islamic law. In the area of fundamental rights, those rights have even been derived from the Sharia, which has strengthened the protection of fundamental rights. Overall, however, gaps in legislation are rare. The frequent use of Islamic law to substantiate fundamental rights therefore often has a political-ideological character. Thus, reference is also made to Islamic law, even if this were not necessary if the existing legislation were to be interpreted in the same way.¹⁷

More serious was the question of how far the courts are entitled to annul laws that are in conflict with Islamic law. The classification of the new article 2 (A) of the constitution as mentioned above led to a profound difference of opinion within Pakistani jurisprudence.¹⁸ The quarrel did not only take place between individual High Courts, but partly also within the same High Court.¹⁹ Some judges found article 2 (A) the basis for the fact that the Objectives Resolution, according to which the sovereignty of Pakistan's state power is limited by the regulations of Allah and according to which Muslims should be allowed, their private and public life in accordance with the regulations the Sharia, now took a place above the constitution (supra-constitutional provision). As a result, they issued judgments that defied existing laws and even constitutional law, as far as they believed they conflicted with Islamic law. The Supreme Court is the Superior Court in Pakistan. On the one hand, the Supreme Court can issue declaratory judgments / resolutions pursuant to Article 184 of the constitution of 1973 in legal

disputes between the individual, provincial governments or the Federal Government of Pakistan, as well as issues of fundamental importance to fundamental rights. In addition, the Supreme Court acts as appellate court under Article 185 of the constitution and “shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.”²⁰

However in the cases of Kaneez Fatima and Hakim Khan the Supreme Court resolutely opposed for any decision which creates confusion and the court cannot strike down any provision of the constitution of 1973 on the touch stone of objective resolution. Particularly, in connection with the case of Hakim Khan, the court stated that a constitutional provision should not be annulled because it is contrary to Islamic law. The judgment of Supreme Court noted:

“In case any inconsistency was found to exist between the provisions of the 1973- Constitution and those of the Objectives Resolution would, they expected, be harmonised by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents. Being creatures of the Constitution it was not visualised that they could not annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2A as no Court, operating under the Constitution, can do so.”²¹

It is true that the Objectives Resolution is not just a target for the constitutional legislator, but a binding part of the constitution. In the event that an existing constitutional provision contravenes Islamic law, however, it must be attempted to interpret the provision in the light of the entire constitution in order to eliminate existing contradictions. If the contradiction cannot be dispelled, then it is the task of the legislature to change the constitution. However, it is not in the competence of the courts, which are merely creatures of the constitution, to annul the relevant constitutional provision. Also in Kaneez Fatima, the Supreme Court stated that article 2 (A) of the constitution does not authorize the courts to annul laws.²²

The relationship between Islamic and state law, which was in itself clarified by the Supreme Court, was called into question by the decision of Zaheeruddin.²³ The Supreme Court held that the provisions of the Constitution were subordinate to the Objectives Resolution. In doing so, it undermined the tension that exists between the existing western fundamental rights and the normative provisions for the promotion of Islamic law. Such changes have been accepted by the Supreme Court as noted:

“Accordingly, unless it can be shown definitely that the body of Muslims sitting in the legislature have enacted something which is forbidden by Almighty Allah in the Holy Quran or by the Sunnah of the Holy Prophet or of some principle emanating by necessary intendment therefrom no Court can declare such an enactment to be un-Islamic”.²⁴

The court further stated that the constitutional rights should not violate Islamic rules and the “the Injunctions of Islam as contained in Quaran and Sunnah of the Holy Prophet are now the positive law”. Article 2A and the objectives resolution have been made effective and operative. Therefore every man-made law must conform to the Islamic injunctions and even the fundamental rights of the constitution that is not according to Islam must be repugnant.²⁵ The legal view expressed here is highly problematic, as it would ultimately lead to the entire written right being undermined by Islamic law through court decisions.

About the place of Islam in the constitution of Pakistan, confusion existed amongst the various groups of the rightists, the leftists, modernists, and the secular, and that is the main reason where Islam has been very explicitly mentioned in the constitution of Pakistan. An expert noted:

“From the very beginning there has been an acute struggle between the rightists ... and the modernist intellectuals over the meaning of an Islamic State. When the rightists contended for the insertion of the Sovereignty of God, they meant that the Shari'a ought to be implemented in Pakistan. And what they meant by "the Shari'a" was that body of law and doctrine which had been worked out in history by Muslim lawyers and theologians by their deductions and derivations from the Qur'an and the Sunna of the Prophet. Hence the rightists were actually arguing for a revival and resuscitation of the past. The Modernist, on the other hand, wished to avoid at any rate, a total reimposition of the past knew that much of that past was inapplicable in today's society.”

He further added that “When it enunciates the principles of "Islamic social justice" and "freedom, equality and tolerance in accordance with the teaching of Islam," such statements are Janus-faced. To the Modernist they mean values that are valid in the progressive liberal modern societies and which, in his view, Islam stood for in its pure and pristine teaching; to the revivalist, secondly, they mean values as acted upon in the early history of Islam (implying the Muslim community's special status as distinguished from non-Muslims”.²⁶

Though Islamization process have been initiated in Pakistan and the 1973 constitution having more Islamic provisions but it failed to achieve its real change in Pakistan's state and society. There are three major occurrences of incoherence in this process of Islamization. First there have been clear differences in the formal codes and social norms. Second huge gape existed amongst the norms of courts and statutory legal norms and third the legal norms itself. A writer noted

“(1) the difference between formal legal codes and socially observed norms; (2) the gap between statutory legal norms and the norms actually applied in practice in the courts; and (3) differences between legal norms, such as where the requirements for evidence prevent substantive law from actually being carried out”.²⁷

The slogan of Islamization has been used by Pakistani politicians and dictators to strengthen their power in Pakistan as “after Jinnah, various leaders came up with their own novel ideas of reforming Islam. Ayub Khan introduced ‘modern’ Islam, whereas Bhutto came up with his version of a ‘socialist’ Islam. Not forgetting the ‘classical’ Islam of Zia we would also gaze upon the ‘compromising’ Islam of Benazir Bhutto and the ‘capitalist’ version of Islam introduced by Nawaz Sharif.” It is process of Islamization and “the Islamic ideology was never ever to be made a closed, dogmatic and politically expedient code in the hands of the ruling elite. But the Ulema defined Islamization and its use as a political weapon and put the country on a different track with serious consequences. Unfortunately, both the civil and military rulers continued the use of Islamization as a political weapon and went on ignoring the people of Pakistan.”²⁸

The Islamization process of laws in Pakistan has been described by some experts as duality in its nature. An expert noted “On the one hand, Islamization exacerbated the structural problems deeply embedded in Pakistan's post-colonial legal system and provided the state as well as the powerful social elites with new avenues of coercion and harassment. Islamization also increased the internal dissonance between the different parts of the legal system and added new stress to the judicial hierarchy by creating jurisdictional conflicts between appellate courts. On the other hand, Islamization has introduced indigenous laws and, much more significantly, indigenous modes of thinking about legality, and hence a basis for constitutionalism and due process in Pakistan's legal milieu. It has provided the public morality on which positive constitutional law may be grounded. It has furnished the superior courts with the moorings to affect fundamental change in the institutional balance of power within the post-colonial state such that the Rule of Law and the accountability of the executive have become increasingly more relevant.”²⁹

Conclusion

The 1973 constitution as compare to the previous constitutions, have more Islamic provisions and clauses to promote and strengthen the Islamic values in state and society of Pakistan. It declares Pakistan as an Islamic Republic and Islam as the state religion. Objectives Resolution became the part of the constitution that sovereignty over the entire universe belongs to Allah Almighty. It noted that the principles of democracy, equity, freedom, social-economic and political justice, tolerance, as pronounced by Islam shall be observed. It also focused on the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah. The teaching of Quran and Islamic studies was also made compulsory, in addition to ratifying and facilitating the teaching of the Arabic language and the principles of Zakat, Auqaf, and organization of

mosque are also endeavored. More importantly it noted that all existing law should be reconciled with the rules of Islam and future law must not be in conflict with Islamic law. The Constitution also states that only a Muslim is qualified to be elected president or prime minister of the country.

The Constitution also states that the prevention of prostitution, gambling and alcohol consumption, as well as the printing, publication, dissemination and exhibit of obscene literature and publicity is a duty of the State. In order to reconcile future laws with Islamic law, the Council of Islamic Ideology and for Islamizing the existing laws and its functioning Federal Shariah court were established. Several provisions of Sharia laws have also been incorporated into the Criminal Code. The Federal Court of the Sharia and the section of the Sharia of the Supreme Court serve as appeals courts for certain sentences in criminal courts, in accordance with the Hudood ordinances. All judges and prosecutors of these courts must be Muslims. The Constitution includes a series of basic and fundamental rights, and prohibits any form of discrimination.

Unfortunately Pakistan's history has been marked by political instability through intense domestic conflict as well as tensions between the strictly religious camp and less religious-conservative forces as well as the lack of political consensus and the desire for power of individuals. This created the breeding ground for military dictatorships. Even till now, there is a clear tension between traditionalists and progressive thinkers and political forces. Even after the enforcement of the more Islamize constitution of the 1973 that remained an agreed document for decades, these political difficulties and differences were reflected amongst the leadership of Pakistan, and the confusion of the place of Islam in the constitutional history also prevailed. The question arises that what type of conceptual confusion existed amongst the various groups i.e. the rightists, the leftists, modernists, and the secular, where Islam has been very explicitly mentioned again and again in the constitution of Pakistan. Most recently the questions of how Islamic the Constitution of Pakistan is remained a roadblock in negotiations between the government of Pakistan and the Tehreek-i-Taliban Pakistan. The TTP leadership refused to hold talks with the politicians, who were considered by TTP, to be bound under an un-Islamic constitution.

Even today, politicians are aware of the power that has the appeal to religion for the social movement, but the widespread lack of religious knowledge has contributed; in a growing way to the resistance against this type of initiative. The most intransigent political and religious parties adopt a challenging stance in the face of any attempt to implement constitutional religious reforms in Pakistan. In any case, it is important to understand that these politically motivated elements to introduce Islamic Shaira through constitutional are not representative of the whole Pakistani religious community. While power structures and pressure groups have often used

religion as a control mechanism, Pakistan society is more tolerant and progressive than it has been wanted to represent. Religious fanaticism is a phenomenon that has only recently been introduced in society. For the street man, the supposed differences between a progressive Islam and a traditional or conservative Islam are purely nominal, and often only reflect the differences existing in the educational, professional and political affiliation.

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