

Legitimacy and Significance of Art. 2A in the Constitution of Islamic Republic of Pakistan, 1973

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ABSTRACT

Religion is a nearly common institution in humanity. It is found in all societies past and present. All the prehistoric societies have the influence of religions in their societies. Religion goes back to commencement of the culture itself. There is no primeval society without religion. It is social treatise that deals with familiarity and restraint. Religion is concerned with the shared beliefs and practices of human being. Allah being creator of this universe delegates his authority to those who owes it as a sacred trust in order to maintain peace and justice on this earth as per his commandments. Islam is an ideology sanctioned by revealed law. It is a way of life universal, humanitarian, eternal and egalitarian based on equality, fraternity, justice and liberty. Now, it is the duty of the state as well as the people of Pakistan to resort to the golden rules of Islam as enunciated by the Holy Quran and Muhammad (PBUH), in all fields of life. The key concern of this research is to evaluate the legitimacy of Art. 2A in the constitution of Pakistan and how is it practiced in Pakistan?

Key Words: Constitution of Pakistan, Political, Islam, Objective Resolution, Preamble & Art. 2A

Underpinning of the state of Pakistan

Pakistan appeared as a state because of the Islamic perception of the people of subcontinent which had developed over a number of times, served by the notions of many rulers, religious leaders, researchers, theorists and poets. The Muslims of India apprehended afterwards the incidence of certain events in the political, social and economic perspective of India that it is not possible to live with Hindus in the subcontinent after the withdrawal of British rulers. It was presumed the Hindus were thinking to replace the British regime due to their dominating position in all

walks of life and the Muslims of India needs their own state due to their distinct Ideology of Islam and a sovereign Islamic polity where they would live according to their own religious and cultural values.

The history of Pakistan dates back from the entry of Muhammad Bin Qasim in Sindh who conquered it and headed towards the establishment of Muslim rule in Sindh. In 999 A.D. the other Muslim rulers like Mehmood Ghaznavi, Ghouri and Zahiruddin Babar who established the Mughal Empire caused a rapid spread of Islam in India but did not amalgamate their identity with other communities living in the region.

However, regrettably, the bulwarks of the real faith were damaged by the Emperor Akbar, who announced Din-e-Ilahi, which was a mixture of diverse religions. He introduced various Un-Islamic practices in his era but an intense response by the Muslim saints like, Mujaddad Alf Sani was portrayed who exposed the so-called myth of Din-e-Ilahi. However, all these Un-Islamic practices were eliminated by his great grandson Aurangzeb who united the Muslims of India first ever as a combined nation (Rehman, 2008).

In 1857, the Jang-e- Azadi after the emperor Aurangzeb became ultimately the existence of the Muslim organization in India was endangered by the growing wave of Jats, Rajputs, Sikhs and Marhathas but a spiritual scholar and reformer Shah Wali Ullah anticipated the threat and contact with Muslim personalities to deal with eminent danger approaching towards them. He himself started a drive to motivate the Muslim masses for the sanctuary and elevation of Islam in India in order to purify the Muslim society by eradicating bribery which was widespread then and to strengthen the concept of Jihad. It was the first effort in the subcontinent of India which prepared the Muslims to encounter the challenges of prevailing rivals. However, this drive after some time went covert only to resurface with the arrival of the British in the country afterwards through the 'Jang-e-Azadi of 1857' (Mehmood, 2000).

The new rulers try their best to suppress the Muslims of India and as a result Muslims suffered a lot. The Hindus accepted the new imperative of the British and provided full support snub the Muslims of India (Ibid). The renowned Muslim scholars like Sir Syed, Jamal ud din Afghani; Maulana Hasrat Mohani etc. realized that Muslims of India needs their own separate sovereign state in order to live as per Islamic principles. On Dec.29 1930, the great thinker, poet and philosopher Allama Muhammad Iqbal in his presidential address of All India Muslim League at Allahabad was the first one who formally launched the idea of an independent and separate sovereign state for the Muslims of India comprises on the Muslim dominated areas (Amin, 2003: 2-3).

Later on, Mohammad Ali Jinnah provided his thought provoking idea of "Two-Nation Theory" in the presidential speech at the annual conference of the Muslim League on March 1940 and a resolution was passed for an independent sovereign state for the Muslims of India. He was given the title of Quaid-e-Adam on his untiring efforts for the Muslims of British India. Quaid did a lot of efforts to liberate Muslims from the dominating role of Hindus. On Jan. 3 1941, at Bombay,

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he said, "What the Muslims should have opportunity to have their own governments in two zones which they considered as their homelands and develop their own culture." On March, 1941 at Aligarh, he explained, "Pakistan is not only a practicable but the only goal if you want to save Islam from complete annihilation in this country."

The country was achieved in the name of Islam and without this belief it would become worthless as Islamic principles provides the foundation of nationhood and patriotism in Pakistan.

Research questions

The current research involved these questions;

- 1-What is the implication of Art. 2A in the constitution of Pakistan, 1973?
- 2-What impact has depicted by Art. 2A as an operative part of the Constitution of Pakistan, 1973?

Methods and methodology

The contemporary research is the study of Art. 2A in the Constitution of Pakistan 1973. It is an analysis of Art. 2A which involve the law making process in the parliament and its compliance by the courts of law in Pakistan.

This learning involved both normative and empirical methods which comprises the primary and secondary foundations. Firstly, it is an analysis of the study and evaluation of Art. 2A in the Constitution of Pakistan. It elaborate constitutional amendments, books, journals, case laws, academic articles, websites, newspapers and blogs formulating material related to the study.

Islamic provisions in the constitution of Pakistan 1973

In 1970, the elected parliament was given the task to draft the Constitution of Pakistan. On April 17, 1972, the first meeting of the committee including all the representatives was held and the members were briefed about the fundamental principles on which the new Constitution has to be drafted. The task of constitution making was carried on under the supervision of the Minister of Law and parliamentary affairs Mr. Mehmood Ali Qasoori, later it was assigned to Mr. Hafiz Pirzada who replaced the former as Law Minister. The task completed by the committee on 20th December, 1972.

The draft constitution prepared by the committee was presented before the Assembly for approval on 2nd February, 1973. The recommendations of the committee were thoroughly examined and deliberations took place in the sessions of the Assembly. On April 10, 1973, it was approved by the parliament and signed by the head of state on April 12, 1973. On 14th August, 1973, the constitution was

executed and the day was termed as the commencing day of the constitution (Sarwar, 1993: 263).

As we know that various Islamic provisions are provided in our constitution which are scattered throughout the various parts of the constitution. For our convenience we will divide these provisions into two genres.

- Those Islamic provisions which are expressly provided in the constitution and,
- Those which are not expressly provided and we can term them as implied Islamic provisions.

Preamble is the most significant provision in express provisions provided in the constitution of Pakistan, 1973.

Preamble

The preamble of the constitution which lays down the key objectives which the constitution makers have in their mind to achieve. It aims to furnish the basic concepts, guidelines and governing doctrines on which the constitution is to be founded. In order to see deep into the purpose of the framers of the constitution as to what type of political system they wanted to establish, it is required here to arrest the contents of the preamble of the Constitution, of 1973.

- It starts with the words of (Bismillah)
- The word ' sovereignty, is used in paragraph (1) of the preamble which says, that authority over the whole world belongs to Allah alone and the power to be applied by the people of Pakistan within limits set by him. The word ' sovereignty, is used here in a religious and not in a political or legal sense. In law dominance entails an absolute power of enacting, amending or annulling laws constitutional or not, but the legislature in an Islamic state is not supreme in this sense because it does not have authority to make any law as per their desires, that power being inadequate by the boundaries enforced by Islam on law making, which are lasting and cannot be impasse by any course of law.
- A guarantee for the application of fundamental rights is also specified in the preamble, subject to law and public morals.
- Impartiality of judiciary is also fortified in the preamble.
- The preamble also recites that the Quaid-e-Azam had affirmed that Pakistan would be an egalitarian state established on Islamic principles of social justice. There can be a little doubt that in describing the future political system of Pakistan as democratic, the Quaid-e-Azam was using the word in its popular sense, namely, a system which the government can remain in the office only by the will of the people, accountable to and changeable by the people, and is charged with the duty of promoting social justice, which is a fundamental obligation of the state in Islam.

We can extract from above, the desire of framers of constitution to establish an Islamic polity, for instance the concept of divine sovereignty is enshrined in the very first paragraph of preamble, and Islamic notion of authority is

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completely diverse from the Western dominion. It has been originated from its primary sources i.e. Quran and Sunnah. The essential features of the Islamic notion are:

1. Sovereignty of Allah over the entire universe
2. Khilafat of Man i.e. an authority bestowed by God and to perform his duty as a sacred trust on this earth.
3. Delegated or Limited Authority of Legislation of the Amir.

Preamble as an operative part of the constitution

During the debate on Draft Constitution, there was a lengthy debate on the status and position of the Preamble as an operative part of the Constitution. Some members were demanding to treat the Preamble like any other functioning part of the Constitution and in a way created some doubts regarding above mentioned situation.

Hence, the preamble at best roles as what is thought to be appearance of intent, nothing outside that (Rizwi, 2005:3). The Preamble cannot have the same status or authority, as the operative part of the constitution itself, unless it is incorporated therein and included in it as its substantive part. The purpose of a Preamble is that in case of any hesitation as to the objective of legislature it may be observed at in order to determine a real sense of a specific provision but cannot control the substantive provisions of the enactment (State V. Zia-ur-Rehman, 1973).

On March 2, 1985, Art. 2A was inserted in the constitution by the presidential order No. 14 of 1985 enforced by the head of state. In this way the objective Resolution has become an active part of the constitution. The new accumulation in the constitution got its significance and ultimately become an essential part of the constitution. Thus the condition laid down by the supreme court in Zia-ur-Rehman's case to the effect that although objective resolution has generally been established and has never been annulled or abandoned, but at the same time does not recognized as par the constitution itself and consequently, any amendment whether in the constitution or the law which is in violation of the objective resolution must be declared repugnant (Ibid).

Interpretation of art. 2A by high courts

Justice Tanzil ur rehman observed that by virtue of Article 2A, the holy Quran and the Sunnah of Muhammad (PBUH), for Muslim community around the globe means the Supreme Law and Command has eventually developed the absolute Law of Pakistan. Authority of Allah, in a broader sense assuming all political, legal, social and economic spheres, is now an applicable governance. The enforceable, which are foundation of the Constitution and got the sanctity to be implemented more effectively than the Constitution itself and any law of Pakistan

which is repugnant to the same will be declared null and void. He further added that courts in Pakistan are not only capable but indulged to interpret and apply present laws with such editions as are essential as per Quran and Sunnah (Habib Bank Limited V. Muhammad Hussain, 1987).

The full bench of the Sindh High Court in Sharaf Afaridi's case held that:

It is not necessary for the Courts to strike down any provision of the Constitution if it is inconsistent with the Objectives Resolution or with any other provision thereof which stands on a higher pedestal Court can solve the problem by applying the principle of harmonious interpretation keeping in view the principles of Islamic Ideology, morality, public good read with the judicial activism following the latest trend of the decisions of the Supreme Court and High Courts of the country. In the same judgment the Court observed, that it is not open to the High Court to hold that any of the Constitutional provisions is violative of the Objectives Resolution (Sharaf Faridi V. Federation of Islamic Republic of Pakistan, 1989).

Mr. Justice Allah Nawaz of Lahore High Court in Kaniz Fatima's case observed that High Court being a creation of the Constitution, is to make adjudication strictly in accordance with the Constitution and thus cannot undertake the job of "declaring any part of the Constitution as ultra vires, that being the sole function of Parliament. His lordship further observed that no law in Pakistan can be tested on the touch stone of the Objectives Resolution to bring it in accord with the injunctions of Islam (Kaniz Fatima V. Wali Muhammad, 1989).

Again in Masu V. United Bank Ltd., Mr. Justice Allah Nawaz perceived that Article 2-A is not self-accomplishing provision in the Constitution and High Court has no power to observe any law on the standard of Objectives Resolution (Masu V. United Bank Ltd. 1990).

The above mentioned judgments of the superior courts of Pakistan show that provisions of Article 2-A attracted a lot of discussion and opposite views on the questions like, status, and authority of Article 2-A vis-a-vis other Articles of the Constitution. It was also debated whether it is self-executory provision or not. But this discussion reached its culmination before the Full Bench of the Lahore High Court headed by Mr. Justice Sh. Riaz Ahmad. A large number of writ petitions were filed against the order of the President of Pakistan whereby, the President had vide letter NO.6/15/86 PTNS, Islamabad dated, 7.12.88, while exercising his powers under Article 45 of (lie Constitution, commuted all death sentences awarded by the Military or other courts up to the imprisonment for life.

However, the cases would be on different footings if a person has been punished by way of Tazeer as in such cases, the head of the State has the power to pardon the offender and that too in public interest (Sakina Bibi v. federation of Pakistan, 1992).

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Interpretation of article 2A by the Supreme Court

This was the greatest judgment in reference with interpretation and status of Article 2A of the Constitution. Against the decision of Full Bench of Lahore High Court an appeal was filed in the Supreme Court. Under the title as Hakam Khan Son of Fazal Elahi and two others V. Government of Pakistan, etc. The arguments were heard by the Honourable Supreme, Court and the judgment was announced. The appeals were allowed by the Supreme Court and the cases were remanded to the Lahore High Court for re-decision in the light of the observations made by the Supreme Court (Hakim Khan V. Govt. of Pakistan, 1992).

In another case the Supreme Court of Pakistan took a step further towards the interpretation of Article 2A and observed:

Provisions of Article 2A strive at carrying current laws in conformity with Injunctions of Islam and also no contraventions with these Islamic provisions and the procedure of judging such enactments has been enumerated in the Constitution of Pakistan. The Courts have not vested any authority by the framers to declare null and void any law just on the basis of Art.2A but this can be done in connivance of Art. 8 of the Constitution (Kaniz Fatima V Wali Muhammad, 1993).

In the same judgment, it has been further observed that principles of Islamic Law and injunctions of Islam have to be kept in view and should be applied in interpretation of statutes or in cases where, administrative decision affect individual's rights, the superior court may not strike down such law, rule and regulation on the touch stone of Article 2-A or Article 227 of the Constitution but the action under law can be tested in case where judicial review is permissible (Ibid).

In the same judgment, the court further observed that Political Justice include complete functioning of political parties which include full participation in election and the winning political party has a fundamental political right under Article 17 to be read with Article 2-A to complete the term provided under the Constitution (Muhammad Nawaz Sharif V. President of Pakistan, 1993).

In another case the Supreme Court pointed out a curb on the powers of elected representatives to discourage the tendency on their part to exploit their position. Therefore, it was observed, "...any abuse of position on the part of chosen representatives will amount to breach of such sacred trust entailing heavenly and worldly punishment" (Muhammad Muqem Khoso V. President of Pakistan, 1994).

The above resume of case law shows that every year arguments are being given regarding the explanation of Article 2-A. In the initial years the Superior Courts gave conflicting judgment, for example, in Muhammad Hussain's case, it was held that by feature of Article 2-A the Book of Allah and the sayings of the

prophet Muhammad ﷺ, that Muslims believe to be the supreme law and therefore, a Superior Law of Pakistan. It was held that Article 2-A is basis for Constitution and succeeds all laws and even the Constitutional provisions that contradicts it (Habib Bank Ltd. V. Muhammad Hussain, 1987). But this view was considered an extreme interpretation of Article 2-A. Almost similar but less harsh view was taken by Full Bench in National Industrial Cooperative Credit Corporation's case where the Superior Courts of Pakistan remained consistent in their opinions that:

On the basis of Article 2-A, no law or provision of the Constitution can be struck down because this can be done only by the Parliament. Moreover, Article 2A does not add/confer any new fundamental right. In this context Article 8 clearly declares that no law can exist or be made in contravention of Fundamental Rights (National Industrial Cooperative Credit Corporation Ltd. V. President of Punjab, 1992).

However, the above, discussion confine that the superior Courts of Pakistan are undisputed in their opinion that for explanation of the provision of the Constitution and other enactments, the provisions of Article 2-A are to be considered, encouraged and applied wherever necessary.

Sharia Appellate Bench of the Supreme Court of Pakistan in its latest judgment appraised the preceding judgments of the Supreme Court concerning eminence and power of Article 2A of the constitution. The Bench also alleged that Article 2A has enriched the power of judicial review of the superior Court in Pakistan. It is also apprehended that even provisions of Constitution which relate to Fundamental Rights must have conformity with injunctions of Islam. Mr. Justice Khalil-ur-Rehman envisaged as under:

This Courts in Pakistan has closely observed its impact and declared that adoption of Objectives Resolution as Article 2A in the Constitution by legislature as an operative part of the Constitution, is the acknowledgement of power of Allah to be vital on them who assured that they will use only the delegated powers within the specified limits by Allah. Therefore, this recognition also developed the supremacy of judicial review of the Supreme Court. It was further observed that "the Constitution has adopted the Injunctions of Islam as contained in Qur'an and Sunnah of (The Holy Prophet (PBUH) are now the positive 'law. Article 2A made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law as embodied in the Objectives Resolution, have become effective and operative". Therefore, every substitute law must now follow to the Injunctions of Islam as mentioned in the Holy Qur'an and Sunnah of Muhammad (PBUH). Therefore, even the Fundamental Rights as given in the Constitution should not infringe the injunctions of Islam (Zaheer-ud-Din and others V. the State and others, 1993).

The integration of the Objectives Resolution as functional part of the Constitution by incorporating Article 2A in the Constitution of the Islamic Republic of Pakistan, 1973 paved a way forward to frame laws as well as actions

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as per the grund norm of the Constitution i.e. Art. 2A (Mushtaq Ahmad Mohal and others V. The Honourable Lahore High Court, Lahore and others, 1997).

Conclusion

It is obvious that Art. 2A is now an operative part of the Constitution of Pakistan, 1973 whereas it was non-operative part of the previous Constitutions. There is a series of judgements by the High courts and Supreme Court of Pakistan to conform the laws of Pakistan as per the mandate of Art. 2A of the Constitution of Pakistan. The provisions of Article 2A endeavor at carrying present laws in conformity with Islamic Injunctions and also to look whether any law contravenes with such injunctions. There is a clear procedure laid down to observe such laws and enactments that has been provided under the Constitution. However, the Courts have not conferred any authority by the parliament to annul any law on the basis of Article 2A but they may do the same on the basis of Art. 8 of the Constitution of Pakistan 1973. This is a fact that Art. 2A may play a vital role in the law making process in Pakistan as per Quran and Sunnah but the framers of the Constitution did not provided a way forward yet to frame laws in conformity with the said article.

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