

# CONSTITUTION AND THE SUPREMACY OF SHARIAH

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Reference to be provided by Prof. Khurshid

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The Shariat Bill envisages establishment of the supremacy of the Quran and Sunnah. That is the real target and even some of those who have expressed reservations about the Shariat Bill have categorically said that they are all for the supremacy of the Shariah. The Government also claims adherence to this objective. There is no doubt that the entire nation stands committed to this objective from the moment Pakistan movement was launched. If we have not been able to achieve it, the failure is that of the leadership and not otherwise.

In the Report of the Select Committee appointed by Senate, placed before the Senate in December, 1985, by Hr. Maqbool Ahmad Khan, the then Minister for Religious Affairs, expressed some reservations about the Bill and suggested that clause 3, 4 and 5 of the Bill are repugnant to article 203.B(c), clause 7 is in conflict with article 248 of the Constitution while clause 10 is in conflict with article 177(2), 203(c) and chapter 3A of the Constitution.

The Islamic Ideology Council in its comments on the Shariat Bill suggested that articles 2-A, 177, 193 and 203.B would have to be amended to give effect to the provisions of the Shariat Bill.

We have examined the Constitution and without claiming that all or even most of the important points which deserve to be reviewed to bring the constitution in consonance with the demands of the supremacy of the shariah, an effort is being made to identify amendments required in the Constitution that may, on the one hand give effect to the provisions and stipulations of the shariah bill through constitutional means, and on the other, bring the constitution in conformity with the explicit injunctions of the Quran and Sunnah. The principle to bring the Constitution in conformity with the changes made in article 2 through the Ninth Constitutional Amendment as well as by the incorporation of the objectives resolution in article 2-A of the Constitution, has already been accepted in the form of a resolution of the National Assembly and the Senate in October 1985. As such there is a very strong case to make the following amendments in the Constitution. We hope this would resolve the issue of conflict between Shariah and the Constitution as well as the alleged conflict between Constitution and the Shariat bill. It has to be realized that the Constitution has precedence over any ordinary act of the Parliament and as such what should be in the Constitution cannot be taken care of merely by a Federal Act. Let us be very clear that Shariat Bill represents a concept, an approach and a need, and it is our duty to see how this concept can be realized through constitutional amendment, federal law and executive action:

1. Article 2 is being amended through Ninth Constitutional Amendment. The objectives Resolution has also been incorporated in the body of the Constitution in the form of 2-A. As such it may not be advisable to further amend this article at this stage, although it would have been better if the whole article was redrafted to provide for the supremacy of the Quran and Sunnah in clear and the unequivocal terms.

2. Articles 4 and 5 of the Constitution are very fundamental articles and lay down the basis of the whole legal system of the country. They deserve to be amended to make explicit provision for the supremacy of the Shariah. We would suggest the following:
  - a) Article 4: Its title be called "right of individuals to be dealt with in accordance with the Shariah, law, etc."
  - b) Article 4(a): In this article the word "Shariah" be added and prefixed to the word "Law" used five times in this article.
3. In article 5 a new article be added as 5-A with the short title "Supremacy of Shariah". The new clause is as follows;

### Supremacy of Shariah

- 5 (a) Notwithstanding anything contained in the Constitution or the law, all enactments made by Majlis-e-Shoora (Parliament) or a Provincial Assembly, ordinances issued by the President or a Governor rules, regulations and bye-laws made by any authority, body or corporation, judgments, decisions or orders passed by any court, tribunal or authority including the President, Governor, Supreme Court, High Court or the Federal Shariat Court, a Government, a local authority, a body or a corporation shall be in accordance with the Shariah; and any law, or direction, decision or action issued or taken at any time which is repugnant to the injunctions of Islam as contained in the holy Quran and Shariah of the holy Prophet (peace be upon him) shall be void."
4. 111 article 8(1), line 2, after "inconsistent with the" and before "rights over" add "Shariah and the".
5. Article 31 of the Constitution dealing with the directive principle of the state policy has to be further strengthened. In this respect after 31(c), the following may be added:
  - “(d) All functionaries of the state belonging to executive judiciary or legislature, federation, provinces or local administration shall respect and follow the obligations of the Shariah and avoid its prohibitions.”
  - “(e) All those forms of business or economic and financial activities which are repugnant to the Shariah shall be prohibited and wealth procured through illegitimate means may be subject to confiscation by the state under a

special law made for the purpose to ensure prohibition of illegitimate means of income."

**“(f)** The restructuring of the whole educational system and the educational policy in the country to bring them in conformity with Islamic values and traditions,"

**“(g)** The communication media, particularly radio, T.V. and press would respect the ethical norms of Shariah and would project the teachings of Islam in appropriate manner.

6. Article 45 of the Constitution has to be amended to bring it in conformity with the Shariah because the head of the state has no right in Islam to remit; suspend or commute any stance relating to Hadud or Qisas. It is therefore proposed that after the word "authority" full stop be replaced, by quoma and the following be added;

"Except a sentence passed by any court or authority in any of the laws enforcing any Hadud or Qisas"

7. Article 91 deals with the appointment of the Prime Minister. While the original Q1973 constitution laid down that the prime minister shall be a Muslim, and the oath of the prime minister assumes him to be a Muslim, there is no explicit mention of this in the present formulation of article 91 as amended in March, 1985. It is therefore proposed that article 91 be amended as follows:

**a)** Article 91 (2) line 2 after “from amongst the” and before “members” add “Muslim”.

**b)** Article 91 (2-A) line 3 after “shall invite the” and before “members” add “Muslim”.

8. Article 177 deals with the appointment of the Chief justice of Pakistan and the judges of the Supreme Court. After president and the prime minister this is the most important position in an Islamic state. It is therefore essential that the chief justice should be a Muslim, having adequate knowledge of Islam, it is therefore proposed that this article be amended as follows:

**a)** After article 177 after (1) the following (1-A) be added:

“(1-A) the Chief justice of Pakistan Shall be a Muslim, having adequate knowledge of Islam, and qualified to be appointed as Judge of the Supreme Court”.

**b)** In article 177 (2) after (b) the following (c) be added:

“(c) He has for a period of or for periods aggregating not less than 15 years been a Mufti in recognized religious institution or engaged in research or teaching the Islamic sciences in such an institution”.

**9.** In article 193(2) after (c) add (d) as follows:

**d.** He has, for a period of not less than 10 years, served as a Mufti, or has been engaged in research or teaching in a recognized religious institution."

**10.** Chapter 3-A may be further amended as follows:

**a)** "Article 203 B (c) lines 2 after "constitution" replace quoma (,) by full stop (.) And delete the remaining sentence".

**b)** “Article 203 (c) line 3 after “president” replace “full stop” by “quoma” and add “on the recommendation of the Chief Justice of Pakistan”.

**c)** "In article 203(c) (3), after "High Court" substitute full stop by quoma and add "has adequate knowledge of Islamic Shariah."

**d)** In 203(c) (3A), line 3, after "not" and before "than" replace "more" with "less". In line 4, replace full stop by quoma and add "have served for not less than ten years as Mufti or engaged in research or teaching in Islamic sciences in a recognized seat of Islamic learning."

**e)** In 203(c)(4), article (4) be substituted as follows:

"(4) The Chief Justice or a Judge of the Federal Shariat Court shall hold office until he attains the age of 55 years, unless he resigns or is removed "from office in accordance with the law."

**f)** Article 203(c) clause 4(B), 4(c) and 5 may be omitted.

**g)** In 203(d), in proviso to clause (2) substitute words "before the disposal of such appeal" by “tills the operation of the decision is suspended by the Supreme Court."

**h)** In 203(e) (8), line 2 after the word "Court" put a full stop and delete the remaining i.e. "under article 203(d)."

**i)** In 203(f), clause (6), last line the words "and allowances as that of a judge or a Supreme Court" shall be substituted for the words "as the Judge of

the Supreme Court can be paid such allowances as the President may determine."

- 11.** Article 248: It is preferable that this article be deleted. If this is not possible than at least the following amendments must be made:

Add after proviso to 248(1) the following:

"Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the persons mentioned in 248(1) for actions taken in their personal capacity or for actions taken in abuse of their official powers"

- 12.** Article 248(2) is deleted.

- 13.** Article 248(4), line 5, and replace "sixty" by "fifteen".

- 14.** In article 260 add after "service of Pakistan" and before "Speaker" the following:

"Shariah/Shariat means the Quran and Sunnah.

Explanation: In interpreting the injunctions of the Quran and Sunnah guidance shall be sought from the following:

- a) Sunnah of Khulafa-e-Rashideen;
- b) Tamul of the venerated Ahle Bait and the companions of the Prophet (peace be upon him);
- c) Ijma-e-Ummat; and
- d) Expositions and opinions of recognized jurists (Fuqaha-e-Islam).

- 15.** In article 270-A, clause 1, at the end and before the proviso replace colon by quoma and add "except on the grounds of being repugnant to the Shariah and in clause (2) at the end after the words "whatsoever" substitute full stop by quoma and add "except to the extent of its being repugnant to the Shariah."

### 3RD SCHEDULE

In the Oath of the Office of the President, Prime Minister, Federal Ministers, Speakers of National Assembly, 'Chairman of Senate, Deputy Chairman of National Assembly, Deputy Chairman of Senate, Members of National Assembly, Members of Senate, Chief Election Commissioner, Governors of provinces, Chief Ministers, Provincial Ministers, Speakers and

Deputy Speakers of Provincial Assembly. Member of a Provincial Assembly, Chief Justice and Judges of the Supreme Court and Chief Justice and Judges of High Court, Auditor General, Chief Justice and Judges of the Federal Shariat Court, in between the words "faithfully in accordance with the" and the words "Constitution" the word "and, Shariat" shall be inserted.

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