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Judicial constructions of National identity in Pakistan

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The Judiciary in Pakistan has perhaps, had the greatest opportunity to mould and construct a national identity as compared to the Judiciaries of India and Bangladesh. This has been made possible by the peculiar set of circumstances that Pakistan found itself in since its inception as a sovereign nation-state. Pakistan took birth on the promise of a separate nation for Muslims of the subcontinent. However, the real purpose of Pakistan got shrouded in ambiguity soon after and continues to be so because the rival narrative of Pakistan as an Islamic theocracy based on dogmatic Islamic law has taken over as the dominant narrative.

Pakistan represents a case of a makeshift or temporary national identity because the other real differences among Muslims on ethnic, linguistic and cultural lines were cleverly suppressed by the Muslim League and religion was the only ascriptive feature used for imagining and constructing the national identity. Due to the above set of historical circumstances, Pakistan has been torn between two facets of its identity: whether it is a liberal democracy in the western sense of the term conceived primarily for the Muslim minority of the Indian subcontinent or a "theocracy" to be guided by the principles of Islam while borrowing its democratic institutions from the west. The intellectual discourse in Pakistan together with the Political elites have been constantly trying to shape and reshape Pakistan's constitutional democracy but the search for a definite identity is still eluding Pakistan. The rift in the idea of Pakistan can be traced back to two major events where the founding fathers laid the normative bases on which the newly born nation was to erect itself. They are: First Presidential address to the Constituent assembly of Pakistan by Muhammad Ali Jinnah, 11th August, 1947 and the Objectives Resolution adopted by the Constituent Assembly of Pakistan under the Prime Minister ship of Liaqat Ali Khan on 12th March, 1949. The 11th August Speech of Jinnah where he spoke his vision for the state of Pakistan, clearly envisaged Pakistan as a Liberal Democracy with no state religion. Some excerpts from his speech are quoted below:

Dealing with our first function in this Assembly...The first observation I would like to make is this: You will no doubt agree with me that the first duty of a government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State...You are free; you are free to go to your temples, you are free to go

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to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed — that has nothing to do with the business of the State...We are starting with this fundamental principle: that we are all citizens, and equal citizens, of one State.... Now I think we should keep that in front of us as our ideal, and you will find that in course of time Hindus would cease to be Hindus, and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.[1]

The legislators, the Judges, the elected officials and the intellectuals supporting the idea of Pakistan as a secular democracy refer to the above speech by Jinnah to justify their view, whereas people on the other side argue that this speech was made by Jinnah simply to assuage the fears of the minorities of Pakistan under the incumbent situation. That it was a strategic move to assure non-Muslim minorities that they will be treated fairly as equal citizens of Pakistan (Datta, 2004). They say that the whole idea behind formation of Pakistan was to have a State based on Islamic principles and Jinnah was well aware of it. This debate though, is still very inconclusive and is played out day to day in different public forums. The way it is played out in the courts forms the primary research objective of this thesis. The way court decisions are informed by this debate and in turn, the way court decisions shape the public discourse is sought to be examined.

The Objectives resolution was Pakistan's first attempt at constitution making following the Indian example where Jawaharlal Nehru also presented an Objectives Resolution in the Constituent Assembly of India on December 13th, 1946. It was presented by Pakistan's first Prime Minister Liaqat Ali Khan and adopted by the Constituent Assembly of Pakistan on 12th March, 1949. Though it envisaged a similar line of vision for Pakistan's minorities as enunciated by Jinnah, but ran quite contrary in the matters of state religion. It declared the following:

(i) Sovereignty belongs to Allah alone but He has delegated it to the state of Pakistan through its people for being exercised within the limits prescribed by Him as a sacred trust;

(ii) The state shall exercise its powers and authority through the chosen representatives of the people;

(iii) The principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;

(iv) Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings of Islam as set out in the Quran and Sunnah;

(v) Adequate provision shall be made for the minorities to freely profess and practice their religions and develop their cultures;

(vi) Pakistan shall be a federation;

(vii) Fundamental rights shall be guaranteed;

(viii) The judiciary shall be independent.[2]

After the passing of the Objectives Resolution, all the Constitutions of 1956, 1962 and 1973 carried forward the spirit of the above resolution and contained certain provisions from

1. Mr. Jinnah's address to the Constituent Assembly of Pakistan www.columbia.edu/itc/mealac/pritchett/.../txt_jinnah_assembly_1947.html (accessed on 29th March, 2014)
2. http://en.wikipedia.org/wiki/Objectives_Resolution (accessed on 29th March 2014)

Islam. Though, the first constitution of 1956 as well as all the subsequent constitutions proclaim Pakistan to be an Islamic state, but there is a strong tension subtly lying underneath which can be seen when the state institutions and Laws are sought to be brought into consonance with Islamic principles. This is because the founders and the early rulers of Pakistan were men acculturated in British political tradition and promoted liberal democratic values (Cheema, 2012). Pakistan like India inherited colonial legal system based on English Common Law and had all its state structures modeled on the western institutions of government. That is why, even when Islamization of Laws has always been a part of the political discourse and the word Islam finds mention in Pakistan's constitution, the state of Pakistan is not fully Islamized. The process is very much underway and the resultant friction is very much there.

Coming back to the circumstances which forced the courts to play a greater role in shaping the national identity of Pakistan, the weakness of the elected offices, was a major reason. The lack of strong political institutions in Pakistan can be traced back to the weak organizational networks of the Muslim League in the areas which finally constituted the territory of Pakistan. Big swathes of territory where the Muslim League enjoyed support remained in India. This, combined with a strong camaraderie between the Military and the Civil Bureaucracy both of which had a high Punjabi preponderance resulted in frequent disruptions of the constitutional order and long phases of military rule. Every time a military coup took over the government machinery, the Supreme Court was called upon at the behest of the political representatives to make sense of the legality or necessity, as the case may be, of the military rule.

A preliminary assessment of the landmark verdicts delivered by the Pakistan courts show that they have preferred the Objectives Resolution over Jinnah's vision in deciding constitutional questions and have thereby contributed in shaping the national identity in religious terms. The thrust of the political elite, including both the elected government and the military rulers, to bring the successive constitutions of Pakistan in consonance with the spirit of the Objectives Resolution has affected the Pakistan Judiciary to a great extent. This can be seen in the stance taken by the Supreme Court whenever it had to grapple with the question of Islamization of Laws. Islamization of Laws has prominently been the instrument employed by the political elite to clothe the national identity of Pakistan with an Islamic identity. Let us consider briefly some important cases along with the political situation in Pakistan surrounding those cases.

The first Parliamentary Government in Pakistan instituted by the newly promulgated constitution of 1956 was short lived as it got abrogated by the first military coup of 1958. Major General Iskander Mirza being the last Governor General of Pakistan simultaneously became the state's first President. The period soon after the adoption of the Constitution saw large scale political turmoil with four Prime Ministers taking office in succession within a span of two years. The One Unit Program launched by the then Prime Minister Muhammad Bogra in 1954 became controversial and fuelled further unrest. This program brought the four provinces of West Pakistan into one province with the East Pakistan as one separate province. It was done to counter the political and numerical dominance of Bengali inhabitants of East Pakistan. But it made it more difficult to administer the provinces. These events coupled with rampant corruption and frequent succession of Prime Ministers instilled a feeling

in the public and that the political incumbents of Pakistan are too weak to govern the system effectively. One of the earliest and best known analysts on South Asia, Late Wayne Ayre Wilcox wrote: "Some observers accepted the coup as inevitable, given Pakistan's weak political community and the superior organization, training and leadership of the military forces. The collective wisdom of published opinion seems to suggest that the political system failed, and that representative government collapsed" (Wilcox, 1965).

Under such context, when the question first came before the Supreme Court of Pakistan in *State v. Dosso*[3] , it validated the imposition of Military rule by invoking legal jurist Hans Kelsen's theory. According to this theory "an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, 'higher' legal norm that authorizes its creation in that way."[4] Using this theory, the Supreme Court reasoned, "Where revolution is successful it satisfies the test of efficacy and becomes a basic law creating fact" (Virk, 2012).

The Martial Law was however lifted and a new Constitution got promulgated in 1962 and then for a period of seven years Pakistan functioned as constitutional democracy, but again in 1969, the 1962 constitution got abrogated this time at the hands of General Yahya Khan. Now, the martial law came under challenge in the landmark case of *Miss Asma Jillani v. The Government of the Punjab and another.*[5] In this case, the detention of Malik Ghulam Jilani and Althaf Gohar, which had been made under the Martial Law Regulation No. 78 of 1971 imposed by General Yahya Khan, was challenged first in the Lahore and Karachi High Courts by Jilani's daughter. The High Court held that it had no jurisdiction to go into this case because clause 2 of the Jurisdiction of Courts (Removal of Doubts) Order No.3 of 1969 barred the courts from questioning the validity of any act done under the Martial Law Regulation No.78 of 1978. Then Miss Asma Jilani appealed to the Supreme Court and because the detention was made under the Martial Law, the validity of the whole martial Law came in question. The major points in issue were:

(i) Whether the doctrine of positive law as propounded by Kelsen and applied by the court in State v. Dosso was correct?

(ii) If Yahya Khan's Martial Law is illegal then what is the legality of the acts authorized by such Martial Law?

(iii)What are the limits to the doctrine of necessity? Whether the doctrine of necessity can be used to scrap a constitution or to repeal a part?

The court declared the Martial Law to be illegal and held Yahya Khan to be a usurper. It overturned the earlier judgment in *State v. Dosso* where the court validated the Martial Law citing Kelsen's theory and the doctrine of necessity. The Supreme Court reasoned that this country was neither a foreign land which had been invaded by an Army with General Muhammad Yahya Khan as its head and nor was it an alien territory which had been occupied

3. PLD 1958 SC (Pak) 533
4. Marmor, Andrei, "The Pure Theory of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/>.
5. (PLD 1972 SC 139)

by the said Army and therefore, the Martial Law is without any legal foundation. Justice Hamood-ur-Rehman while speaking for the bench observed:

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone...no valid law comes into force from the foul breath or smeared pen of a person guilty of treason against the national order."[6]

The Court also held, importantly, that Pakistan has its own *grund-norm*[7] in the form of the Objectives resolution according to which no theory could dominate over the Quran and Sunnah. When this judgment was released, War with India had concluded and East Pakistan got separated owing to which Yahaya Khan was forced to hand over power to the party commanding majority in the western wing of the country and thus Zulfiqar Ali Bhutto became the President and also the chief Martial Law administrator.[8] This judgment provided a fresh lease of life to democracy as Bhutto was compelled to remove the martial Law. This case was followed by the interim Constitution of 1972 and then by the unanimous adoption of the permanent constitution of 1973 by the then Parliament. Due to its wide acceptance, the constitution of 1973 continues to be the constitution of Pakistan till date.

The next general elections were held in 1977 amidst strong allegations of rigging which led to yet another disruption of public order and the military forces taking over the reins of government under General Zia-ul-Haq this time. The civil government was dismissed and several leaders including President Bhutto were put in detention. This time though, the constitution was not abrogated, and it was 'held in abeyance', that is, despite the military rule the overall authority of the constitution was maintained. This time the Martial Law was challenged in the case: *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan.*[9] In this case the court yet again upheld the imposition of Martial Law, but this time under the justification of the Doctrine of Necessity and the legal maxim '*salus populi suprema lex'* which means welfare of the people shall be the Supreme Law. The court reasoned that "on account of massive rigging in the 1977 elections, the State machinery had crumbled down and the constitution did not provide remedy.[10]

General Zia's regime was different from other Martial regimes in that it brought about Islamization measures unprecedented in Pakistan until that time. As observed by Cheema, in the first three decades of independent Pakistan, the 'Islamization of Laws remained on the proverbial back burner' (Cheema, 2012, 878). But soon after the takeover by General Zia-ul-Haq a number of controversial constitutional amendments and ordinances were enacted which brought the Islamization of Laws at the centre of the Pakistan's political discourse. The most controversial part was the passing of Hudood ordinances which brought certain

6. PLD 1972 SC 139, p.181
7. Grundnorm is a term given by Hans Kelsen in his treatise, 'Pure Theory of Law'. It means the basic norm: the norm which gives authority to all other norms.
8. Tasadduq Hussain Jillani, The Rule of Law and the Supreme Court of Pakistan, p. 4 www.aihja.org/images/users/1/.../pakistan.national.report_pakistan.en.0.p...ý(accessed on 2nd April, 2014)
9. PLD 1977 SC 657
10. Op cite; Jilani, p. 4.

Islamic criminal laws and punishments into mainstream penal laws. Most important and far reaching measure adopted by the Zia regime was the establishment of separate religious courts at the appellate level called the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. Religious scholars (ulemas) were appointed as judges in these courts and they were granted powers of Judicial Review of legislative and executive action. They could also strike down any action on grounds of repugnancy to the Islamic Injunctions. Despite all these efforts towards Islamization made by the Zia regime, there is a belief among some Pakistani scholars that the serious intent to Islamize was lacking and the real reason for taking these steps was to legitimize the illegal occupation of power by the Zia regime. Cheema writes: "Having displaced the elected government of Zulfiqar Ali Bhutto in 1977, General Zia was desperately in search of some basis for popular support and legitimacy. During Bhutto's rule Islamization was one of the key demands of the leading opposition parties. "An alliance between these opposition parties and General Zia, with Islamization at the core of the manifesto, was thus a natural development" (Ibid, 879). However, General Zia's Martial regime could not control the Islamization process because the courts had their own internal mechanisms and their own way of incorporating Islamic Law. In some other instances the interpretation given to certain Islamic Laws by the newly established Shariat Courts ran contrary to interpretation and intentions of the regime. For instance, in *Huzoor Bakhsh v. The State*[11] , the Federal Shariat Court by a majority decided that the punishment of 'Rajm' (stoning to death) provided for in the Hudood Ordinances for 'Zina' (adultery or fornication) is un-Islamic. This decision proved to be an embarrassment for the Military regime because they had projected the Islamic credentials of the Hudood ordinances despite protests by human rights groups (Cheema, 2012: 881).

Another crucial juncture came when the Zia regime inserted Article 2A to the constitution through an amendment which made the Objectives Resolution a substantive and enforceable part of the Constitution. As discussed earlier, the Objectives Resolution of 1949 was a document providing the guiding principles for the future constitutions of Pakistan and it was not enforceable. This amendment had the effect of bringing about a pervasive change in the nature and functioning of Pakistan's legal system as now the Shariat courts could have used Article 2A as a supra constitutional provision to interpret the whole constitution in its light. Some High courts actually started to give such an interpretation to article 2A. But the Supreme Court in *Hakim Khan v. Government of Pakistan*[12] ended the confusion by declaring that all constitutional provisions including Article 2A were at par with each other and any conflict between them had to be resolved by harmonizing the interpretation of both the provisions. It is interesting to see the court's decision on the question of further course of action if the inconsistency between the objectives resolution and any existing provision of the 1973 constitution could not be harmoniously resolved. It held that if in the opinion of the court any existing provision of the Constitution contravened the Injunctions of Islam in some respects "it should have brought the transgression to the notice of the Majlis-e-Shoora (Parliament) which alone was competent to amend the Constitution, and could initiate remedial legislation

11. PLD 1981 FSC 145
12. PLD 1991 SC 595

to bring the impugned provision in conformity with the Injunctions of Islam".[13] The Court reached this decision by interpreting the words "within the limits prescribed by Allah" and "chosen representatives of the people" in the clause (i) and (ii) of the Objectives Resolution, respectively. It observed:

Objectives Resolution has three separate distinct components. The first is purely structural feature of it that the sovereignty of Almighty descending on the people of Pakistan constituting State of Pakistan is to be exercised through their chosen representatives. So the people operating through their chosen representatives and the Almighty Allah at the apex exhaust the pristine devolution, distribution and sharing of Divine sovereignty. The individuals, the authorities, the institutions, the Courts, do not figure in this structure.

The Supreme Court of Pakistan in this case, as we have seen, despite maintaining that all the provisions of the constitution are equal to each other, accepts the supremacy of the provisions of the Objectives Resolution in that it relinquishes its power to adjudicate in case of a conflict between a normal provision of constitution and Art. 2A containing the provisions of the Objectives Resolution.

This was followed by the Supreme Court and High Courts increasingly using Islamic Law arguments and Islamic reasoning in their judgments, especially towards the end of the Zia regime. This was one of the consequences of the establishment of the Shariat courts because they opened the doors for a wider permeation of Islamic Law throughout Pakistan's legal system due to which increasing number of litigants started to use Islamic law arguments in the pleadings and the judges had to go into the terrain of Islamic Law to adjudge their evidentiary value within the circumstances of the particular case. This development had mixed effect. In some cases it had the effect of discriminating against the minorities, while in some others the interference of Islamic principles produced better accountability of the government and enhancement of the Rule of Law. For instance, in *Zaheeruddin v. State*[14] the Supreme Court legitimized the discrimination against the Ahmadiya minority sect. In this case certain criminal Laws prohibiting the Ahmadis from adopting religious practices and titles similar to Muslims were challenged as being unconstitutional and violating the fundamental right of freedom of Religion. But the Court dismissed the challenge on the ground that the fundamental rights provisions of the constitution were to be interpreted according to the principles of Islamic Law which resulted in the denial of their fundamental right for the Ahmadis. In *In re: Islamization of Laws*[15], the Federal Sharaiat Court gave an absolute character to the rules of natural justice which were frequently flouted in a military style administration of justice. It gave the status of Islamic Law to the rules of natural justice, that is, (i) the rule of fair hearing and (ii) the rule against bias now became mandatory. In the same case, the Court also held that 'the exemption granted to the members of Parliament from appearing before courts while the Parliament is in session, could effectively result in immunity from prosecution and is thus repugnant to the injunctions of Islam."[16] In *In re:*

13. P L D 1992 Supreme Court 595, (ppd.pitb.gov.pk/index.php?q=system/files/...pdfý, accessed on 2nd April, 2014)
14. 1993 S.C.M.R. 1718.
15. PLD 1985 FSC 221.

Civil Servants Act[17], quoting some instances from the Muslim history where even rulers were answerable to the courts, the court observed that "even the head of state cannot claim immunity from prosecution or from appearance in the court during the tenure of his office."[18]

However, when General Pervez Musharraf took over the reins of government in yet another military coup in 1999 for similar reasons, he adopted a string of de-Islamization measures. One of the reasons for this, according to some commentators, was that he wanted to improve his image in the international media and make his regime acceptable in the international forums. Whatever might be the reasons, he successfully reduced the rigour of the Hudood Ordinances by bringing a number of procedural safeguards which lead to the enactment of the Protection of Women Act, 2006. Nevertheless a number of Islamic provisions remain on the statute books of Pakistan and it is to be seen which direction the public discourse takes in Pakistan. Apart from these developments, there are growing demands of autonomy and separation in certain provinces of Pakistan like the Federally Administered Tribal Areas and Balochistan. People in these provinces defy the official Islamic narrative inviting heavy oppression from the state leading to disappearances and killings. Recently, a 72 year old man Mama Qadeer Baloch was in the news for walking more than 2000 Kilometres on foot from Quetta to Islamabad, breaking Mahatma Gandhi's record for longest walk barefoot. He did it in protest of the enforced disappearances in Islamabad by military action. Much like in India and Bangladesh, there are growing fissiparous tendencies in Pakistan trying to assert their own narrative of the nation that is Pakistan.

Analyzing the above decisions, the Judiciary's proclivity to accept and further the dominant narrative of an Islamic identity as Pakistan's national identity can hardly be missed. This has been manifest especially in the above cases of *Hakim Khan v. Government of Pakistan*, *In re: Islamization of Laws*. It can be said that the Judiciary in Pakistan has been very true to the spirit of its constitution of 1973, if not to the Jinnah's Independence Day speech of 11th August, 1947. Pakistan Supreme Court has furthered the dominant religious imagination of Pakistan conceived in the Objectives Resolution of 1949 and pursued by every successive government since its inception. Few exceptions have been in the area of minority rights (with the exception of Ahmadiya sect), martial law and federal and democratic structure where the Pakistan Supreme Court has taken bold stands for preservation of the democratic structure of the polity but it has certainly not been enough to reverse the continuous trend of Islamization of Pakistan's national identity. The initial idea of Pakistan as observed by many commentators (Islam, 1981; Ahmed, 2008 and Talbot, 1998) was that of a homeland for the Muslims of the Indian subcontinent which was per se a secular idea, but the ruling elite refashioned the national identity and grounded it increasingly in religious terms. This trend has found considerable support from the judicial wing of the state.

REFERENCES

Ahmed, I. (2008) 'Pakistan's National Identity'. *Internat. Rev. Modern Soc.*, **34** (1) : 47-59.

16. Ibid pp.199-200.
17. PLD 1984 FSC 34
18. Ibid, pg- 37.

Cheema, M.H. (2012). 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law'. *Australian National University College of Law Research Paper* No. 13-01, pp. 875-917.

Datta, V.N. (2004). 'Islam and Pakistan'. *Economic & Political Weekly*, **39** (39) : 4329-4333.

Islam, N. (1981). 'Islam and National Identity: The case of Pakistan and Bangladesh'. *Internat. J. Middle East Studies*, **13** (1) : 55-72.

Talbot, I. (1998). *Pakistan: A Modern History*. London: Hurst and Company.

Virk, M.N. (2012). 'Doctrine of Necessity – Application in Pakistan – Cases of Immense Importance – A Critical Review'. *Internat. J. Soc. Sci. & Edu.*, **2** (2) : 82-87.

Wilcox, W.A. (1965). 'The Pakistan Coup d'Etat of 1958'. *Pacific Affairs*, **38** (2) : 142-163.

Table Of Cases :

State v. Dosso, PLD 1958 SC 533.

Miss Asma Jilani v. The Government of Punjab and another, PLD 1972 SC 139.

Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, PLD 77 SC 657.

Huzoor Baksh v. The State, PLD 1981 FSC 145

Hakim Khan v. Government of Pakistan, PLD 1991 SC 595.

Zaheeruddin v. State, 1993 S.C.M.R 1718.

In: re Islamization of Laws, PLD 1985 FSC 221.

In: re Civil Servants Act, PLD 1984 FSC 34.

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