

Presidential Pardon and the Limits Prescribed by God: A Bill to Amend Article 45 in Pakistan

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Summary

Article 45 of the Constitution of the Islamic Republic of Pakistan gives the President the power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. But whether this power conforms to the norms and principles of Islamic law and can indeed be exercised to commute punishments mandated by the sharia has been a subject of ongoing debate and contention. The critical point of division relates to Hudood and Qisas cases. A recent constitutional Bill introduced to amend Article 45 spotlights the tensions between divine and popular sovereignty in both the Constitution and the legal system of Pakistan.

Article 45 of the third and current 1973 Constitution of the Islamic Republic of Pakistan gives the President the power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. This power is strictly a constitutional power and does not derive from the Pakistan Penal Code or Criminal Procedure Code. However, whether this power conforms to the norms and principles of Islamic law and can indeed be exercised to commute punishments mandated in Islamic law has been a subject of ongoing debate and contention. This is an important question of constitutional significance since Pakistan's Constitution mandates in its preamble that sovereignty belongs to God alone, and that the authority exercised by the people of Pakistan is a sacred trust and must fall within the limits prescribed by Him. It also states that Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teaching and requirements of Islam as set out in the Holy Quran and Sunnah. While many preambles serve as a kind of opening mission statement for constitutions around the world, in Pakistan it not only serves this purpose but also forms a substantive part of the Constitution.¹ In order to realise the mandate of this provision, a number of Islamic provisions feature in the text of the document.²

¹ Article 2a of the 1973 Constitution states that the principles and provisions set out in the Objectives Resolution form a substantive part of the Constitution.

² While Part IX is explicitly entitled Islamic Provisions, the Constitution features a number of articles and clauses which place an emphasis on Islam including Article 2 of the Constitution which declares that Islam is state religion. Article 19 states that freedom of speech is permissible subject to any reasonable restrictions imposed by law in the interest of the glory of Islam. Article 20 maintains that citizens have the right to profess, practice and propagate religion and that every religious denomination and every sect has the right to establish, maintain and manage its religious institutions. Article 31 proclaims that the state is responsible for ensuring an Islamic way of life for Muslims in Pakistan. Article 40 asserts that the state will endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity. Article 62 places restrictions on choosing members of parliament to ensure that they are religious, moral, upright and knowledgeable in Islamic teachings. Articles 41, 42, 91(4), 91(5) poses sectarian limits in selecting the President and Prime Minister. And Articles 106, 260 (3a) and 260 (3b) are articles which define the distinction between Muslims and non-Muslims for electoral purposes.

Article 227 of the Constitution mandates that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, and no law shall be enacted which is repugnant to such Injunctions.³ Article 203D of the Constitution provides the Federal Shariat Court with the power to examine and decide the question of 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. The trouble, however, is that the jurisdiction of the Federal Shariat Court is narrow and limited.⁴ Indeed, the Constitution itself is outside of the jurisdiction of its powers of review alongside other important areas of law.⁵ The matter also remains unsettled in the secular courts. The question of whether Article 45 follows legal norms of the sharia has been the subject of ongoing debate and division. The critical point of division relates to Hudood and Qisas cases.

General Zia ul Haq justified his 1977 coup on Pakistan's inability to transform itself into an Islamic state.⁶ Part of his efforts to turn Pakistan into an Islamic political and legal order involved the introduction of Hadd offenses. In Islamic criminal law, Hadd offenses are those which the Quran specifies fixed punishments so long as particular conditions are fulfilled.⁷ Zia introduced Hadd punishments for sexual offences, theft, highway robbery and the consumption of alcohol.⁸ Qisas and Diyat laws in Pakistan relate to offences of murder and bodily harm. "In Islamic law", law professor Tahir Qasti explains, "the expression retaliation is termed qisas because it follows the footsteps of the offender, perpetrates on him an injury, as a punishment, exactly equal to the injury, which he inflicted upon his victim, but no more".⁹ It is, in other words, a form of "eye for an eye" principle.¹⁰ Qisas and Diyat laws allow the heirs of a victim the right to demand retributive death (qisas) or negotiated monetary settlement (diyat).¹¹

³ In *Mian Aziz A. Sheikh vs The Commissioner Of Income-tax* SC PLD 894, the Supreme Court explained that "It is command to all, law-making bodies and functionaries"; The Constitution however states that in the application of Article 227(1) to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by the sect. Article 227(3) further elaborates the scope of Article 227(1) adding that it will not affect the personal laws of non-Muslim citizens or their status as citizens.

⁴ Chapter 3A of the Constitution outlines the powers, composition and jurisdiction of the Federal Shariat Court.

⁵ Article 203B(c) states that the jurisdiction of the Federal Shariat Court does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure.

⁶ Lawrence Ziring, *Pakistan: At the Crosscurrent of History* (Lahore: Vanguard, 2004), pp.157-160. Martin Lau explains that The 1956 Constitution 'did not change the essentially secular character of the legal system'; nor did the subsequent 1962 or 1973 Constitutions. Martin Lau, 'Twenty-Five Years of Hudood Ordinances-A Review', *Washington and Lee Law Review*, Vol. 64, no. 4 (2007), pp. 1293-1294.

⁷ *Ibid.*, p. 1294.

⁸ Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (London: Bloomsbury, 2018), p.227.

⁹ Tahir Wasti, 'Islamic Law in Practice: The Application of Qisas and Diyat Law in Pakistan', *Yearbook of Islamic and Middle Eastern Law*, Vol.13 (2006-2007), pp. 97-106

¹⁰ Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (London: Bloomsbury, 2018), p.232.

¹¹ *Ibid.*

In 1988, the President of Pakistan commuted all death sentences awarded by the military or other courts to life imprisonment.¹² The full bench of the Lahore High Court investigated the issue regarding whether the President could in fact exercise such powers and declared that: “The President of Pakistan had no such power to commute the death sentences awarded in matters of Hudood, Qisas and Diyat. In this view of the matter, the power of pardon in such cases only vests with the heirs of the deceased, therefore, the cases in which death sentences had been awarded, the President had no power to commute, remit or pardon such sentences. However, the cases would be on different footings, if a person had been punished by way of Tazir as in such cases, the Head of the State has the power to pardon the offender and that too in public interest.”¹³ The decision was challenged and the Supreme Court reversed the judgement of the High Court stating: “If the High Court considered that the existing provision of Article 45 of the Constitution contravened the Injunctions of Islam in some respects it should have brought the transgression to the notice of the Parliament which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam.”¹⁴ In other words, the Supreme Court referred the matter to parliament meaning that the prerogative of determining whether Article 45 conforms to Islamic norms lies pre-eminently with the legislature.

The chief of the Jamaat-i-Islami and senator Sirajul Haq argued that Article 45 violates the mandate of Article 227(1). On 20 January 2020, he had moved *The Constitution (Amendment) Bill, 2020*, in the Senate recommending amendment to the President’s power to grant pardon in sentences awarded in Hudood or Qisas cases.¹⁵ Haq argued that Article 45 does not conform to the dictates of the sharia in which the commands with respect to the punishments given under Hudood and Qisas are clear and non-negotiable.¹⁶ Under the Islamic law of Diyat and Qisas, Haq explained that the legal heirs of the deceased have the sole right to pardon the convicted person. *The Constitution (Amendment) Bill, 2020*, was referred to the Standing Committee on Law and Justice for consideration and report. In order to investigate the matter, the Committee drew upon the expertise and advice of the Council of Islamic Ideology, a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam, namely whether it violates injunctions from the Quran and Sunna.¹⁷ The Chairman of the Council, Dr Qibla Ayaz, affirmed Haq’s contention

¹² Syed Shabbar Raza Rizvi, *Constitutional Law of Pakistan: Text, Case Law and Analytical Commentary Vol 1* (Lahore: Vanguard, 2002), p. 251.

¹³ *Sakina Bibi Vs Federation of Pakistan* PLD Lahore 99 (1992).

¹⁴ *Hakim Khan vs Govt. of Pakistan* PLD Supreme Court 595 (1992).

¹⁵ Report of The Senate Standing Committee on Law and Justice, “*The Constitution (Amendment) Bill, 2020*” (Amendment of Article 45), http://senate.gov.pk/uploads/documents/1593071577_137.pdf. Accessed on 1 November 2020.

¹⁶ In the Statement of Objects and Reasons, he explained that “no remission can be given in respect of these by any human authority.”

¹⁷ The body was initially proposed in the first Constitution of Pakistan 1956. It was named as the Islamic Commission which was to be established within one year of promulgation of the Constitution. The 1956 Constitution however emerged during a tumultuous period of political transition and was short lived. The Council of Islamic Ideology was originally established as the Advisory Council of Islamic Ideology on August 1, 1962 under Article 199 of the 1962 Constitution. The 1962 Constitution furthermore detailed the constitution of the Council (Articles 199 – 203), its functions (Article 204), rules of procedure (Article 205), and also established an Islamic Research Institute (Article 207). The Advisory Council of Islamic Ideology however was renamed and reformulated as the Council of Islamic Ideology in Article 228 of the 1973

explaining that in all cases of Hudood or Qisas, the President could not grant pardon because these principles have been unequivocally settled in the Quran.¹⁸ This is in line with the Council's earlier findings with regard to Article 45.

In its annual report for 2012-2013, the Council had previously concluded that Article 45 in its current form was un-Islamic.¹⁹ Other Islamic legal experts called by the Committee reinforced the same position that the Presidential power to pardon cannot be exercised in Hudood or Qisas cases as that would violate Islamic injunctions.²⁰ The Bill, however, did receive resistance. Senator Mustafa Khokar argued that even if absolute Presidential powers of pardon were not appropriate, a situation could arise when such a power could be useful. The Ministry of Law and Justice also opposed the Bill arguing that both the scope of Hudood laws and Article 45 have multiple aspects which the proposed amendment elides. Nevertheless, the Bill was put to a vote and passed with a majority. The Committee recommended that the Bill be passed.

The Constitution's declaration that the authority to govern is conditional on conformity to divine limits poses fundamental tensions for democratic governance in Pakistan. If divine sovereignty trumps democratic consensus in matters of law-making and law reform but requires the democratic process itself to ensure that this constitutional commitment is upheld without structural checks (such as courts) poses an interesting paradox. It also demonstrates Pakistan's deep constitutional ambivalence towards Islam. Passing the Bill and consequently upholding divine sovereignty and bringing Article 45 within the limits prescribed by God requires parliament to set partisan differences aside and remain firm on its political commitment to Islam. This is a gargantuan task for Sirajul Haq and his party to achieve.

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Constitution with provisions for its composition detailed in Article 228, procedure for reference to the Council in Article 229, its functions in Article 230, and its rules of procedure in Article 231.

¹⁸ Report of The Senate Standing Committee on Law and Justice, "*The Constitution (Amendment) Bill, 2020*" (Amendment of Article 45), http://senate.gov.pk/uploads/documents/1593071577_137.pdf. Accessed on 1 November 2020.

¹⁹ Ansar Abbasi, 'CII finds Article 45 of Constitution un-Islamic', *The News*, 15 January 2020, <https://www.thenews.com.pk/print/598738-cii-finds-article-45-of-constitution-un-islamic>. Accessed on 3 November 2020.

²⁰ Ibid.