

FIFTEENTH AMENDMENT BILL -AN APPRAISAL

CHAUDHRY HASAN NAWAZ

Before a critical approach to the proposed bill, it will be worth its while to examine what has already been provided in the Constitution and whether those at the helm since the inception of this State, have ever been sincere in the establishment of an Islamic Order, visualized by the Constitution.

2. The preamble of 1973 Constitution, inter alia, provides that whereas the sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust, and whereas it is the will of the people to establish an order wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.

3. Article (2) of the Constitution says that Islam shall be the State religion of Pakistan. Then in Article (31) of Chapter 2 with regard to Principles of Policy it has been provided that 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 able to understand the meaning of life according to the Holy Quran and Sunnah. Clause (2) of this Article is to the effect that the State shall endeavour, as respects the Muslims of Pakistan:

- a. to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran;
- b. to promote unity and the observance of the Islamic moral standards;
- c. to secure the proper organization of zakat, ushr, auqaf and mosques.

Article 37 is also in place whereby the State has taken upon itself the Constitutional obligation of ensuring inexpensive and expeditious justice.

4. Article 29 of the chapter makes it the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with these Principles, in so far as they relate to the functions of the organ or authority. In clause (3) of this article, the President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before the National Assembly or as the case may be, the Provincial Assembly, a report on the observance and implementation of the Principles of Policy, for discussion.

5. The provisions of article 203 D are also in point. Under clause (1) of this article, it is the primary function of the Federal Shariat Court to examine and decide the question whether 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. Clause (3) of the article provides that if any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam, the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law, so as to bring such law or provision into conformity with the Injunctions of Islam; and such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the court takes effect.

6. Reference may also be made to article 227 which provides 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. An explanation was added to this article by President's Order No.14 of 1980, which clarified that in the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect. By virtue of clause (3) of the article, nothing provided in relation to the Quran and Sunnah shall affect the personal laws of the non-Muslim citizens or their status as citizens.

7. In spite of the aforementioned provisions being there in the Book, P.O. No.14 of 1985 inserted Article 2-A, providing that the principles and provisions set out in the Objectives Resolution are hereby made a substantive part of the Constitution and shall have effect accordingly.

8. As for the principles and provisions set out in the Resolution, these are more or less the same as had already been enunciated in the 1973 Constitution. The change is that the expression "and that authority to be exercised by the People of Pakistan" in paragraph (1) of the preamble, has been replaced in para 1 of the Objectives Resolution with the expression "and the authority which he has delegated to the State of Pakistan, through its people for being exercised". The other change in the phraseology is that the statement "whereas it is the will of the people of Pakistan to establish an order" has been substituted in the Objectives Resolution by the statement that "this Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan".

9. It may be mentioned as important that in the preamble as also in the Objectives Resolution we find the provision that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.

10. This detailed address has been considered necessary to point out that those who were in charge of the framing of the Constitution wanted to underscore the fact, in unequivocal terms, that the State is bound, in exercise of the power delegated to it by Allah Almighty through the people of Pakistan, to establish an order, where the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed and where the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.

11. These provisions speak for themselves and nothing can be more clear to establish, without an iota of doubt, that these are sufficient to achieve the required purpose, that is to say the establishment of an Islamic Order. Despite this, it is common knowledge that this goal has not only remained a dream so far, no serious attempt seems to have ever been made by those who have been in charge of the affairs of this Country for the last about forty years; which makes us feel that the provisions with regard to Islamization were meant only to adorn the Constitution. They betray a sub-consciousness that failure on their part to cause a particular impression regarding Islamization, is bound to invite an adverse criticism from the people. One feels obliged to think that the real purpose in the background has always been the promotion of self interest and self preservation and that the Republic is described as Islamic only in name.

12. And in the wake of very clear provisions to that effect in the Constitution, comes the present amendment bill now introduced in the National Assembly. Its preamble is a literal reproduction of what has already been stated and provided in the preamble of the Constitution and the Objectives Resolution. It inter alia says that "whereas Islam enjoins the establishment of a social order based on Islamic values, of prescribing what is right and forbidding what is wrong (amar bill Ma'roof wa nahi anil-munkar); and whereas in order to achieve the aforesaid objective, it is expedient further to amend the Constitution of the Islamic Republic of Pakistan, now therefore, it is hereby enacted as, follows:

13. The expression "Amr-Bill Ma'roof" has been translated by most of the scholars as "to enjoin what is right". In the preamble and then in clause (2) of article 2-B of the bill it has, however, been rendered as "to prescribe what is right". The word 'prescribe' goes with various meaning and connotations, but its popular definition is "to lay down a commandment, law or a rule". If taken and understood in this sense, the word 'prescribe' does not appear to be a correct translation of the word 'Amar', for what is right (Ma'roof) has already been clearly laid down in the Holy Book and nothing left to the 'prescription' of any person, much less to that of the Federal Government, as it appears to have been conveyed by these provisions. What is left to us or class of persons from amongst us is only "enjoin what is right". (Sura Al-i-Imran-verses 104 and 114 of the Text).

14. It is however, suggested that on account of the nature of the subject, as also because the expression "to provide what is right" is capable of conveying different messages, it would be proper and expedient to have recourse to the Ulema and Scholars of the languages concerned, for a consultation as to the exact import of the expression "Amr-Bill Ma'roof" used at various places in the Holy Book and which in the present case is the subject of discussion.

15. There is another aspect of the matter. It may be assumed that "prescribing what is right" is synonymous with "enjoining what is right". But then it is not possible to perceive that this goal can be achieved only by further amending the Constitution, and that too in the manner proposed in the amendment bill. As already elucidated, this object can be attained by having recourse to the relevant provisions mentioned above, already their in the Book and no further amendment is either appropriate or in any way required. The existing provisions are not only sufficient to get the needful done, they rather enjoin and positively demand the establishment of such a social order by the State.

16. Seen in the context of these considerations, the proposed amendment in the Constitution becomes only a redundant affair. In that case, it would lead us to the surmise that the purpose is not the actual Islamization of laws or the establishment of a social order based on Islamic values, but the imposition of an absolute and autocratic rule in the name of Islam as is supported by what is intended to be enacted by clauses (3) and (5) of article-2 B and the provisions of article 3-A of the bill. This clearly amounts to an attempt to mislead the masses and the perpetration of a brazen faced fraud on the constitution.

17. Clause (2) of article 2-B of the bill provides that Federal Government shall be under an obligation to take steps to enforce Shariah, to establish Salaat, to administer zakat, to promote Amar Bill Ma'roof and Nahi Anul Munkar (to prescribe what is right and forbid what is wrong), to eradicate corruption at all levels and to provide substantial socio-economic justice in accordance with the principles of Islam as laid down in the Holy Quran and Sunnah. As seen, the Federal Government is already under an obligation, in consequences of the provisions of article 31, to take steps to enable the Muslims, individually and collectively to order their lives in accordance with the fundamental principles and basic concept of Islam, to promote unity and the observance of Islamic moral standards and to secure the proper organization of Zakat, Ushr, Auqaf and mosques. Likewise, under the objectives Resolution and the preamble of the Constitution, it is already the duty of the State to ensure the observance of the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam. This being so, there is no need for further amendment in the Constitution, especially when under article 227 (1) of the Constitution, the Federal Government is already constitutionally bound to bring all existing laws in conformity with the injunctions of Islam. The only difference made by clause (2) of the proposed bill is to provide "substantial socio-economic justice" in place of equality and social justice. Considering that 'justice' includes "substantial justice" the use of word 'substantial' was not necessary. Even if no motive is attributed to this avoidable addition, the interpretation of the word having been left to conjecture, there is room for a genuine apprehension that it may, at any time, be used as a license, by whosoever is at the helm, to do whatever he likes, in the name of 'substantial justice'.

18. These considerations apart, one wonders what is there in the existing Constitution or elsewhere to obstruct the enforcement of Shariah, to establish Salat, to administer Zakat, to ordain right and forbid wrong, to eradicate corruption at all levels and to provide such socio economic justice in accordance with the principles of Islam. These are in fact subjects for substantive law which can always be made by the legislature on the basis of existing provisions of the Constitution.

19. The statement of objects and reasons is still more superfluous than the provisions of the preamble of the proposed act. It says that in view of the fact that the Objectives Resolution is now substantive part of the Constitution, it is necessary that Quran and Sunnah are declared to be the supreme law of Pakistan, and the Government is empowered to take necessary steps, to enforce Shariah. One would say that these powers are already there in abundance under the Constitution; and as for the supremacy of Quran and Sunnah, it hardly is in need of a declaration by the Government. Quran and Sunnah constitute Supreme law as already declared in the Quran itself and by the Holy Prophet on numerous occasions. Even if such formal declaration was at all required, it can easily be spelled out from the existing provisions.

20. Incidentally, this statement of objects and reasons reminds us of the question referred to referendum under para 4 of the Referendum Order of 1984, to the following effect: Whether the people of Pakistan endorse the process initiated by Gen. Muhammad Zia-UL-Haq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (peace be upon him) and for the preservation of the ideology of Pakistan, for the continuation and consolidation of that process and for the smooth and orderly transfer of power to the elected representatives of the People. "Para 5 of the Order said that it shall be answered either by 'yes' or 'no'. What followed in para 7 of the Order was atrocious. It enjoined that in the event of 'yes' answer by a majority

of the votes cast in the Referendum, Gen. Muhammad Zia-ul-Haq shall be deemed to have been duly elected President of Pakistan and that too for a term of five years from the day of the first meeting of the Houses of the Parliament in joint sitting. This incident in the history of our Constitution and Country, is beyond the scope of any comment, by whosoever dare take up this exercise.

21. The mischief intended by the amendment comes to light in clauses (3) which cuts too close to the bones. It provides that the Federal Government may issue directives for the implementation of the provisions set out in clause (2) and may take necessary action against any State functionary for non compliance of the said directives. It is pertinent that the proposed amendment does not say that the Federal Government may by law ensure the implementation of these provisions. As it now goes, the draft has rendered the Parliament absolutely irrelevant and superfluous, evidently because the directives sought to be issued by the Federal Government will neither be the result of, nor in pursuance of any law passed by the Legislature. The powers sought by Federal Government under this clause are limit less and beyond the imagination of those concerned with the making of laws.

22. The apprehension that this amounts to the introduction of a despotic rule, would certainly not be without substance, which finds further support from what follows in clause (5) of the Article. It says that "provisions of this article shall have effect, notwithstanding any thing contained in the Constitution, any law or judgment of any Court". It overrides everything to the extent of repugnancy and renders, all in one go, the higher judiciary and legislature as absolutely irrelevant and redundant; which is clearly suggestive of the fact that, in case the proposed amendment is carried, whatever of the democratic dispensation is still there in actual practice, is bound to go by the board.

23. The gravity of the situation becomes all the more serious when seen in the background of the fact that there is absolutely nothing in the bill to suggest the establishment of any institution or body to determine what is Shariah and what exactly is the scope of "Amr Bill Ma'roof and Nahi Anil Munker". All this has been left to the discretion of those responsible for managing the affairs of the State under the Prime Minister. Another question relevant to the subject is as to who is entitled to enjoin what is right and to forbid what is wrong, and whether any such enjoining can validly and legally be within the Competency of the Federal Government, considering that only that person can order the doing of right and forbidding of wrong who is himself fully conversant with the subject. Then, the category of 'Ma'roof' covers and refers only to those acts which are conclusively established and known as good things. These considerations in view, there can be no effective legislation on the subject without the association of those who are conversant with the Quranic Injunctions. Since there is no provision with regard to any such association, clauses (3) and (5) of the bill are arbitrary and absolutely unjustified.

24. These apprehensions are further strengthened with a closer application to the provisions of article 3-A of the bill which altogether changes the procedure laid down for amendment of the constitution, now possible under Art. 239, only if the bill is passed by the votes of not less than two thirds of the total membership of both the Houses. If the present bill is passed, it will be possible to amend the Constitution by a simple majority of the Members present, if the amendment is sought in the Constitution to provide "for the removal of any impediment in the enforcement of any matter relating to Shariah and the implementation of the Injunctions of Islam". Here the question arises as to who is going to determine whether a particular bill to amend the Constitution is going to provide for the removal of any impediment in the enforcement of any matter relating to Shariah and the implementation of the Injunctions of Islam. There being no definition of the word 'impediment', what is to be understood by the provisions of future amendment bills, has also been left entirely to the discretion of the Federal Government. For these reasons, you might reasonably feel that the amendment bill amounts to a declaration of the supremacy of the Federal Government under the Prime Minister, rather

that of the Quran and Sunnah of the Holy Prophet (Peace be upon him); more so, when the President will be constitutionally bound to fulfill the formality of assent to the amendment bill within seven days of its presentation. This assent is obviously less than even a formality and one wonders whether the word 'assent' can be reasonably ascribed to what the President is bound to do within seven days.

25. The provisions of the Bill leave almost everything to the imagination and discretion of the Federal Government and it is not possible to foresee, much less comprehend, the extent and scope of directives to be issued to the state functionaries. Nor is there anything to show what exactly is the import of the expression

"State Functionaries" and to whom will the directives be addressed. These considerations in view, the bill is highly speculative, and one cannot help saying, without intending any thing derogatory of the Legislature, that they would not be knowing as to what exactly are they going to lay down by the passage of this blind package and what would be its repercussions. Because of certain ambiguities inherent in its provisions, its passage will not be the result of democratic process and the association of the people. It is one of those many situations we have come across during the last fifty years, rather than the introduction of a system.

26. The bill seems to have left everything to be desired and it is by no means reflective of the strenuous efforts, 'extensive consultations' and 'thorough considerations' of six months, as the Minister for Religious Affairs is reported (The Nation of 1st September) to have claimed, during a briefing he hosted in his ministry for the representatives of certain religious parties. This self serving style of drafting appears to have gone awry and given the game away. In spite of padded shoulders, the slips are clearly showing; and the Prime Minister will be well advised to allow this piece to wither on the vine, instead of rail roading it, if not for any other reason, simply because it is too controversial and being considered a media hype.

27. While supporting the amendment, the Prime Minister is reported to have said in the PML parliamentary party meeting on 03-09-1998 (The nation of 04-09-1998) that the "people need socio economic justice" and that "law and order can be restored through Islamic justice". What cannot possibly be understood is that if they are really interested in producing these results, why don't they take steps in the Islamic way to recover billions of rupees in criminal default, which is the mother of all ills. In God's name why don't they set out, sword in hand in the manner of Hazarat Abu-Bakar Siddique, and crack down on those who owe huge amounts of public money to the Banks, Wapda, PTC and other financial institutions. Why, in the name of this dear land, they do not disclose the names of those who had their loans written off and who have taken millions of dollars out to the foreign banks during the period after 11-05-1998. Why don't they speak of taking steps to retrieve that money to bring down the rate of dollar and to stabilize the sinking ship of Pakistan's economy.

28. Under the crunch period we are passing through, there is no greater offence against Islam than fraud and the criminal misappropriation of public money and forcing, in direct consequence, the poor and bourgeois to near starvation. This recovery of billions in the interest of the masses, will by far be the greatest act of "substantial socio economic" justice, in accordance with Injunctions of Islam. Let us endeavour to save and keep in tact the country to remain available for Islamization, by restoring the confidence of the people in its viability. Pray take steps to do it Mr. Prime Minister please.