

Pakistan

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Introduction

On 15 August 1947, designated as the “appointed day” under the provisions of the Indian Independence Act of 1947, the crown colony of British-India was partitioned into two independent states. Referred to as the dominions of India and Pakistan, their respective borders were demarcated on the basis of religion. Areas with Muslim majorities became part of Pakistan and those with Hindu majorities formed India. The partition of British India along religious lines meant that Pakistan emerged as West Pakistan and East Pakistan, with the two parts of the country separated by about 1600 km of Indian territory.

The country’s name was coined in 1933 as an acronym formed by the letters of the Muslim majority areas of the Northern parts of British India, with “P” standing for Punjab, “A” for the “Afghan” North-West Frontier Province, “K” for Kashmir, “S” for Sindh and the “tan” derived from the last three letters of the province of Baluchistan. The presence of East Pakistan, formed from the Muslim majority areas of the British Indian province of Bengal, was not reflected in the name of Pakistan. The official name of Pakistan is the “Islamic Republic of Pakistan”, a designation which was only briefly interrupted under the Constitution of Pakistan 1962, which had named the country simply as “Pakistan”. A constitutional amendment passed in 1963 returned its name to the “Islamic Republic of Pakistan”.

As a matter of international law, newly independent India inherited the legal personality of British India and continued as a member of the United Nations. In contrast, Pakistan was regarded as a seceding state and its application for membership to the United Nations was accepted by General Assembly during its Neintey-Second Plenary Meeting on 30 September 1947. In 1972, East Pakistan declared independence and adopted the name Bangladesh.

The Indian Independence Act of 1947 not only granted independence but also determined the shape of Pakistan’s legal system immediately following independence. Section 18(3) of the Indian Independence Act of 1947 provided for the continued validity of all colonial laws and Section 6 declared that “*The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.*” Section 18(3) of the Indian Independence Act 1947 was adopted under the provisions of the Pakistan (Adoption of Existing Laws) Act 1947. As a result, in 1947 Pakistan inherited and incorporated into its legal system the entire body of colonial, both in the form of codified law as well as legal precedents. In turn, this legacy was based on English common law as it stood at the time of the enactment of particular colonial statutes. In codifying laws for British India, the drafters,

mostly Scottish and English jurists, sought to adapt principles of English law to what they imagined were “Indian conditions.” The majority of Pakistan’s substantive and procedural laws concerned with civil and commercial law are based on adopted colonial enactments, such as the Pakistan Contract Act 1872 and the Pakistan Code of Civil Procedure, 1908. Until 1947, judges in British India filled any gaps in the statutory laws by relying on the principles of justice, equity and good conscience. Whilst substantial parts of Pakistan’s legal system are based on the colonial legacy of the English common law, neither the courts of British India nor the courts of Pakistan have considered themselves bound by decisions of English courts.

Founded as the homeland for the Muslim populations of British-India, Islam has played an important role not only in the creation of Pakistan but also in the development of its legal system. In accordance with Article 227 (1) of the Constitution of Pakistan, 1973, all existing laws have to be brought in conformity with the injunctions of Islam as laid down in Holy Quran and Sunnah. Established in 1980, it is the Federal Shariat Court that has the exclusive jurisdiction to review and, if found to be repugnant to the injunctions of Islam, to invalidate existing legislation. With respect to Pakistan’s civil and commercial laws, the impact of the Federal Shariat Court’s judicial review of legislation on the basis of Islam has been limited, with the most controversial issue being the question of whether or not the charging of interest on sums of money is repugnant to the injunctions of Islam. This issue of “*Riba*”, as interest is referred to in Arabic, has been litigated since 1991 with the most recent development being a decision of the Federal Shariat Court announced on 28 April 2022. In the case of *Shariat Petition No. 30 L of 1991 & all other 81 connected matters relating to Riba/Interest*, the Federal Shariat Court decided that any law or part of law that provides for the charging of interest was repugnant to the injunctions of Islam and therefore invalid¹. The laws affected include laws regulating banks and money lending generally, such as the Banking Companies Ordinance 1962 and the West Pakistan Money-Lenders Rules 1965, as well as the Negotiable Instruments Act 1881 and parts of the Code of Civil Procedure 1908. Private banks as well as the State Bank of Pakistan have appealed against the judgement. Until the Shariat Appellate Bench of the Supreme Court decides the appeals, the judgement of the Federal Shariat Court remains suspended, with all the laws identified as being repugnant to Islam continuing to be in force. None of the other laws on civil and commercial laws have been invalidated as repugnant to Islam.

Unlike East Pakistan, where Bengali constituted the main provincial language, the regions that formed West Pakistan are marked by linguistic diversity, with all of West Pakistan’s provinces being home to several languages. For example, in the province of Punjab it is Punjabi and, in the Southern parts of Punjab, Saraiki, that are the main spoken languages. In attempting to identify a national language, the drafters of Pakistan’s first constitution provided for a transitional period, during which English would be the language for official purposes, followed by the adoption of Urdu and Bengali as both the national and the official languages.

¹ The judgement can be accessed via the website of the Federal Shariat Court:
<https://www.federalshariatcourt.gov.pk/Judgments/S-P%2030-L1991%20Riba%20Case-28.04.2022.pdf>.
(accessed on 18 July 2022).

The designation of Urdu as a national language was in itself problematic because it was not spoken in any of the regions that formed Pakistan. Nevertheless, being linguistically neutral as well as the language of the Muslim intellectual elites of Northern India made Urdu a convenient but also controversial choice as one of two constitutionally designated national languages. Article 214 of the Constitution of Pakistan 1956 designated Urdu and Bengali as the national languages of Pakistan, subject to the proviso that English could be used for official purposes for another 20 years and that individual provinces could designate either Urdu and Bengali as the official provincial language earlier, effectively terminating the use of English in that province. In the two years in which the Constitution of Pakistan 1956 was in force, none of the provinces made use of the option to adopt either Urdu or Bengali as the provincial language. The Constitution of Pakistan 1962 continued with the designation of Urdu and Bengali as the two national languages, with the designation of English as the official to be reconsidered by a commission to be set up for this particular purpose in 1972. The Constitution of Pakistan 1962 omitted the option for a province to opt for Urdu or Bengali on its own. The failure to recognise Bengali as the official language of East Pakistan gave rise to the Bengali language movement as a forerunner to the Bengali nationalist movement. With secession of East Pakistan and the founding of Bangladesh in 1972, Article 251 (1) the Constitution of Pakistan 1973 dropped the reference to Bengali and declared Urdu as the only national language, providing also that arrangements should be made for Urdu to be used for official purposes within fifteen years from the date of the commencement of the Constitution. Until such arrangements are in place, English is allowed to be used for official purposes. In addition, provinces are permitted to teach, promote and use a provincial language, as long as this does not prejudice the status of Urdu as the designated national language. The designation of Urdu as the aspirational national and English as the *de facto* official language cannot hide the fact that neither Urdu nor English are spoken widely. As far as the legal system is concerned, all of the laws are issued in English and, bar very few exceptions, all reported judgements are written in English. In 2015, in the case of *Muhammad Kowkab Iqbal v. Government of Pakistan* (PLD 2015 SC 1210) the Supreme Court of Pakistan ordered the government to implement Article 251 of the Constitution of Pakistan 1973, to translate all federal and provincial laws into Urdu within three months from the date of judgment, to hold all competitive examinations for admission to the civil service in Urdu, to respond to citizen's queries in Urdu and for the courts to publish in Urdu all judgments concerned with public interest litigation or which enunciate principles of law. The implementation of the judgment has been patchy, with hardly any judgements written in or translated to Urdu and all laws and regulations only being published in English.

Pakistan is a dualist system, requiring any international law to be incorporated by legislation before it can be applied by Pakistani courts. Being a federation, Pakistan distributes legislative competences between the centre and the four provinces. The 18th Amendment of the Constitution of Pakistan 1973, passed in 2010, strengthened the legislative and fiscal autonomy of the provinces and devolved a number of ministries to the four provinces of Baluchistan, Khyber Pakhtunkhwa (formerly named the North-West Frontier province), Punjab and Sindh. In addition, there are the Northern regions of Gilgit Baltistan and Azad Jammu Kashmir which are not formally part of Pakistan. Whilst *de facto* controlled by Pakistan, both regions have

autonomous systems of law and government, including constitutions and constitutional courts, which are not directly linked to the legal system of Pakistan.

Constitutional Law

Military coups in 1958, 1968, 1977 and, most recently, in 1999, have left deep marks on Pakistan's constitutional history. The current Constitution of Pakistan 1973 was preceded by the Constitution of Pakistan 1958 and the Constitution of Pakistan 1962. The Constitution of the Islamic Republic of Pakistan 1973 came into force on 12 April 1973. In the half century of its existence it has undergone significant amendments reflecting breakdowns in the constitutional order caused by military coups in 1977, with the rule of the army lasting until 1988, and in 1999, with the rule of the army lasting until 2008, as well as returns to democracy. Since the end of the most recent period of military rule, which came to an end with the resignation of President Musharraf on 18 August 2008, the Constitution of Pakistan 1973 was amended nine times with the 18th Amendment to the Constitution 2010 being the most significant because it aimed to reverse many of the constitutional changes introduced during Musharraf's rule.

The Constitution of the Islamic Republic of Pakistan 1973 is the supreme law of the land and provides for the structure of the legal system, the system of governance, the distribution of powers, the competencies of the centre and the provinces, the role of Islam as well as the fundamental rights of the people are based on. The Constitution of Pakistan 1973 was drafted and promulgated in English only. An Urdu version was published by the National Assembly².

Consisting of twelve parts and five schedules, the Constitution 1973 provides for fundamental rights and principles of policy, the organisation and the powers of the Federation of Pakistan and the provinces, the relationship between the federation and the provinces, the judiciary, elections, Islamic provisions, emergency provisions as well as the procedure for constitutional amendments.

The Preamble of the Constitution 1973, incorporated into the main text of the Constitution as Article 2A, declares that "*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 Article 2 establishes Islam as the state religion of Pakistan. Only Muslims can be appointed as President or Prime Minister. In addition to having to conform to the injunctions of Islam, all laws have to comply with the constitutionally protected fundamental rights. These rights include the right to life under Article 9, the right to fair trial under Article 10A, the right to dignity and the privacy of the home under Article 14, the right to information under Article 19A and the right to education under Article 25A. Article 184 (3)

² https://na.gov.pk/uploads/documents/1391139448_469.pdf.

empowers the Supreme Court of Pakistan to review the constitutionality of laws and to pass orders against the government if it considers that a question of public importance with reference to the enforcement of any of the constitutionally guaranteed rights is concerned. In accordance with Article 199, provincial high courts are empowered to issue writs for the enforcement of fundamental rights. In the past two decades, Pakistan's Supreme Court has developed a proactive stance towards the enforcement of fundamental rights. Known as "public interest litigation", this exercise of the Supreme Court's writ jurisdiction involves the judges taking up alleged violations of fundamental rights *suo moto* and without the involvement of any petitioner.

The legislative power consists of two chambers, the National Assembly, also referred to as the *Majlis-e-Shoora*, and the Senate, with the former also giving representation of members of the provincial assemblies. The executive branch is headed by a ceremonial President, with the elected Prime Minister heads the federal government. The prime minister and all ministers must be members of parliament and jointly accountable to it. Governments can be removed through a vote of no confidence in the National Assembly. The separation of powers in the four provinces mirrors that of the centre, with unicameral, elected provincial assemblies constituting the legislative, high courts the judicial and chief ministers the executive branch. Appointed by the President in consultation with the Prime Minister, provincial governors represent the federal government but have no role to play in the government of the province.

Private and Commercial Law

The sources of Pakistan's civil and commercial laws are spread across a number of statutes as well as precedents in the form of pre- and post-independence judgments of the superior courts. Property law is based on a number of statutes, the most important being the Transfer of Property Act, 1882, the Land Acquisition Act, 1884 and the Easements Act, 1882. The Trusts Act, 1882 does not apply Islamic trusts, referred to as *waqfs*. Islamic *waqfs* are governed by the provisions of the West Pakistan Waqf Properties Ordinance, 1961, the latter based on the colonial era Mussalman Wakf Validating Act, 1913.

When first introduced, the Contract Act, 1872 covered in addition to the law of contracts also that of related areas, such as indemnity, insurance, guarantee, agency, sale of goods and partnership. In the course of the nineteenth century, many of these areas of law were removed from the Contract Act, 1872 and replaced by dedicated statutes. Thus, the Sale of Goods Act, 1930 was passed in order to align British Indian law more closely to the English Sale of Goods Act, 1883. The Partnership Act, 1932 replaced the chapter on partnerships in the Contract Act, 1872. With the first statute on company law being the Companies Act, 1850, this area of law is now governed by the Companies Act, 2017. The Civil Procedure Code, 1908 and the Limitation Act, 1908 apply to all civil suits. In addition to banking law, the only other area of civil law that has been subjected to a process of Islamisation is the law of evidence. The *Qanun-e-Shahadat*, 1984 is an adaptation of colonial Evidence Act, 1872, incorporating

Islamic law of evidence in relation to criminal offences and transaction involving future obligations.

The personal status of the parties determines the family law applicable to them. Muslims, Hindus, Christians are all governed by their respective religious laws. The family law of Christians is based on Christian Divorce Act, 1869 and the Christian Marriage Act, 1872. The family law of Hindus has been partially codified in the form of the Sindh Hindu Marriage Act, 2016 and the Hindu Marriage Act, 2017. The latter applies to the whole of Pakistan except the province of Sindh. Muslim Family law has been partially codified in the form of the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961. In all other areas of family law, Muslims are governed by Islamic law.

Court System and Law Faculties

The judicial structure consists of a hierarchy of courts. There is one Supreme Court of Pakistan and a High Court for each province, as well as a High Court for the Islamabad Capital Territory. In accordance with Article 185 (1) has jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of the High Court. On its original side, the Supreme Court has exclusive jurisdiction in any dispute between any two or more governments (Article 184 (2)). Furthermore, under Article 184 (3), the Supreme Court has original jurisdiction in cases of public importance with reference to the enforcement of any of the constitutionally guaranteed fundamental rights.

Decisions of any High Court are binding on all subordinate courts and, in accordance with Article 203, each High Court controls and supervises all subordinate courts. The jurisdiction of the High Courts is divided into an appellate and an original side. In its appellate jurisdiction, the High Courts hear appeals from all subordinate courts. On its original side, pursuant to Article 199, each High Court has the jurisdiction to issue to any person or authority the writs of *certiorari*, *mandamus*, prohibition, *habeas corpus* and *quo warranto* for the enforcement of any of the constitutionally guaranteed fundamental rights. Courts subordinate to the High Courts are divided into civil and criminal courts, with the latter established under the Civil Courts Ordinance, 1961. The lowest civil court is the court of the civil judge, followed by the district judge. Civil judges are divided in civil judge first, second and third class. Ad valorem court fees have to be paid in most civil proceedings in accordance with the Court Fees Act, 1870. The West Pakistan Family Courts Act, 1964 provides for the establishment of family courts in each District. The Constitution (Amendment) Order 1980 incorporated into the Constitution provisions relating to a new court, the Federal Shariat Court, with the original jurisdiction to review and decide whether any law or provision of law is repugnant to the injunctions of Islam and to hear any appeal arising under the Zina (Enforcement of Hadd) Ordinance, 1979.

Whilst many of the defining features of Pakistan's legal system are derived from the principles and institutions of the English common law, such as the doctrine of binding precedent, there are also a number of important differences. Unlike English law, the bulk of Pakistan's law is codified. In applying statutes, Pakistan courts are required to interpret them in the light of Islamic law. In the case of *Commissioner of Income Tax, Peshawar Zone, Peshawar vs. Siemen A.G.* (PLD 1991 SC 368 at 372 and 373), the Supreme Court held that “as long as existing statutes are not brought in conformity with the injunctions of Islam (Art. 227 of Constitution), their interpretation, application and enforcement wherein discretionary judicial elements are involved, only that course would be adopted which is in accordance with the Islamic philosophy, its common law and jurisprudence.” In the case of *Mian Aziz A. Sheikh v. Commissioner of Income Tax* (PLD 1989 SC 613) the Supreme Court held that in areas of law not occupied by statute, judges are required to apply the “common law of Islam its jurisprudence and philosophy.”

Founded in 1868, the University Law College of the University of Punjab is the oldest seat of legal education in Pakistan. Affiliated to it are twenty private colleges. In addition, most of the provincial public universities offer legal degrees. There are several private law colleges, such as the Shaikh Ahmad Hassan School of Law at the Lahore University of Management Science in Punjab. The LLB, modelled on the English law degree and taught in English, is the academic qualification required to be admitted to practice law. The Faculty of Sharia and Law of the International Islamic University in Islamabad offers a five year LLB programme that is taught in English and Arabic. Improving the quality of legal education has been a long standing concern of the Supreme Court of Pakistan. In the case of *Pakistan Bar Council vs. The Federal Government and Others* (Constitutional Petition No. 134/2012 decided on 31 August 2018), the Supreme Court made a number of directions with regard to the quality of legal education, such as the introduction of Bar Entrance Examinations and Law Admission Tests, an increase the three year LLB to five years of study, minimum qualifications of teaching staff of law colleges, a complete ban of evening classes for LLB programmes, the introduction of a bar vocational course, evaluation of law colleges' examination systems and processes by the Higher Education Commission and the setting up of a committee to monitor the implementation of the judgment. In the same judgment, the Supreme Court closed down five private law colleges and ordered that almost 100 private law colleges, affiliated to public universities, should be closed down because they were either outside the territory of the relevant university or had been found “below the mark”. A number of other law colleges were directed to “overcome weak areas” within six months from the date of judgment. In April 2022, the Supreme Court of Pakistan admitted another petition brought by the Pakistan Bar Council for the improvement of legal education and ordered the setting up of an independent committee to make suggestions for regulating and improving legal education in Pakistan.³ Pursuant to the Legal Practitioners and Bar Councils Act, 1973 and the Pakistan Legal Practitioners and Bar Councils Rules, 1976, it is the Pakistan Bar Council that regulates the admission of lawyers entitled to practice before the Supreme Court. The corresponding provincial bar councils regulate the legal profession in their respective provinces.

³ <https://www.dawn.com/news/1687202>.

References to official sources and literature

The official source for all newly enacted legislation is the Gazette of Pakistan. Legislation only becomes binding and enforceable after publication in Part I of the Gazette of Pakistan. The Gazette of Pakistan is published by the Government of Pakistan. There is no index or table of contents but recent issues of the Gazette of Pakistan can be accessed on the website of the Printing Corporation of Pakistan: <http://www.pcp.gov.pk/index>. Important pieces of legislation are printed in Pakistan's main law report, the Pakistan Law Report or PLD. In addition, the Ministry of Justice's website contains a link to the Pakistan Code, an on-line data base which contains all of the laws in force in Pakistan, listed in alphabetical order or under particular categories: <https://pakistancode.gov.pk/new/index>. Provincial governments maintain websites listing legislation as it pertains to their province. The four provincial governments of Punjab⁴, Sindh⁵, Khyber Pakhtunkhwa⁶ and Baluchistan⁷ all maintain and regularly up-dated on-line official versions of primary legislation in force in their respective provinces.

There is no official report of judgements decided by Pakistani courts. The official websites of the provincial high courts and the Supreme Court list a selection of recent significant judgments as decided by individual judges. There are a number of privately published law reports. The All Pakistan Legal Decisions, abbreviated as PLD, is the only law report that has been published since the country came into existence. Published monthly, the PLD contains decisions of the five provincial high courts, the Federal Shariat Court and the Supreme Court as well as recent legislation and, in a dedicated section headed "Journal", articles on legal topics produced by both practitioners and academics. It also includes judgments from the Supreme Court of Azad Jammu and Kashmir as well as profiles of newly appointed judges of superior courts. There are a number of specialised law reports, including the Supreme Court Monthly Review (SCMR) published since 1968, the Civil Law Cases (CLC) published since 1979, the Monthly Law Digest (MLD) published since 1984, the Pakistan Labour Cases (PLC) published since 1960, the Pakistan Criminal Law Journal (PCrLJ) published since 1968, the Pakistan Tax Decisions (PTD) published since 1959, the National Law Reporter (NLR) published since 1978, Shariat Law Reports (SLR) published since 2000 and the Pakistan Law Journal which has been published by the Pakistan Bar Council since 1971 and is now available on-line.⁸ There are several digests of reported cases. Published by PLD is the Decennial Digest covering the period from 1947 to 1956, two Quinquennial Digests covering the periods from 1957 to 1961 and from 1962 to 1966. From 1966 onwards, PLD has been publishing annual law digests. In addition there is the Decennial Digest for the period from 1967 to 1976. PLD also offers a comprehensive on-line data base of reported judgments⁹. The well-established Pakistan Law

⁴ <http://www.punjablaws.gov.pk/index1.html>.

⁵ <http://sindhlaws.gov.pk/SindhIndex.aspx#>.

⁶ <http://www.kpcode.kp.gov.pk>.

⁷ <https://pabalochistan.gov.pk/new/acts/>.

⁸ <https://www.pljlawsite.com/editormore.asp>.

⁹ www.pakistanlawsite.com.

House in Karachi is in the process of launching a on-line data base of Pakistani and South Asian judgements at the South Asian Law Portal.¹⁰ In addition, there are several research guides on Pakistani law published by law libraries, such as the “Legal Research Guide to Pakistan”, published on-line by the Hauser Global Law School Program of New York University¹¹ and the Library of Congress.¹²

Literature on Pakistani law is published mostly in English. Most text books on Pakistani law are aimed for practitioners and are presented in the form of annotated commentaries of statutes, often grouped on particular subjects. The most prolific author of annotated textbooks on Pakistani statutes is the M. Mahmood, a legal practitioner and author based in Lahore. Starting in 1973 with his first commentary titled “The Constitution of the Islamic Republic of Pakistan, 1973: A Comprehensive and Detailed Commentary with a Comparative Study of the Constitutions of Pakistan, 1956 and 1962”, published by Pakistan Law Times Publications in 1973, M. Mahmood has, for the past 50 years, published annotations of every single important Pakistani piece of legislation. in detailed that regularly up-dated annoted commentary. In line with other textbooks, M. Mahmood’s commentaries take the form of extracts and references of judgments to particular sections of a statute. Prominent publishers include Sa Salam Publications¹³, Petiwala Books International¹⁴, Paramount Books¹⁵, Manzoor Law Books¹⁶ and Federal Law House¹⁷ and, amongst the oldest and best known, the Pakistan Law House¹⁸ which has been publishing and selling books on Pakistani law since 1950.

Further Literature

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¹⁰ <https://salp.co/Account/Register>.

¹¹ <https://www.nyulawglobal.org/globalex/Pakistan1.html#LegalResearch>.

¹² <https://www.loc.gov/item/guide-to-law-online/pakistan/>.

¹³ <https://www.loc.gov/item/guide-to-law-online/pakistan/>.

¹⁴ <http://petiwalabooks.com>.

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¹⁶ <https://manzoorlawbook.com>.

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