

THE ISLAMIC LAW (THE SHARIA) IN THE CONSTITUTIONAL STRUCTURE OF PAKISTAN

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Abstract:

The assimilation of divine laws into the man-made set of rules is not an easy task. The matter of the interpretation of divine laws and their conversion from jurist's law into positive law is another difficult task to make the adoption of divine laws into the legal structure of a state. The Muslim states try to achieve the goal of enforcing the Islamic laws in their constitutions along with the working of their legal structures that protect their religious identity by not giving up their historical, religious, and cultural backgrounds. This article analyses the adoption of the Islamic Laws (the Sharia) into the democratic constitutional structure of Pakistan, in a social context where religious groups, owing the wills of a fair portion of the society, have remained on the move to get Sharia declared as state law while secular groups have been advocating the democratic constitutional structure of the state. To analyse the constitutional structure of Pakistan in the context of Islamic Law (Sharia), the author uses references from the constitutional structure of some other leading Muslim states that give various treatment to Islamic Laws (Sharia) ranging from pure, mixed and secular systems. This study concludes that leading Muslim states adopt Sharia into their constitutional structures by giving Sharia various treatments. Likewise, Pakistani constitution is expressly dominated by Sharia but instead of directly applying Sharia as a legal system of the state, the constitution, as well as legal structure of Pakistan, declare Islam as official religion and all the rules are made in consideration with the rules of Islamic Law (Sharia)

Keywords: Islamic Law (Sharia), Democratic constitutionalism, Pakistan

INTRODUCTION

The religious law and social customs are given importance in the framing of constitutions by various countries in the world, especially, the inclusion of Islamic law in the constitutions of the Muslim countries. The matter of the inclusion of divine laws within the constitutional framework of the modern states is a challenging task. The Muslim countries have developed Islamic constitutionalism from contemporary religious constitutionalism to adopt Islamic law into the constitutional frame of the states.¹

Most of the majority of Muslim countries implement Islamic principles

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into their constitution. Kingdom of Saudi Arabia (KSA) is among those Muslim majority countries that exclusively asserts its identity as a Muslim state and basis its constitution on the principles of the Holy Quran and Sunnah. The constitution of the Kingdom of Saudi Arabia (KSA) contains 9 chapters and 83 articles which are derived from the Holy Quran and Sunnah.² Brunei Darussalam is another Muslim state that not only declares itself as a Muslim country but also puts this declaration in its constitution, stating Shafi school of thought as its official school. The constitution of the Brunei Darussalam consists of several legal rules for both civil and criminal matters that are based on Islamic Law.³

The adoption of Sharia as a legal system of Pakistan has remained a topic of discussions and debates.⁴ The application of Islamic Law in the legal system of Pakistan has remained a widely discussed topic among various sections of the society. Most people in Pakistan favor the implementation of Sharia Law. The public narratives support the application of Sharia Law across the country.⁵ There is a general belief among the citizens of Pakistan that Pakistan follows Sharia Law, and they favor the implementation of Sharia Law as the official law of the land.⁶ The efforts to enforce Islamic Law as a Legal system of Pakistan remained a debatable point in the parliament of Pakistan.

The Islamic movements all around the world have been trying to compel their states to adopt Sharia as their legal system. These movements have involved a lot of controversies, violence, and warfare.⁷ This debate has become more significant after the incident of 9/11.

SHARIA AND MUSLIM MAJORITY COUNTRIES

The legal structures of the Muslim Majority nations give different types of treatment to Sharia (Islamic Laws).⁸ Most of the Islamic countries use the mixed system by giving importance to Sharia but frame their own legal system, some of the Muslim Majority countries follow the secular system where Sharia is given no role in framing the legal system of the state and only a few Islamic states apply the Classical Sharia system where Sharia is considered as the primary source of their legal system.⁹

In mixed Sharia systems, sharia does not dominate but plays an important role in framing the domestic legal structure of the nation. In these systems, the legal system is based on the national constitution and the rule of law and rules of Islam play a dominant role in specific areas of national law. There exist different codified laws along with the constitution of the country. Although non-democratic elements interfere in the matters of

state, yet these states acknowledge the concepts of separation of powers and democratic electoral system.¹⁰

In mixed Sharia Systems, religious scholars and religious organisations are not given any role in the process of law-making. The political and legal authorities play a central role in the law-making process. Pakistan, Afghanistan, Egypt, Morocco, Malaysia, Nigeria, Sudan, and Indonesia and many more Muslim Majority countries. These countries keep changing and modifying their rules, and most of them have undergone many major changes when compared to the rules of classical sharia.¹¹

Sometimes, this method of adopting religious law into the constitutional structure of Islamic states turns the constitutional structure into a complex system. The presence of conflicting Islamic rules and Human rights establishes legal pluralism where a scheme for a dual system of Islamic law and secular law operates at the same time. The 1957 Constitution of Malaysia is the leading example of the establishment of dual pluralism. In this scheme, the secular court's system works at state in the presence of Sharia courts system at the federal level. The federal-level courts have the responsibility to protect the fundamental liberties under the constitution that adopts Islam as a state religion and protect the other religions practiced in peace and harmony.¹²

To protect themselves from this complexity and to fulfil their desire for the enforcement of Islamic Law, Al Sanhuri suggests the Muslim states put their efforts in the codification of Islamic Law. After the codification of Islamic Law, this approach can be considered as a historical identity which has been modernised to meet the modern challenges. This method of holding religious identity by protecting its values under modern constitutionalism is a difficult task but can be achieved through a systematic way of dealing with this complex phenomenon.¹³

The Iraqi and Afghanistan constitutions provide a glimpse of retaining legitimacy in the eyes of their own people by adopting Islamic Law into their constitutions. Both the countries have given considerable place to Islam in their constitutions of 2004 and 2006 to gain the support of their people. Islam has been proved as a source of unity and harmony.¹⁴ The quest to retain the historical past has urged the Iraqi people to get released from a secular government.

The people have considered Islamic Law as a symbol of attachment to a glorious Muslim past and the revival of their history. They have aimed to see Islamic Law as a part of their constitution to limit the political

authorities and compel the political authority to obey the Islamic Law by giving supremacy to divine authority.¹⁵

The changing dynamics of the domestic legal structures of the Muslim states have introduced a new concept of the constitutional status of Islamic law where Islamic law is applied within the constitutional structure of the Islamic states. This system gives parliament powers to constitute laws of the state in consultation with the Islamic laws. Although, the matter of the primacy between parliamentary powers and Islamic rules becomes a point of debates and discussions, yet this trend is expected to be successful in framing a unanimously accepted system.

The constitutional structures of Afghanistan, Iraq, Tunisia, and Egypt are the leading examples of the application of Islamic law within the constitutional structure of Islamic states. This concept is becoming popular and is likely to be applied by many more Islamic states in the near future. The political parties come up with their political philosophies, the religious organisation's stress on the adoption of Islamic law as the law of the state and liberals argue against the adoptions of Islamic laws.¹⁶

The democratic electoral systems of most of the Islamic states suit the concept of parliamentary supremacy over Islamic laws. The parliamentary supremacy allows the lawmakers to adopt a flexible approach in the framing of their domestic legal structures. The rigid nature of Islamic laws become a hindrance in the way of framing new rules when they are needed. The religious organisations often oppose the parliamentary powers to frame rules, and their approach turns into agitation against the states.¹⁷

There are many Muslim states that conflict with the religious organisations on the matter of the adoption of Islamic law legal structure of the state. They consider Sharia as the supreme system that stands above any man-made law, and the state must refrain from making legislation in parliament. The Muslim countries face the dilemma of adopting rules of Sharia into their domestic legal systems due to the various interpretations of the rules of Sharia by various schools of thoughts among Muslim scholars. This situation makes the framing of a constitution ambiguous when it comes to the matter of the separation of legislative, executive, and judicial powers.¹⁸

SHARIA IN THE CONSTITUTIONAL STRUCTURE OF PAKISTAN

The Islamic Republic of Pakistan binds the legislative authorities to bring all existing laws in conformity with the injunctions of Islam as laid down in the Qur'an and Sunnah and forbids the enactment of any law which is repugnant to such injunctions.¹⁹ The other Islamic countries like Egypt, Iraq, and Brunei adopt Islamic law into their constitutions respectively.

Pakistan, being a country established on the ideology of religion, is a unique country in the world that owes the deep-rooted legacy of European colonialism and long-standing social roots with Hindus, Christians, and other non-Muslim communities. None of the Muslim countries has the same kind of circumstances like circumstances of Pakistan at the time its creation. Martin Lau expresses the situation of Pakistan in the following words;

'The constitutional history of Islam in Pakistan differs somewhat from that of many other Muslim countries: Egypt and Turkey, for instance, were not created as states defined by religion; Iran and Afghanistan did not experience the same type of European colonialism; Indonesia has its own rather distinctive constitutional vision of Pancasila; Malaysia has its federalization of shari'a. Similarly, many states struggling with the status of shari'a focus on high-profile constitutional clauses — clauses regarding the status of Islamic law as 'an' or 'the' source of legislation. But, in Pakistan, many of the most important debates regarding shari'a involved, not the substantive features of shari'a, but rather the separation of powers'.²⁰

The first constituent assembly of Pakistan decided to bring all the legislation into accord with the injunctions of Islam.²¹ It was decided that any law made in repugnant to the injunctions of Islam will be considered as invalid. It was clearly conveyed to the legislative authorities that Islamic principles will be realised and it will be the responsibility of the legislature to ensure the application of Islamic rules in framing the legislature.

Despite considering the religious establishment, democratic constitutionalism was not neglected. In fact, the application of Sharia was proposed to be assimilated into the democratic constitutionalism. The idea of the working of democracy, with the combination of the constitutional law and religion by parliamentary powers, was presented by an early twentieth-century Muslim philosopher Mohammad Iqbal.²²

The legislative system of Pakistan ties democracy with Islamic values as well as the separation of powers. The concept of the sovereignty of God has been delegated to the chosen representatives of the state. The representatives have been given the responsibility to make rules as to enable the people of Pakistan to spend their lives in accordance with Islam.²³ This formulation of the constitutional system does not absolutely represent the pure Islamic concept but makes the working of Islamic Law practicable in a democratic constitutional frame.

Until 1980, the Islamic Law remained applicable to the personal status issues of the Muslims in Pakistan. In 1980, Sharia courts were established, and the changes were made in the criminal justice system of the country.²⁴ The Sharia courts were given powers to judge and review the cases, court decisions and the acts of government to look at their compliance with the rules of Islam. The rules of Sharia Law were included in the Pakistan Penal Code.

The conventional court system of Pakistan remains under the influence of Sharia Law. The Sharia courts have the power and authority to review any law and declare it invalid if it is repugnant to any of the injunctions of Islam.²⁵ But laws have been made to transfer jurisdiction from Islamic Law to the criminal code of the country. In 2006, The Women Protection Act was passed, and the rape cases were moved from the authority of Islamic Law to the authority of the criminal code of the country.

NARRATIVE OF THE PEOPLE OF PAKISTAN

The matter of the constitutional relationship has always remained a topic of political, social, philosophical, religious, academic, and scholarly discussions throughout the history of Pakistan. Pakistan.²⁶ The study of the matter of the constitutional approaches towards the application of Islamic Law in the parliamentary system of Pakistan provides a comprehensive understanding of the relationship between Islam and democracy.²⁷

The majority of people in Pakistan favour the implementation of Sharia Law. The public narratives support the application of Sharia Law across the country. There is a general belief among the citizens of Pakistan that Sharia Law is followed by Pakistan and they favour the implementation of Sharia Law as the official law of the land. The efforts to enforce Islamic Law as a Legal system of Pakistan remained a debatable point in the parliament of Pakistan.

According to the supporters of the implementation of Sharia Law, is created for the implementation of Sharia Laws as a system of the state They present the ideology of Pakistan, that is based on the two-nation

theory (Muslims are a separate nation)²⁸ in favor of their argument. They present examples from the movement of Pakistan that separates Muslims and Hindus into two different nations.²⁹ They support their argument by quoting the summaries from the speeches of Muhammad Ali Jinnah:

The constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principle of Islam. Today, they are as applicable in actual life as they were 1,300 years ago. Islam and its idealism have taught us democracy. It has taught equality of man, justice, and fair play to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan. In any case, Pakistan is not going to be a theocratic State to be ruled by priests with a divine mission. We have many non-Muslims --Hindus, Christians, and Parsis --but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.³⁰

In 1940, Muhammad Ali Jinnah claimed, 'Islam and Hinduism: are not religions in the strict sense of the word, but are, in fact, different and distinct social orders and it is a dream that the Hindus and Muslims can ever evolve a common nationality'. The policymakers and parliamentary practices in Pakistan have remained ineffective in the decision making about the implementation of Sharia Law as the legal system of Pakistan. The implementation of secular laws has always been opposed by the religious organisations that have an influence on the decision making of a fair portion of the general masses in Pakistan.

The opponents have been favouring the formation of an Islamic democratic system where Muslims, as well as non-Muslims, could exercise spend their life in complete freedom. They present the theory of the working of a democratic system in Pakistan according to the ideology of the founder of Pakistan (Muhammad Ali Jinnah).³¹ They use the speeches of Muhammad Ali Jinnah that favour the democratic system as the structure of the state, as there are contradictory statements in his speeches on the matter of this matter and create confusion among both the sections. The proponents of Sharia interpret his speeches in their own way and vice-versa.³² They call the movement of Pakistan as the movement of Muslims, not a movement of Islam.³³ They use to link the demand for Pakistan for economic reasons. Adeel Khan states:

'the demand of Pakistan was purely a secular nationalistic demand because Muslims of subcontinent felt threatened by an overwhelmingly Hindu majority, economically not religiously. If threat had been purely religious-based, the Muslim religious groups would have been first to demand a separate homeland, but they were not in favour of the creation of Pakistan'.³⁴

In Pakistan, different sections of society have been struggling to frame the legislative structure of the state based on Islamic or secular structure. The religious leaders have always been demanding the implementation of pure Sharia Law, while the liberals, business communities and political leaders have been contesting on the applicability of Sharia Law into the democratic system of the state. None of them seems to oppose the applicability of Islamic Laws.³⁵

CONCLUSION

The method of adopting the Islamic Laws into the constitutional system and question of supremacy has remained a topic of discussion throughout the constitutional history of Pakistan. The cultural, social, theological, economic, and personal factors play an important role in building the views of the individuals on the matter of Islamic or secular system of the state. In a society that derives its roots from religion, the matter of the supremacy of divine will and human will always result in the acceptance of divine laws as supreme.

The working of this constitutional system provides a context to study the matter of compatibility of Islam with democracy. Although the situations of other Muslim countries vary and this system might not be considered as a model for each and every Muslim country, but the other Muslim countries of the world can have a look at this model to frame their own systems to make the working of democracy possible with Islam. The constitutional system of Pakistan provides a sophisticated image of the working of democracy in an Islamic context.

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