



Islamic Constitutionalism and the Challenges Facing the Muslim World

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Introduction

History is testament to the rise of Islam which started with the Prophet Muhammad's (PBUH) establishment of the state of Medina in 622. The Constitution of Medina was arguably the first human rights document which formed the basis of a state¹. It outlined right of citizens and firmly established principles meant to guide the governance of an Islamic state. This constitution was a political document which was successful in establishing peace among the conflicting groups within the society and it established an institutional mechanism which was harbinger of economic and political triumph. The state of Medina established a social welfare state that was successful not only militarily and economically but developed into an empire that achieved remained the global center of education and research for centuries. The phenomenal success of the state of Medina is a major source of inspiration for the modern day Muslim countries who seek to establish a constitutional order that is in line with the principles of Islam.

The sound foundations of the state of Medina enabled the rise of Islamic Empire that stretched across the globe. After the Holy Prophet (PBUH) the leadership of Muslim community was passed on to the Khalifa's who became the spiritual and administrative leaders and contributed immensely to the spread of Islam to other part of the globe. The Khalifa's were elected from amongst the Muslims and their religious piety and knowledge of Islam was one of the key factors of nomination to the high office. Overtime the spread of the Islamic empire saw the rise of various caliphates in different part of the world. The Umayyad Caliphate, Abbasid caliphate, Fatimid Caliphate and the Ottoman caliphate were all offshoots that originated from the state of Medina.

¹ Mohammad Berween, "Al-Wathiqah: The First Islamic State Constitution", Journal of Muslim Minority Affairs, Vol. 23, No. 1, April 2003.

The importance and prestige the Islamic empires enjoyed and the reputation they built in governance and promoting knowledge economy helped Islam spread rapidly. This remarkable success of Islamic empires built on the foundations and principles laid by the state of Medina achieved tremendous glory and remains a matter of prestige for the Muslims for all times to come. The fall of the Ottoman caliphate in Turkey in the early 19th Century became symbolic of the downfall of the Islamic civilization. The downfall of the last Islamic empire i.e. Ottoman Empire after being defeated by the allied forces in the First World War left the global Muslim citizenry in despair. Overtime idea developed that a modern state emulating the Islamic values of the state of Medina and guided by Quran and Sunnah of the Prophet (PBUH) would help the Islamic world to go back to its roots and develop a comprehensive governance system that enables the Muslims to take their place in the world and regain their lost prestige.

The post-colonial era witnessed many Muslim majority countries striving to develop modern constitutional arrangements that were in line with Islam. Professor Noah Feldman observed that it is Islam that continues to “invoke the core idea of law in terms that resonates deeply with the Islamic Past”. Efforts have been made by many countries to bring their governance model in conformance with the principles and values of Islam. In another place, Noah Feldman writes “where the country is majority Muslim, many citizens will often want Islam to have some official role in state governance, beyond mere symbolism”². Many Islamic countries underwent rigorous reforms however, their conformance with the principles of Islamic law and Sharia remain questionable. One tool used by legal experts for this purpose is the introduction of the Sharia Guarantee Clauses (SGCs) into the constitution. The SGC provide that any law, even if it has been

² Dawood I. Ahmed, Moamen Gouda, “Measuring Constitutional Islamization: The Islamic Constitutional Index, Hastings International and Comparative Law Review, 2015.

enacted by constitutionally correct procedure, is void so long as it is inconsistent with principles of Sharia³.

This paper will analyze the efforts geared towards Islamic constitutionalism⁴ by Pakistan, Iran and Malaysia in a comparative perspective. This paper aims to identify the problems these countries faced as a consequence of introducing Islamic reforms. This paper will focus on a textual analysis of the relevant constitutional provisions and see how various SGC in these constitutions aim to induce Islamic character into the constitutional framework. It will make use of different cases and issues in these three jurisdictions to show how and why insertions of Islamic provisions into these constitutions have proved to be problematic. The goal is to understand the historical and social experiences of these three jurisdictions that led to development of their Islamic identity. The last chapter will also look at the theoretical foundations of Islamic Constitutionalism and come up with guidelines that will be useful to help the project of reconciliation of the Islam and the modern day constitutional principles, in an efficient manner.

The choice of jurisdictions for this comparative analysis is made to ensuring that a variety of approaches to the project of Islamic Constitutionalism are analyzed based on the divergent approach towards state and religion used by these three countries.

Islam is the state religion of Pakistan. The Constitution of Pakistan is modeled on the Westminster system and inculcates the modern day constitutional principles of rule of law, separation of powers, fundamental rights and judicial review. The insertion of Islamic principles

³ Clark B. Lombardi, "Designing Islamic constitutions: Past trends and options for a democratic future", Oxford University Press and New York University School of Law 2013.

⁴ Constitutionalism that is in some form based on principles and values of Islam, as opposed to constitutionalism that has developed in countries that happen to be Muslim but that has not been informed by distinctively Islamic principles.

and institutions into the constitutional model is a significant feature of Pakistan's constitution. Multiple Sharia Guarantee Clauses (SGC's) within the constitution ensure that any law repugnant to Islam is declared unconstitutional.

The theocratic state of Iran established as a result of the 1979 Islamic Revolution successfully established Vilayat-e-Fiqh i.e. rule of religious scholars. The unique Iranian constitutional model establishes the supremacy of a supreme leader over the entire state apparatus that ensures strict enforcement of Sharia law.

Both Pakistan and Iran have faced serious problems as a consequence of introduction of SGC into the constitution and Islamization of their ordinary laws. One objective of this paper is to dissect and analyze the problems that Pakistan and Iran face because of their use of religion in the constitutional framework, statecraft, and politics. The Third Jurisdiction i.e. Malaysia is a Muslim majority country that has constitutionally declared Islam as the religion of federation but has consistently identified itself as a secular state. While many laws in Malaysia laws have been inspired by Sharia, there are no SGC in the Malaysian Constitution.

1. Pakistan: An Islamic Republic Governed by Islamic Principles

Fierce political struggle of the Muslims of sub-continent culminated in to the creation of a separate homeland for the Muslims in 1947 i.e. Pakistan. The Two nation theory⁵ laid the foundation of the Pakistan movement and sought to create a distinct nation-state wherein Muslim would be free to establish a state based upon the teachings of Islam. Pakistan's First Constituent Assembly was successful in coming up with the Objectives Resolution⁶ which stated that sovereignty over the entire universe belongs to Almighty Allah alone and the authority is to be exercised by the people of Pakistan within the limit prescribed by Him is a sacred trust. The Objectives Resolution outlined that the state shall exercise its powers and authority through the elected representative of the people in accordance with the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam. The objectives resolution guaranteed fundamental right, independence of judiciary and freedom of religion for minorities in line with the vision of Pakistan's Founder Muhammad Ali Jinnah who sought to establish a democratic state based on Islamic principles.

Interestingly, the objectives resolution has served as the preamble for Pakistan's 1956 and 1962 Constitutions. It remained as the preamble of the incumbent 1973 Constitution and was made its substantive part⁷ by virtue the 8th constitutional amendment introduced by President Zia-ul-Haq as part of his Islamization project. The principles outlined in the objectives resolution therefore,

⁵ Muslims and Hindus are two separate nations by every definition; therefore, Muslims should be able to have their own separate homeland in the Muslim majority areas of India, in which Islam can be practiced as the dominant religion.

⁶ Objectives Resolution drafted by the First constituent Assembly of Pakistan.

⁷ Article 2A, Constitution of Islamic Republic of Pakistan 1973.

have maintained constitutional status throughout the country history and have frequently been interpreted and deliberated in various constitutional Court judgments in Pakistan⁸.

1.1 Islamic Provisions in Pakistan’s Constitution

In line with the aspiration of the people of Pakistan and the vision of the founding fathers of the country to create a state wherein the Islamic principles are applied in letter and spirit, the existing 1973 Constitution inculcates multiple provisions that seek to ensure the fulfillment of this goal. It must be noted that nowhere in the Constitution of Pakistan the word “sharia” is directly used⁹, this was done deliberately to avoid importation of classical interpretations of Islam. The term sharia is used widely to refer to the God ordained law that Muslims ought to follow. Under Islamic legal jurisprudence Islamic legal scholars used the various sources of Islamic law discussed in Chapter 4 to declare “fatwa” or final pronouncement regarding their interpretation of Islamic law on any particular legal issue. While there was a strong support base and demand for the inculcation of sharia law into Pakistan’s constitution, progressive religious forces and the liberal ruling elite was wary of the potential threat posed by direct reference to sharia. This would have not only strengthened the conservative and dated interpretation of religion but also delegated the authority of interpretation of Islamic law from the courts to a highly orthodox religious clergy¹⁰.

1.1.1 State Religion

The Constitution of Pakistan clearly states that Islam shall be the state religion¹¹. Having established Islam as the state religion the framers of the constitution ensured that religious

⁸ Marva Khan, “Constitutional Comparison and Analysis of Discrimination against Religious Minorities in Pakistan and India” LUMS Law Journal 2014: 1(1)

⁹ Except where reference to the Federal Shariat Court is made.

¹⁰ Clark B. Lombardi, “Can Islamizing a legal system ever help promote liberal democracy? A view from Pakistan” University of St. Thomas Law Journal Spring 2010.

¹¹ Article 2, Constitution of Islamic Republic of Pakistan 1973.

minorities are protected and their freedom to practice and propagate their religion is protected by the state as a fundamental right¹². The founding father of Pakistan Qaid-e-Azam Muhammad Ali Jinnah was cognizant of the importance of religious freedom of minorities and in his first address before the constituent assembly he stated “You are free; you are free to go to your temples. You are free to go to your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion, caste or creed—that has nothing to do with the business of the state.”

1.1.2 State responsibility to Promote Islamic Way of Life

Under the chapter of principle of policy that is not judicially enforceable but are meant to guide the state in its governance objectives the Constitution obligates the state to take steps to enable the Muslims individually and collectively order their lives in accordance with basic concepts of Islam. Article 31¹³ also requires that Holy Quran and other Islamic teachings are made compulsory. Arabic is also to be promoted in order to make Quran more accessible to the masses. The constitution enjoins upon the state to promote unity and observance of Islamic moral standards along with securing proper organization of Zakat, Usher, Auqaf, and mosques. Moreover, Article 38 enjoins upon the state to eliminate the system of riba or usury as early as possible. While all these duties of the state are not enforceable through the court system, they

¹² Article 20: Subject to law, public order and morality:-

- (a) every citizen shall have the right to profess, practice and propagate his religion; and
- (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions

¹³ Article 31 (1) 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 enabled to understand the meaning of life according to the Holy Quran and Sunnah.

(2) 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; and
- (c) to secure the proper organisation of zakat, ushr, auqaf and mosques.

outline the aspirational goals the constitution envisions and considers important policy objectives for the executive to pursue.

1.1.3 Laws to be in Conformance with the Quran and Sunnah

Perhaps one of the most important Sharia Guarantee Clause (SGC) in the constitution that aims to ensure that compliance of the Pakistan's legal framework in accordance with Islam is Article 227¹⁴ which enjoins upon the state to bring all existing laws in conformance with the Holy Quran and the Sunnah of the Prophet (PBUH) and prohibits enactment of any law that is contrary to Islamic injunctions.

1.1.4 Islamic Qualifications for State officials

The constitution also requires that the Head of the State i.e. the President of Islamic Republic be of Muslim¹⁵ faith. Similarly, the requirement to be a Muslim is applicable to most members of the National Assembly (Parliament's lower house). In addition, Article 62 requires all the Muslim members of the National Assembly and the Senate (Parliament's Upper House) to satisfy other religious and moral qualifications. Thus, a Member of Parliament must be someone who has "good character" and is not commonly known to be someone who violates "Islamic Injunctions", he or she "must have adequate knowledge of Islamic teachings and [practice] obligatory duties prescribed by Islam as well as avoid from major sins" and finally he must be "sagacious, non-profligate, honest and truthful".

¹⁴ Article 27: (1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions

¹⁵ Article 40(2) "A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly"

Similarly, the constitutional requirement for disqualification of the members of the national and provincial legislatures also borrows requirements from Islamic tradition. There is a plethora of case law emanating from the constitutional courts where members of the Parliament have been disqualified from their offices upon failure to fulfill these Islamic requirements. Quite often these provisions are heavily criticized for being overly broad and generic which have the potential to be misused. In 2017, a much criticized landmark judgment¹⁶ by the Supreme Court of Pakistan removed the Prime Minister of Pakistan, Mr. Nawaz Sharif from power by the order of the court since he was unable to provide money trail for properties his family held in London which caught the public eye in the Panama Papers controversy. The Supreme Court gave ample opportunity to the Prime Minister to present his case and even formed a Joint Investigations Team to probe into the matter. In light of the contradictory positions taken by the Prime Minister before the court and in his speech before the parliament along with the forged documents submitted on his behalf, the Court reached the conclusion that he failed to establish that he was “Sadiq” (truthful) and “Ameen” (Honest) a requirement under Article 62(1) f¹⁷ of the Constitution. As a consequence, he was declared unfit to be a member of the National Assembly and removed from office.

1.1.5 Council of Islamic Ideology

Pakistan’s constitution in its pursuit of creating a state based on Islamic principles sets up multiple institutions meant to ensure compliance of its legislation with Islam. Articles 227-231 establish a Council of Islamic Ideology to see that “all existing laws be brought in conformity with the injunctions of Islam as laid down by the Holy Quran and Sunnah...and no law shall be enacted

¹⁶ *Imran Ahmed Khan Niazi Vs Mian Muhammad Nawaz Sharif* citation PLD 2017 SC 265

¹⁷ Article 62(1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora unless-
(f) he is sagacious, righteous and non-profligate, honest and ameen, there being no declaration to the contrary by a court of law;

which is repugnant to such injunctions”. This lofty proclamation is limited by Article 227(2) which states that “effect shall be given to the provisions only in a manner provided in this Part” meaning only through the roles and responsibilities of the council detailed in Article 230¹⁸. The Council of Islamic ideology is a constitutional institution that aims to make sure that all laws made by the Parliament and the policies of the government are formed in accordance with Islamic principles. Since the Council’s duties are only of an advisory and recommendatory nature and it lacks independent powers of enforcement, this constitutional intuition lacks the requisite constitutional powers to deliver on its actual potential.

1.1.6 Federal Shariat Courts

Perhaps the most significant and powerful constitutional institution established to maintain conformance of Laws with Islam is the Federal Shariat Court (FSC). Article 203C and D lay down the jurisdiction¹⁹ of FSC. It comprises of eight judges out of which five come from the superior judiciary and three remaining judges are “ulema” or scholars with extensive experience in Islamic jurisprudence and research. The court is empowered to check the conformance of laws prevalent in the country to the principles enunciated by Islam and has the power to declare void any law

¹⁸ Article 230 The Functions of Islamic Council shall be,

- (a) to make recommendations to Majlis-e-Shoora (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;
- (b) To advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;
- (c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and
- (d) to compile in a suitable form, for the guidance of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect

¹⁹ Article 203 D The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

which in the opinion of the FSC is contrary to Islamic injunctions. Moreover, the court also enjoys wide powers of revision²⁰ in any matter concerning the application of Islamic criminal law or any person convicted under any offenses recognized by Islamic law.

The Shariat judicial system consists of a single level Federal Shariat Court, with all appeals of its decisions going to the Shariat Appellate Bench (SAB)- a special bench of the Supreme Court with three supreme court judges and two ad-hoc members who are “Ulema” or Islamic law experts in accordance with Article 203-F (3).

1.2 Problems Arising from Islamization of Constitution and Laws

1.2.1 Lack of clarity regarding Federal Shariat Courts Jurisdiction

It is important to note that there is lack of clarity regarding the jurisdictions of the Shariat judicial system which has been subject matter of some very difficult and vexing cases. For example the FSC decisions are binding on “a High Court and on all courts subordinate to the High Court”²¹- but not the Supreme Court. However, Article 203-G gives exclusive jurisdiction to FSC- excluding even the Supreme Court over every matter within the FSC jurisdiction²². Additionally, the SAB is labeled as part of the supreme court in Article 203-F however its jurisdiction is defined in different terms in a different part of the Constitution than that of the Supreme Court.

²⁰ Article 203DD (1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

²¹ Article 203-GG, Constitution of Pakistan 1973

²² Redding, and Jeffrey A. “Constitutionalizing Islam: Theory and Pakistan.” Virginia Journal of International Law Association, spring 2004, Available at papers.ssrn.com/sol3/papers.cfm?abstract_id=468563

1.2.2 Institutional Conflicts

Jurisprudence emanating out of the Federal Shariat Court not only added to the complexity of the legal system but created multiple precedents that highlights the problems of attempting to operate “parallel” judicial systems having multiple sources of law. In line with its constitutional mandate the Federal Shariat Court has struck down laws that has resulted in hampering some governmental initiatives. For example in the 1960’s when the government initiated Land reforms to address the problem of huge landholding by powerful families the government introduced ceilings on landholdings to ensure an equitable distribution of wealth. When the land reforms were challenged before the FSC they were upheld. However, in appeal against this decision the maximum ceiling for landholding imposed by the government was struck down by the Shariat Appellate Bench of the Supreme Court²³. The Court overturned the FSC decision and applied a different interpretation of Islamic property law holding that the right to property cannot be encumbered under Islamic principles. As a consequence, much needed land reform in the feudal society of Pakistan became impossible to enact.

1.2.3 Institutional Failures

The existing banking system in Pakistan is based on “riba” or usury which is prohibited in Islam. Article 38(f) of the Constitution enjoins upon the state to “eliminate riba as early as possible”. While successive government has remained unmoved on this duty, council of Islamic ideology has failed to make any pragmatic suggestion on this front and the Federal Shariat Court has retained in pendency for over two decades challenges to the existing banking system based on “riba”. Perhaps the issues remains unresolved due to lack of availability of a realistic and viable

²³ *Qazalbash Waqf and Others v Chief Land Commissioner* citation 1990 PLD 99 SC.

alternative. Lack of institutional commitment to fulfill such constitutional duties is perhaps another explanation.

1.2.4 Sectarian Conflicts

The second amendment to the existing 1973 Constitution of Pakistan whereby a specific religious community commonly known as the “Ahmadi group” were excluded from the definition of Muslims²⁴. While the Ahmadis identified themselves as Muslims, their assertion was vehemently opposed by a large section of the religious clergy and population of the country. The issue sprung up in the 1953 anti-Ahmadi riots that broke out in Pakistan and resultantly emergency had to be imposed in the country’s largest province of Punjab to maintain law and order. Similarly, in 1974, countrywide riots again broke out following a tragic incident in the town of Rabwah where 400-500 Ahmadi students attacked a train full of medical students from Multan. In response to intense political pressure a special session of the National Assembly was convened which resulted in the Constitutional Amendment and assigned non-Muslim status to the Ahmadi group. Following this General Zia’s as part of his Islamization of laws enacted two provisions 298-B and 298-C into the Pakistan Penal Code which imposed penalties on Ahmadis for their religious practices. By virtue of these provisions the use of Islamic epithets, description and titles by member of Ahmadi community was criminalized and the Ahmadi group was deprived of the right to propagate their faith²⁵.

²⁴ Nadeem Ahmad Siddiq, “Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan” *Law & Inequality* Vol 14 Issue 1, 1996

²⁵ Redding, and Jeffrey A. “Constitutionalizing Islam: Theory and Pakistan.” *Virginia Journal of International Law Association*, spring 2004, Available at papers.ssrn.com/sol3/papers.cfm?abstract_id=468563

When these provisions were challenged before the Federal Shariat Court in the case of *Majibur Rehman Vs Federal Government of Pakistan*²⁶, the court upheld the provisions banking on the “Public Order” limitations in Article 20 of the Constitution on protections of religious liberty. The FSC ruling upholding Section 298-B and 298-C was again upheld by the Supreme Court in the case of *Zaheeruddin V State*²⁷.

This above example highlights a threats posed by incorporating religion in the affairs of the state and outlines the dangerous potential of misuse of religion in politics that threatens the peaceful coexistence of diverse religious communities when religion employed as force to exploit the sentiments of public.

1.3 Islamic Laws in Pakistan and their Efficacy

Beyond the constitutional mechanisms the objective of establishing supremacy of Islamic Law in Pakistan upon principles enunciated in the Holy Quran and Sunnah can be evidenced from the wide range of Islamic laws introduced in the country. A plethora of laws concerning all areas of life have been enacted. Muslim personal law, Islamic criminal laws, Islamic evidentiary requirements and laws concerning Islamic banking and finance are just a few examples.

Under the regime of military General Zia-ul-Haq in 1970’s Pakistan underwent a period of radical Islamization of laws. Under the military led government, which desperately sought legitimacy, Islamization of laws was the tool used to appease the right wing religious groups in the country in an effort to gain their support and garner legitimacy for the military regime. Alcohol was banned and a series of laws was introduced that inculcated the Islamic punishment for various

²⁶ *Majibur Rehman Vs Federal Government of Pakistan* 1985 PLD FSC 8.

²⁷ *Zaheeruddin V State* 1993 SCMR 1718.

Hudood²⁸ offenses. A controversial Women Protection Act was also introduced which was extremely problematic and heavily criticized for being poorly drafted. Moreover, amendments were brought into the law of evidence and the penal code, new offenses were introduced and their punishments were prescribed based upon Islamic law.

Contrary to expectation, the project of Islamization of laws failed in executing the spirit of Islamic law in the country. These laws encountered heavy criticism from the masses and resulted in flagrant miscarriages of justice²⁹. The law regarding premarital sex i.e. Zina Ordinance became a tool of female oppression, whereby a woman alleging rape but unable to produce two adult male witnesses (an Islamic law evidence requirement) was automatically convicted of adultery. Similarly, addition of the concept of Diyat (blood money) into the penal code was also widely condemned. This speedy introduction of ill-drafted which were not duly deliberated and introduced with pure political motives gave rise to further problems in the legal system.

1.4 Concluding Remarks

In light of the above it can be concluded that while the constitution of Pakistan envisions a state based upon Islamic principles and establishes various institutions geared towards this objective. Laws have been enacted in personal, criminal and economic domain to bring compliance of existing laws of the state to Islamic principles. However, a wholehearted effort to introduce realistic Islamic reforms has never been taken seriously as a priority by any government. The Islamization period during the Zia regime was motivated by political aims which combined with

²⁸ Offences recognized in the Holy Quran

²⁹ Moeen H. Cheema, Abdul Rahman Mustafa, "From the Hudood Ordinance to the Protection of women Act: Islamic critique of the Hudood laws of Pakistan" 8 UCLA J. Islamic & near E.L (2009)

the poor drafting of the laws and insincere attempts by legislatures have resulted in a convoluted setup where conformance of laws to Islamic principles remained unachieved. A serious intellectual exercise of interpreting Islamic principles enunciated by the Holy Quran and a diligent effort to inculcate those principles into the existing legal system is the need of the hour. Constitutional institutions like the Council of Islamic ideology and Federal Shariat Court have their own political and legal constraints. The Legislature needs to play a more active role to attain the constitutional objective of creating a state where a Muslim can live their life in accordance to Islam.

2. Iran: Islamic Republic under a Supreme Leader

The modern day nation state of Iran developed an Islamic identity against the backdrop of a monarchy that was politically and economically dependent on the west. The repressive regime of the Shah of Iran was abhorred for its un-Islamic secular identity and its political strangulation and stifling of dissent via the state security apparatus. The monarch maintained complete control of the state machinery and favored a secular form of government which was strongly opposed by the Islamic revolutionaries who rallied behind the slogan of Independence, Liberty and an Islamic Republic.

In 1979, under the leadership of Ayatollah Khomeini when the Iranian Muslim revolutionaries were successful in their goal of overthrowing the monarchy, they were challenged with the task of designing a constitutional arrangement that was in line with the teachings of Islam. The governance system needed to be progressive and competent to deal with the national affairs and also have the ability to respond to international events. Since the majority of Muslims in Iran ascribe to the “Shia” interpretation of Islam in which the Imam or the religious leader enjoys an esteemed position and unquestioned authority. The Iranian constitution therefore took its inspiration from the book *Velayat-e-Faqeh* or *Governance of the Jurist* written himself by Ayatollah Khomeini which proposed that Jurist or Islamic scholar should rule an Islamic state³⁰. This was the source of inspiration for the constitutional office of Iran’s Supreme Leader.

³⁰ Horowitz, Richard. “A Detailed Analysis of Iran's Constitution.” *World Policy*, 3 Feb. 2018, worldpolicy.org/2010/10/12/a-detailed-analysis-of-irans-constitution/.

2.1 Islamic Provision in the Constitution of Iran

In the aftermath of the revolution, the new constitution established a Presidential democracy under the supervision of a supreme leader wherein the three organs of the state power i.e. Executive, legislative and judicial branch operate independently. The constitution ascribes sovereignty to Allah³¹ and the people are to exercise this right in accordance with the Constitution. The constitution also establishes that Islamic principles and sharia is meant to guide the governance of the state and also guaranteed rights and freedoms to the citizens of the Islamic Republic. The constitution also inculcates multiple verses of Holy Quran that outlines Islamic principles to be followed in the governance of the state.

2.1.1 State religion

The constitution establishes Islam as the official religion of the state³². It further explains that the state ascribes to the Twelver Ja'fari School of fiqh and declares it to be eternally immutable. Freedom of other schools of thought within Islam is acknowledged and their right to act in accordance with their own jurisprudence is recognized and official status is granted to them so that their respective private law is applicable. The freedom of religion is also guaranteed to other religious minorities in accordance with the principles of Islam³³.

³¹ Article 56: Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.

³² Article 12, Constitution of Islamic Republic of Iran

³³ Article 13 : Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

2.1.2 Laws to conform to Islamic Criteria

In order to ensure that an Islamic system is applied in true letter and spirit it is necessary that all the laws including civil, penal, financial, economic, administrative, cultural, military, political and other regulations conform to Islamic criteria³⁴. The constitution also appoints the Fuqaha or the religious scholars on the Guardian Council as judges who would ensure compliance of the requirement for all legislation to be Islamic in character.

2.1.3 The Office of the Supreme Leader

Since the Iranian constitution was inspired by the concept of Velayat-e-faqih it establishes the office of the Leader who maintains supervision over all aspects of state structure and ensures that Islamic principles are duly observed. While the supreme leader does not enjoy the executive powers like the president but he is responsible for key appointments including the head of Judiciary (mujtahid), commanders of the armed forces, head of the state radio and television organization and finally the six jurists (fuqaha) of the Guardian Council³⁵. The leader is also in charge of formulating the strategic and principle policies of the state. There is no doubt that the leader enjoys unquestioned authority and retains the power to approve the elections³⁶ and even dismiss the President if he fails to fulfill his constitutional duties or upon a vote against the President by the parliament. Moreover the leader is the supreme commander of the armed forces and has the power to declare war and mobilize the armed forces.

³⁴ Article 4, Constitution of Islamic Republic of Iran

³⁵ Article 91: With a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislations passed by the Islamic Consultative Assembly with Islam, a council to be known as the Guardian Council is to be constituted with the following composition: 1. six 'adil fuqaha', conscious of the present needs and the issues of the day, to be selected by the Leader, and 2. six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power.

³⁶ Article 110

2.1.4 Requirement of State Officials to be Muslims

According to the constitution of Iran it is a requirement that the President, his cabinet members and the members of the Islamic Consultative Assembly (with the exception of minority representatives) are Muslims. Similarly, the “Mujtahid” or the head of judiciary also has to be a Muslim and a competent scholar of Islamic law. Moreover, the state officials are required to take their oaths upon the Holy Quran instead of the Constitution.

2.1.5 Islamic Consultative Assembly

Since as per the constitution the country is to be administered in accordance with public opinion as expressed in the elections³⁷ therefore the legislative power is vested in the Parliament or the Islamic Consultative Assembly which is directly elected³⁸ for a term of four years. The task of establishing laws on all matters is entrusted to the Islamic Consultative Assembly³⁹. The constitution limits the power of the Parliament from enacting any laws contrary to the *usul* and *ahkam* i.e. the rules and dictates of Islam⁴⁰. Finally the power to approve treaties, protocols, contracts and agreement of the state is also vested in the Islamic Consultative Assembly⁴¹.

2.1.6 The Guardian Council

One of the most important institutions that ensures compatibility of all legislations passed by the Islamic Consultative Assembly with Islam is the Guardian Council constituted under the

³⁷ Article 6: In the Islamic Republic of Iran, the affairs of the country must be administered on the basis of public opinion expressed by the means of elections, including the election of the President, the representatives of the Islamic Consultative Assembly, and the members of councils, or by means of referenda in matters specified in other articles of this Constitution.

³⁸ Article 62: The Islamic Consultative Assembly is constituted by the representatives of the people elected directly and by secret ballot.

³⁹ Article 71: The Islamic Consultative Assembly can establish laws on all matters, within the limits of its competence as laid down in the Constitution.

⁴⁰ Article 72: The Islamic Consultative Assembly cannot enact laws contrary to the *usul* and *ahkam* of the official religion of the country or to the Constitutions

⁴¹ Article 77: International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly

Article 91 of the constitution. It consists of six fuqaha or religious scholars selected by the Leader and six jurists who specialize in different areas of law elected by Islamic consultative assembly and nominated by the Head of judicial power. The Members of the Guardian council are elected to serve for a term of six years with half the membership being replaced after every three years. After a legislation is passed by the democratically elected Islamic Consultative Assembly it is sent to the Guardian Council which is responsible for reviewing the compatibility of the law with Islam and the constitution within a period of ten days⁴². In case the council finds the legislation to be against Islamic principles it shall be returned to the Assembly for a review. The legislation may be approved by a majority vote of the fuqaha on the Guardian Council. Another key function performed by the Guardian council is its mandate to interpret the constitution⁴³. Therefore, the supervisory role that the Guardian Council performs by reviewing all legislation and its power to interpret the Constitutional provisions make it an extremely powerful constitutional institution that ensures the Islamic principles are duly reflected in the legislation and interpretation of the Constitution⁴⁴.

2.1.7 The Islamic Judicial Institution

The head of the judiciary in Iran is appointed by the leader based on his ability and command over Islamic jurisprudence. The judicial organ is given complete independence and power by the constitution to perform any and all function necessary to ensure that justice is served

⁴² Article 94: All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable.

⁴³ Article 98 : The authority of the interpretation of the Constitution is vested with the Guardian Council, which is to be done with the consent of three-fourths of its members

⁴⁴ Fatemeh Ameri Seyahooei and Mohammad Kazem Emadzeh, Investigating the Nature and Structure and Functions of the Legislature in Iran, Journal of Politics and Law Vol 9, No.8, 2016.

in accordance with Islam. Similarly Article 170⁴⁵ of the constitution obliges the courts from executing any statute or legislation that is in conflict with the norms of Islam. According to Article 167 the judiciary is duty bound to adjudicate upon the cases based upon the codified law and in cases where no law exists the judges are expected to use authentic sources of Islamic law and authentic fatwas to guide them in the adjudicative process.

2.2 Problems arising from Iran's Islamic Constitutional Arrangement

The constitution of Iran sets up a state structure aimed at ensuring that requirement for an Islamic state are completely fulfilled. In fact, it is the highest ranking country on the Islamic Constitutions Index⁴⁶ which classifies constitutions of Islamic countries in accordance with their compliance to Islamic law. Nonetheless, multiple provisions within the constitution and the overall design of the constitution is heavily criticized (especially in the west) owing to multiple reasons. It can be reasonably argued that the constitutional structure of the state and the intuitions established remains highly problematic and are far from the ideal model of an Islamic state.

2.2.1 Powers enjoyed by of the Religious elite

Since the constitution of Iran was drafted and framed consequent to the revolution of 1979, when Ayatollah Khomeini led a successful countrywide movement to overthrow the prolonged rule of the Pehalvi Dynasty and abolished the monarchy it was foreseeable that his control over the constitution making process and the position of authority he held would result in a significant

⁴⁵ Article 170: Judges of courts are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws or the norms of Islam, or lie outside the competence of the executive power. Everyone has the right to demand the annulment of any such regulation from the Court of Administrative Justice.

⁴⁶ Dawood I. Ahmed, Moamen Gouda "Measuring Constitutional Islamization: The Islamic Constitutions Index", 38 Hastings Int'l & Comp. L Rev 1, 2015.

role of the religious clergy. The influence of his thoughts reflected in his book Valayat-e Faqh is evident in the constitution as the supervisory role over the entire state structure was designated to the Leader. The extensive power enjoyed by the leader under the constitution in combination with the important role assigned to fuqaha of the Guardian Council, who are empowered to veto any legislation they deem un-Islamic along with the power to interpret the constitution, are the crucial functions upon which the religious clergy maintains absolute control.

This centralization of power in the hands of religious elite is highly problematic as they dominate policymaking, legislative domain and key appointment of the state. Moreover, the tight grip of the religious clergy which is not answerable to the people unlike the Parliament means that the constitutional arrangement lacks one of the most crucial aspects i.e. accountability. Since, the appointments of the fuqaha, who are given the task of legislative review and interpretation of the constitution, are appointed by the Leader himself therefore the Leader becomes all powerful in terms of any interpretation of constitution and Islam.

The attribute of infallibility assigned to the Leader under the constitutional setup and the immense power enjoyed by the religious elite as a whole has massive potential for abuse. Lack of safeguards enshrined into the constitution to keep a check on this potential abuse of power is problematic.

2.2.2 Veto of Democratically elected Islamic Consultative Assembly

The Constitution empowers the Guardian Council to approve all legislations passed by the Islamic Consultative Assembly and grants it the power to reject laws based on their inconsistency with Islam. Grant of a veto power to an unelected group of individuals who owe their allegiance to the Leader (by virtue of their appointment) and imposing that veto upon Islamic Consultative

Assembly who are representatives of peoples is in conflict with the principles espoused in Article 6 of the Constitution⁴⁷.

2.2.3 Independence of Judiciary

The constitution assigns the Leader, the power to appoint the “mujtahid” who is the highest judicial authority in the state. Lack of clear qualifications described for this position and the fact that the un-elected leader holds the power of appointment without involvement of other state institutions as the head of the judiciary is questionable. Just like the fuqaha, the mujtahid also owes his allegiance to the Leader. This raises doubts about the independence of the judicial organ of the state.

2.2.4 Control over Media and Broadcast

The constitutional arrangement grants the Leader the right to appoint the respective heads of the radio and television broadcast. This combined with the strict control of the media in Iran completely censors any dissenting opinions in the society. The citizens are deprived of access to crucial information via state control of these avenues. A vibrant and independent media is considered a necessity for ensuring transparency and fostering constructive criticism in the society. While the control of the religious affairs and interpretation of Islam may be justified based on the religious authority of the Leader but the limitations on free flow of information and suppressing of dissenting opinion and criticism of government’s policies is against established principles of governance and transparency necessary for the establishment of state which is to be run in accordance with the opinion of public as per Article 6 of the constitution.

⁴⁷ Article 6: In the Islamic Republic of Iran, the affairs of the country must be administered on the basis of public opinion expressed by the means of elections, including the election of the President, the representatives of the Islamic Consultative Assembly, and the members of councils, or by means of referenda in matters specified in other articles of this Constitution.

2.3 Concluding Remarks

In light of the above it can be concluded that constitutional design of Iran resembles that of a theocracy. Power is concentrated in the hands of the religious clergy that is completely unaccountable to the people. Important principles of constitutionalism and Islamic governance like democracy, accountability, transparency and independence of media are completely non-existent. While the constitution itself aims maintain independence of legislature, executive and the judiciary, the constitutional design hampers the realization of that goal. A plethora of Sharia Guarantee Clauses enables the constitution to be a highly Islamized document however, the lack of procedural safeguards in the constitution against potential abuse of power by the religious elite is another area where the documents seems to be lacking.

3. Malaysia: A Secular Federation with an Official Religion

Constitutions are documents that are reflective of the specific history and the social and political forces prevalent in the country. Thus the Malaysian constitution is shaped and influenced by the historical and political realities of the regions that constitute Malaysia. Historically, Malaysia did not exist as an independent state and consisted of smaller states and regions which were governed by their independent rulers. The population of Malaysia consists of three ethnic groups including majority Muslims Malays, Chinese and Indians. Therefore, apart from Islam, Christianity, Buddhism, Hinduism and other traditional religions constituted a diverse social reality, variety of religious practices and traditions existed in the territory. When the British came to establish their colony in the twentieth century they applied two systems of direct and indirect rule. They ruled directly in the Straits Settlements (Penang, Malacca and Singapore) by acquisition of land through purchase or conquest; and indirectly in Malay states by signing treaties with the then rulers of the Malay states⁴⁸. The British imposed common law on the colonies while other issues like personal matters were left to be governed in accordance with the local practices. Since Islam was the religion of most of the ruling elite application of Islamic law was widespread on the local level of administration⁴⁹. Most disputes were resolved according to common law in courts that were staffed by English-trained common law judges, while laws governing Islamic families

⁴⁸ Farid S Shuaib, "The Islamic Legal System in Malaysia" Pacific Rim Law and Policy Journal, (2012) 2, No.1 p85-88.

⁴⁹ Magaji Chiroma; Mahamad Bin Arifin; Hunud Abia Kadouf, "The application of Islamic law in Modern Muslim States: A comparative Analysis of the Nigerian and Malaysian Systems, 9J Islamic Practices International Law. 61(2013).

and Islamic rituals were governed by Islamic law. Plurality of the legal systems was a dominant feature and each of the states embraced slightly different interpretations of Islamic law and used their own particular kind of Courts to adjudicate Islamic cases.

In 1957, eleven of the thirteen British colonies were successful in gaining independence and signed a constitution establishing a new Federal nation that came to be known as Malaysia in 1963 when the federation was enlarged and 3 new states joined the Federation. Under this federal arrangement a constitutional monarchy was established and a parliamentary form of government was setup with a bicameral legislature consisting of a House of Representative and a Senate. While the monarch enjoys a ceremonial position, the executive branch is headed by the Prime Minister and his Cabinet. The judicial Branch is headed by the Federal Court.

3.1 Islamic Provisions in the Constitution

Unlike Pakistan and Iran, the constitution of Malaysia does not inculcate any specific provisions that aim to give Islamic character to the state structure. Federal law in Malaysia is often referred to as “secular law” and the regular courts also can be described as secular courts. It is however noteworthy that the federal government of Malaysia could, without violating the Constitution, choose to enact across the country an Islamized body of law along with, in theory, choosing to require its judges to be trained in Islamic law. Therefore Malaysian law is not constitutionally secular⁵⁰. It is pertinent to mention that the Malaysian Federation has devolved the responsibility of dealing with religious matters to the states governments, who are free to enact laws dealing and regulating the private religious affairs of their citizens. All states have operational sharia courts and different states have interpreted their powers broadly and established increasingly

⁵⁰ Farid S Shuaib, “The Islamic Legal System in Malaysia” Pacific Rim Law & Policy Journal, (2012) 2, No.1 p85.

large bureaucracies, issuing and enforcing and expanding range of Islamic legislations. The state government are also heavily invested in establishing and “upgrading” the state court systems that have jurisdictions over cases arising under Islamic law⁵¹.

3.2 Religion of the State

By virtue of Article 3 of the constitution Islam has been declared the religion of the Federation⁵². The very same article also guarantees other religions communities the right to freely practiced their religion in peace and harmony. The constitution of individual states designates the ruler as the Head of religion of Islam⁵³. It is interesting to note that Reid commission that was tasked to draft the independence constitution, at the beginning of the constitution making process, rejected the idea of establishing Islam as the state religion⁵⁴. It was only after much debate that the demand for explicit constitutional recognition of religion of the majority was accepted. In 2001 the Prime Minister Mahathir declared Malaysia to be an Islamic state. In any case, it can be stated that Malaysian state identifies with the Islamic identity and the Islam religion enjoys a special status even though the constitution in itself does not positively establish Islamic institutions. The federal government has chosen and is authorized to develop its own body of Islamic law that governs the lives of Muslims located within the Federal Territories and has established courts to administer these laws. While most of the Islamic law in Malaysia pertain to personal law domain

⁵¹ *ibid*

⁵² Article 3(1): Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

⁵³ Article 3 (2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorise the Yang di-Pertuan Agong to represent him.

⁵⁴ Shah, Dian Abdul Hamed. *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka*. Cambridge University Press, 2019, p6.

and is assigned to domain of states the federal courts have increasingly dealt with other areas of law like Islamic finance. Since Islamic finance has become increasingly important in Malaysia, the federal government had to regulate it and the federal courts have resolved pertinent questions pertaining to Islamic Finance⁵⁵.

In a case, Judge Mohd. Noor Abdullah interpreted Constitutions Article 3 “Islam is a Federal religion but other religions may be practiced in peace and harmony” means that “Islam is the foremost religion among other religions embraced in this country. Islam is not equal to, neither sits together, nor stands at par with other religions. However, Islam sits above, walks ahead, is located in the field and its voice is heard loud. This means that the Government is responsible for preserving, illuminating and developing Islam as the Government is able to do at present, and other religions are to be appropriately lined up and positioned in a direction that guarantees that they may be practices in peace and harmony without threatening the leading position of Islam”⁵⁶.

3.3 Sharia Courts in Malaysia

While the civil courts maintain a secular outlook the Malaysian constitution permits states to establish courts with jurisdiction over the Muslim population. These Sharia courts adjudicate cases arising under Islamic law and pertaining to personal and family law of individuals professing Islamic faith, including Islamic law concerning betrothal, marriage, divorce, dower, maintenance adoption, legitimacy and guardianship. Moreover, each state has enacted legislation on a family law, sharia offences, sharia evidence, sharia criminal procedure and sharia civil procedure. Thus there are fourteen different bodies of Islamic family law one for each state. There are also fourteen

⁵⁵ Farid S Shuaib, “The Islamic Legal System in Malaysia” Pacific Rim Law and Policy Journal, (2012) 2, No.1 p89.

⁵⁶ *Meor Atiqulrahman Ishak dan yang lain v. Fatimah Sihi & others* [2000] 5 Malayan Law Journal 375.

different court systems each tasked with the responsibility to interpret and apply Islamic law within its state or territory⁵⁷.

Initially the sharia appellate authority was exercised by the civil courts. However a constitutional amendment introduced to Article 121(1A) stated that federal government civil courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the sharia courts”.

3.4 Religious Freedom

The Constitution of Malaysia declares Islam to be the religion of the Federation. It also guarantees believers of other religions complete freedoms to freely practice their own religion⁵⁸. However, the constitution places a limitation upon the propagation of their faith to Muslim individuals⁵⁹. Similarly another constitutional article that discriminates against persons of non-muslim faith concerns the right to establish and maintain institutions for educating children regarding their own religion. While other religious groups are given complete freedom to establish such intuitions for their children the constitution specifically permits the Federation and the states to establish, maintain or assist such institutions for providing instructions about Islam and incur any expenses on the government exchequer for this purpose⁶⁰.

⁵⁷ Ibid

⁵⁸ Article 11 (1): Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.

⁵⁹ Article 11(4): State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam

⁶⁰ Article 12(2): Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

The mere fact that it is a crime to persuade, influence, force or instigate a Muslim to embrace or become a member of a religion other than Islam is highly problematic. A paper published by the University of Kebangsaan Malaysia⁶¹ offers threefold explanation for this constitutional provision. Firstly, the privileged position enjoyed by Islam due to the its background and history of the special status and position of Islam in Malaysia that resulted in it being recognized the religion of the federation. Secondly, the key role played by the Muslim Malay Rulers in preserving the sanctity of from the pre-independence period to the present. The finally and perhaps the most convincing justification for this provision emanates out of sharia law according to which apostasy is a hudud crime⁶² which is punishable by death.

3.5 Expanding role of Sharia

Following the trend across the Muslim world where there have been significant developments and movements for implementation of Sharia, Malaysia also has witnessed similar tendencies. Since 1970's Malaysia has experienced growing movements by Islamic groups to reformulate and reassert the position of Sharia to cover all aspects of country's laws. Just like Ikhwanul Muslimin in Egypt and Sudan and Jamaat-e-Islami in Pakistan, Angkatan Belia Islam Malaysia (ABIM) founded in 1971 is a large youth movement that has consistently build up a movement to broaden the role of Sharia in the country's constitution and laws. ABIM's efforts are geared towards refinement, repackaging and representation of Islamic legal and ethical code that departs from the parochial mold of covering specific areas of family and property law. Such a venture inevitable necessitates negotiations and conflicts with key actors in society whose interest

⁶¹ Zuliza Mohd Kusrin, Zaini Nasohah, Mohd Al-adib Samuri, Mat Noor Mat Zain "Legal Provisions and Restrictions on the Propogation of Non-islamic Religions among Muslims in Malaysia", *Kajian Malaysia* Vol 31, No.2 2013.

⁶² Crime recognized in Quran

and interpretations of laws and morality have been conditioned by norms that may run counter to those that are propagated by the these Sharia activists. ABIM has been pursuing their goal and have adapted some key tactics to realize their target. They have adapted Institutional subversion i.e. strategic entry of activists into state bodies and political parties with specific agenda of expanding functions of sharia in Malaysia. Moreover, ABIM adapted a policy of entering into partnerships and ideological coalition with independent thinkers and Non-Governmental Organizations (NGO's) that share similar aspirations. Dramatic contention aimed at catching public and media attention by means of public demonstrations and protests is another strategy adapted by ABIM for the furtherance of its goals. The movements efforts have resulted in landmark changes in Malaysian constitution, including the amendment barring federal civil courts appellate jurisdiction in sharia matters, which has given more room to Sharia Courts to deal with matters pertaining to criminal and business laws, areas which were once seen as outside the ambit of Sharia within a secular state⁶³.

While there is an societal impetus towards greater role of Islamic laws in the Malaysia, as evidenced by multiple legislative enactments and development of state intuitions, only time will tell how successful these movements will be in achieving their goal of barganining a greater role of Islamic law within the constitution and laws of Malaysia.

3.6 Concluding Remarks

The Malaysian constitution does not contain any Sharia Guarantee Clause and the only reference to Islam in the document is with regards to it being the religion of the Federation. However, it is

⁶³ Syed Muhd Khairudin Aljunied, "Demarginalizing the Sharia: Muslim Activists and Legal Reform in Malaysia" National University of Singapore, Pluto Journals

pertinent to note that application of sharia law is ensured to the citizens of the federation via sharia court setup by the independent states in the country. The lack of interest of Malaysian population in inculcating Islamic Principles into constitution can be explained by the lack of any major political movement concerning Islam in the country prior to or even after the drafting of the constitution. On the other hand in Pakistan and Iran, the Islamic identity was reinforced owing to the Islamic revolution in Iran and the in the case of Pakistan the two nation theory which served as the basis of political movement of Muslims of subcontinent who sought a separate homeland for themselves.

4. The Way Forward for Islamic Constitutionalism

After discussing the basic structure of the Constitution of Pakistan, Iran and Malaysia and having identifying the key Islamic features enshrined in these constitutions followed by the identifying some of the problems these countries have encountered in inculcating Islamic principles into their constitutions it can be observed that these states have adapted very divergent approaches towards the goal of developing their state and constitutional structure in line with Islam. The approach of these three countries towards developing Islamic constitutions has been influenced and inspired by their local context, culture, history, political forces and other variable factors prevalent at the time of drafting of their respective constitutions.

Pakistan gained independence from the British, hence its constitution borrowed heavily from the British democracy and it adapted the modern day principles of democracy, rule of law, fundamental rights and separation of powers. Being a state that was created as a separate homeland for the Muslims of subcontinent and aspired to establish a state in accordance with the principles of Islam, the framers of the Constitution were able to accommodate Islamic principles and institutions into the constitutional framework. The chapter on Pakistan identifies multiple issues that have come to light and need attention in order to further the goal of establishing a modern state based on Islamic principles. However, by and large, the secular western educated political elite of Pakistan was able to reach a compromise with the progressive Islamic force within the country and developed a stable Constitutional structure in line with modern day constitutional values and Islamic principles.

In the case of Iran, the Islamic Revolution formed the backdrop of the constitution building process and the central position enjoyed by the religious elite is of prime importance. The unquestioned authority of Ayotollah Khomeini and the central role of the religious force that were instrumental in the revolutionary process were able to maintain a stronghold on power and established a constitutional arrangement whereby the clergy retained most of the power and imposed a self-serving system that inculcated Islamic values but completely ignored the western liberal ideas of democracy and constitutionalism. Perhaps, the anti-west sentiment in Iran at the time of the revolution due to the close alliance between the deposed monarch and the western countries was instrumental in minimizing any potential advocates who could have argued against the overwhelming allocation of power to the religious elite of the country. Therefore, a theocratic and authoritarian form of government strictly controlled by the clergy and its own interpretation of Islam was created by the constitution.

Malaysia just like Pakistan and Iran has its own independent approach to establishing Islam in the constitution. During the colonial era the British ruled the regions that constitute Malaysia by entering into agreements with the local rulers who were the religious head of their respective territories. Religious affairs were therefore delegated to the state level government which operated sharia courts and local institutions that maintained religious affairs like managing mosques, Waqfs (Islamic endowments) and Zakat (alms) etc. At the time of its independence, there was no specific demand for creating of federal institutions to ensure an Islamic governance system since the population already had access to sharia courts and Muslim religious laws. Moreover unlike Pakistan and Iran where over 90 percent of the population ascribed to the Islamic faith, the Malaysian population was much more religiously diverse. Therefore, the secular outlook of the

Federal constitution developed with the exception of Islam being declared the religion of the Federation.

According to Islamic Constitutions Index⁶⁴ that measure and ranks the constitutions of all Muslim majority countries according to inculcation of Islamic ideas and Institutions into the constitutional framework, Iran is positioned at the 1st place i.e. having the most Islamized constitution in the world. Pakistan is placed at the 4th position and Malaysia at 22 among 56 countries.

4.1 Islamic law as theoretical framework for Islamic Constitutionalism

In order to do justice to the Islamic Constitutionalism it is necessary to understand Islamic law or sharia which forms the basis of the Islamic legal system.

4.1.1 Sources of Islamic Law and Sharia

Islam was introduced to the Arabs by the Holy Prophet (PBUH), who received divine revelations which were compiled in the form of written text of the Holy Quran. Being the word of God, Quran is the primary source of Islamic law⁶⁵. While Quran is the word of God, it was explained by the Holy Prophet via his teachings and practices which thus form the second source of Islamic law i.e. Sunnah or Hadith of the Prophet Muhammad (PBUH). In order to preserve these primary sources of Islamic law the Holy Quran was compiled from written sources and memory of the Sahaba at the time of the third Khalifa i.e. Hazrat Usman. Similarly, the practices

⁶⁴ Dawood I. Ahmed, Moamen Gouda "Measuring Constitutional Islamization: The Islamic Constitutions Index", 38 Hastings Int'l & Comp. L Rev 1, 2015.

⁶⁵ Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy", Case Western Reserve of International Law, Vol 24, Issue 1, 1992.

and teaching of the Holy Prophet (PBUH) were also compiled and written down by various scholars in the decades following the death of the Holy Prophet. Strict rules of verification of the chain of narrators were followed and whenever there was any doubt about the authenticity of the Hadith/ Sunnah it was discarded⁶⁶. Therefore the two primary sources of Islamic law were written down and preserved for the future generation. Hence it can be concluded that Quran and the Hadith of the Holy Prophet have been preserved in various volumes of the books compiled by the early Islamic Scholars. On the basis of these two texts together, scholars have formulated the actual legal rules (sharia). In other words, Islamic law can be said to be a product of human interpretation based upon on the word of God and the deeds of the Prophet (PBUH).

Islam being the last of Abrahamic religions is cognizant that it is possible that answer to some problems that the future generations might face may not be expressly addressed by the Holy Quran or the Hadith of the Prophet (PBHU). After the death of the Holy prophet fuqaha (scholars) interpreted Islamic law as and when necessary. Fuqaha developed further methods to ensure that continuity of legal reasoning that would be appropriate for contemporary political and social circumstances. The two methods adapted and thus constitute the secondary sources of Islamic law are Ijma (consensus of scholars) and Qiyas (analogical deduction). Ijma is a unanimous consensus of all the Islamic scholars of a particular time on a specific issue of law. The hadith of the Prophet (PBUH) stating “my community will never agree upon an error” is cited in support of Ijma. Lastly, Qiyas the informed and reasoned conclusion reached by a mujthid (Scholar) after a comprehensive review of the primary and secondary sources. An example of Qiyas from today, would be reasoning whether betting in casinos is forbidden in Islamic law- even though, casinos are not

⁶⁶ ibid

mentioned in either hadith or the Quran. The basis of ruling would be a combination of the Quran and analogy.

Therefore, Sharia or the God ordained law can only be derived out of the abovementioned sources of Islamic law.

4.1.2 Fiqh and Sharia: Explaining the Divergent Interpretations of Islamic Law

Muslims understand Sharia to be the divinely ordained universal law meant to guide the mankind. However, while the primary and secondary sources of Islamic law are clear, sharia is not. For this the concept of Fiqh is of paramount importance. Over the period of Islamic history religious scholars who studied Islamic law and developed an expertise in Islamic jurisprudence and interpreted the Quran and Sunnah to make available to Muslims the divinely ordained law i.e. sharia⁶⁷ Fiqh is therefore interpretation of some particular Islamic legal scholar. None of these scholars claimed to be infallible and different scholars interpreted various texts differently. Fiqh therefore lacks the universal validity of sharia and remains temporal⁶⁸.

The various conflicting interpretation of Sharia done by these Islamic legal scholars explains the variety of opinions present today on the various issues pertaining to all areas of life. This is not to say that any particular interpretation is correct or incorrect but the difference of interpretation explains the celebrated diversity of the Muslim community.

This legal system based on sharia occupies a primary place in Muslim thought. Comprehensiveness of sharia with regards to all matters is a matter of belief for Muslims and they understand Islam not merely as a religious guidance for private life but a complete way of life that

⁶⁷ Mehran Tamadonfa, "Islam, Law, and Political Control in Contemporary Iran", *Journal for the Scientific Study of Religion*, Vol. 40, No. 2, pp. 205-219, 2001

⁶⁸ *ibid*

provides governing principles about one's conduct in public life, constitutionalism and international relations. Muslim identify Islamic law as a means to impose limits on arbitrary government and promote rights to establish a just political order based on the rule of law.

4.2 Principles of Islamic Constitutionalism

Maulana Maududi the famous Islamic scholar who is considered the pioneer of the concept of "Islamic state" in his book "The Islamic Law and Constitution" describes that Islamic state would follow sharia, which would comprehensively cover "family relationships, social and economic affairs, administration, rights and duties of citizens, judicial system, laws of war and peace and international relations. In short it embraces all the various departments of life... the Sharia is a complete scheme of life and an all-embracing social order where nothing is superfluous and nothing lacking". In his opinion, the three cardinal principles underlying this operation are: tawhid (unity of God), risala (Prophethood) and Khalifa⁶⁹ (caliphate or successor of the Prophet Muhammad)

Tawhid proposed that God being the creator is sovereign. For Maududi, sovereignty of God and sovereignty of people are mutually exclusive. Islamic constitutionalism therefore entrusts sovereignty to God and not the people unlike in western democracies.

The second principle of Islamic constitutionalism i.e. risla means "scriptures revealed from God through Prophets". Prophets bring God's laws to their communities to guide them towards the correct path. Hence Quran and Sunnah constitute the primary sources of Islamic law and describe ethics and norms for Muslim's behavior. Many Muslim scholars have argued that Islamic

⁶⁹ Dawood I. Ahmed, Moamen Gouda "Measuring Constitutional Islamization: The Islamic Constitutions Index", 38 Hastings Int'l & Comp. L Rev 1, 2015

legislation is preordained by God and the job of Islamic jurisprudence (fiqh) is law finding and not law making. Muslim jurists therefore perform the task ijtehad and struggle to find the answers in line with the sources of Islamic law and use the above discussed methodologies to interpret sharia. This explains why many legal concepts of Islam have changed according to time and place and the prevailing circumstances. This consistent ijtehad provides Islam with the sense of indeterminacy and dynamism to suit different societies.

The third principle of Islamic constitutionalism is Caliphate or Khalifa, is the idea that Islamic state is to be led by an executive known as the caliph. The term resonates in Muslim history as the Holy Prophets successors were called caliphs and enjoyed great reverence among Muslims for their selfless devotion to the Prophet and their immense contribution to Islam. The institution of Khalifa continued throughout Islamic history, even though multiple caliphates existed in various parts of the world, up until the abolishment of Khilafat in Turkey, Muslims globally identified with the office of the caliph as their leader. In the early days of Islam the Prophet was deemed to be chosen by God to lead the Islamic state, centralizing executive, judicial and legislative powers in his person. After his demise and with the passage of time, this paradox has made it difficult to set limits on the powers of the caliph that would parallel the limits set within constitutional democracy. Perhaps, Ijtihad is the key and reinterpretation of the principle of caliphate or substitution of this office with a modern day executive in lines with the modern notions of constitutionalism may be the answer.

4.3 Tools for Islamic Constitutionalism

As evidence from the Pakistan, Iran and Malaysia various states have applied different techniques to give Islamic character to their constitutions and pursue the goal of Islamic

Constitutionalism. Pakistan and Iran's Constitution which are more Islamic in nature than Malaysia display the use of many of these constitutional provisions. I will briefly highlight some of these tools used across the globe by Muslim majority countries to give Islamic character to their constitution.

Delegation of sovereignty to Allah instead of the people is a feature common to both Pakistan and Iran's constitution. Similarly, use of Sharia or Quran and Sunnah as the key source of law is a widely used tool. Some constitutions inculcate a repugnancy clause into the constitution that ensures that any legislation contrary to principles of Islam is void. The requirement for the Head of the State to be Muslim and establishing some key requirements from public office holders e.g. knowledge of Islam, being a practicing and pious Muslim (as in Pakistan) may also be used. Requirement for official state religion to be Islam and state's duties to establish, protect, propagate Islam is a widely common feature established in most of the Muslim majority countries and is common to Pakistan, Iran and Malaysia. Ensuring that the Judiciary relies on Islamic sources of law and trained in Islamic tradition is another tool used in Islamic constitutions. Assigning some important role to Islamic scholars with regard to advising the state like the Council of Islamic Ideology in Pakistan and the office of Leader and Guardian Council in Iran is another provision that seeks to give an Islamic character to the constitution. Some Muslim countries also place limitation upon the rights of individuals guaranteed by the constitutions in accordance with Islam. Countries have also chosen to establish constitutional obligations upon the government to observe Islamic financial doctrines e.g. discouraging usury or riba or establishing constitutional duties or institutions to manage Waqfs (Islamic endowments) and Zakat (alms/charity). Provision of Islamic education to the population or the recognition or applicability of Islamic criminal law are also

some of the tools used by different countries that seek to establish their own version of Islamic Constitutions

Therefore there are a wide range of legal provisions that have been inserted or inculcated into the constitutions by Muslim majority countries that seek to establish their constitutions in accordance with Islam. The choice of these provisions are unique to each country and is highly impacted by their social, cultural or historical context of each country and the demands of the population.

Conclusion

Most of the Muslim majority countries have a tendency to gravitate towards establishing their Constitutional architecture in line with Islam. Consistent effort by countries across the Muslim world to inculcate the modern principles of constitutionalism with Islam have yielded fascinating and divergent models. Some countries have been more successful than the others in establishing constitutional intuitions and provisions aimed at ensuring conformance to Islamic principles. The shape and form of constitutional framework adapted by Muslim countries varies, based upon their particular social, political and historical experiences. Islam is a religion that is spread across the globe and encourages its followers to adapt to the changing need of times in accordance with their own social and political context. It would be a futile (and impossible) exercise to try to develop an Islamic Constitution that fits the need of every Islamic society. Constitutions are man-made documents that seek to ensure rights of the citizens and establish governmental intuitions aimed at governing the state. It is therefore the prerogative of the citizens of Islamic countries to develop their own form of Islamic constitution in accordance with their aspirations so long as it does not conflict with the basic principles and teachings of Islam. The institution of Ijtehad in Islam facilitates the reinterpretation of religion to keep pace with changing times, therefore, it is important that Muslim jurists remain firm on the basic Islamic teachings and approach the task of designing their constitution with an open mind.

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THE END
