RELIGION AND FUNDAMENTAL RIGHTS IN THE CONSTITUTIONS

Constitution “is legally defined as a document laying down the manner in which a State or other body is organized”. It is a compendium of fundamental doctrines and rules of a nation from which stem the duties, obligations and powers of the Government and the duties and rights of the people. The word “Constitution” is used in the different senses, abstract and concrete. The Constitution of a State in abstract sense is a system of laws, customs and conventions which define the composition & powers of the organs of a State and regulates relations of various State organs to one another and to the private citizens. A Constitution is normally a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing operation of those organs.\(^1\) (Wade & Phillips). Constitution is the “mother of Legislation” from which all the laws in a country shall derive their basis and principles which shall be reflected by all the laws enacted in that country.

In Islamic legal system where hierarchy and order of priority of sources are carefully maintained, Qur’an, the Holy Book of Muslims has enjoyed and remains to enjoy the highest position from which the laws of Shariah are extracted and construed in the light of the purposes of Shari itself.

It is for this reason that Constitutions of Muslim countries contain the concept of sovereignty different from the one adopted by the Constitution of Western Nations. A brief survey (given hereunder) of important Muslim countries clearly bears out the above statement.

**Iran:**

Article 2 declares that Islamic Republic System is based on belief in One God and His exclusive sovereignty and the rights to legislate and the necessity of submission to His commands, Divine revelation and its fundamental role in setting forth the laws.

Article 12 of the Constitution says that the official religion is Islam and the twelve Jaffrey Schools in Asul-al-Din and Fiqh (Legal Jurisprudence) and that this principle will remain eternally immutable.

**Arab Constitutions:**

a) **Iraq**

Islam is State religion and basic foundation for the country laws and that no law may contradict the established provision of Islam.

b) **Egypt**

The amendment of the Constitution in 1971 specified that the principle source of legislation is Islamic Jurisprudence (Shariah).
c) **Saudi Arabia**

The government derives power from the Holy Qur’an and the Prophet’s Tradition and the Saudi society will be based on the principles of adherence to God’s command.

d) The Constitutions of **Oman, Yemen, Kuwait, and Syria** say that Islamic *Shariah* is the main source of legislation.

e) **Algeria, Jordon, Lebanon, Libya and Morocco.**

The Constitutions of these Countries do not mention *Shariah* in their Constitutions.

**Pakistan**

Article 2 of the Constitution says that Islam shall be the State Religion of Pakistan

Article 227 says that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah and no law shall be enacted which is repugnant to such Injunctions.

The Constitution declares that sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust and that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed.

**Malaysia**

Article 3 of the Constitution of Malaysia 1957 declares that Islam is religion of the federation but it further states that this does not affect the other provisions of the Constitution, thus the fact that Islam is a religion of Malaysia does not itself import Islamic principles into the Constitution. However, the Constitution contains a number of specific features such as framing of the laws by the States to govern Muslims in respect of Islamic Law, personal and family matters. The Constitution also provides for laws in relation to offences against the precepts of Islam.

**Indonesia**

The Constitution of Indonesia does not refer to *Shariah* in any of its Articles. Indonesia is a unitary Republic based on law with sovereignty in the hands of people and exercised through laws. The nation is based on belief in God and the State guarantees religious freedom for all.
A critical study of the Constitutions of Muslim countries would show that many Muslim countries e.g. Indonesia, Malaysia and Pakistan became independent in the wake of World War-II and the powers-to-be managed to draft such Constitutions which will make these States a part of the International Political System as envisaged by the West.

Despite these efforts, imprints of Muslim history and religion can be found in these Constitutions, as some of the Constitutions contain specific mention of Shariah of Islam while others contain provisions for implementation of Islamic Injunctions. The concept of ultimate sovereignty of Allah is engrained in the psyche of the Muslims and this concept finds mention in one shape or the other in the Constitutions of most of the Muslim countries.

**Concept of sovereignty – Western Versus Islamic**

The word ‘sovereignty’ has been derived from the Latin word ‘superanus’ which means greatness, supremacy over others etc. As a political term the word sovereignty was used for the first time by a French political Scientist, Jean Bodin, in his book *La Republique*, published in 1576 A.D. But it does not mean that this concept did not exist before Bodin. As a matter of fact, the concept of sovereignty existed as early as the days of the Greek thinker, Aristotle (d. 322, BC), who used the term ‘Supreme Power’ to convey this sense. Medieval Roman jurists denoted the sense by the phrase ‘fullness of power’. Among the Western writers who further developed the concept of sovereignty after Bodin (1530-96) mentionable is Hugo Grotius, the so-called father of modern international Law. He was followed by Hobbes, Lock, Rousseau and John Austin.

Western political thinkers have variously defined sovereignty. A comparatively recent author defines it as the power of the state to make law and enforce the law with all the coercive power it cares to employ. According to Pollock, sovereignty is that power which is neither temporary or delegated, nor subject to particular rules, which it cannot alter. Another political scientist defines it as the original, absolute, unlimited power over the individual subjects and over all associations of subjects.

Critical thinkers have assigned certain attributes and qualities to sovereignty such as absoluteness, universality, permanence, inalienability, individuality, originality and infallibility (added by French thinker Jean Jaque Rousseau)53. According to Qur’an, final and absolute sovereignty wholly and solely belongs to Allah Almighty alone. Even before the creation of Earth and Heaven, He exercised His absolute power over the universe. If seen with reference to the attributes of sovereignty noted above, Allah is the only Being Who is the holder of this sovereignty. Absolute power over the universe is only His property. He is answerable to none; every one else is answerable to Him. No one can dare postpone or delay the execution of His Takwini commandment.; He does whatever He wishes without consulting any one. It is only Allah, the Almighty, whose domain is all-pervading; His throne extends over the heavens and the earth and feels no fatigue in guarding and preserving them. He is the Master of all corners of the universe. He has a full grasp of every
moving creature ever existent in the universe. His rule is both eternal and infinite. Final power to rule and to take decisions is with Him both in past and future. His authority cannot be transferred to any one and no one-else can even be endurant enough to hold the Ultimate Authority of the Universe. Likewise, all possible attributes of sovereignty are found in absolute terms only in Allah, the Almighty, the Great, the Creator, the Omnipotent. The sovereignty of Allah is so much stressed and emphasized in Holy Qur’an that it constitutes an important and significant component of the divine book. This subject has been considered by several scholars as one of the major discussions of the Qur’an. In order to bring home this basic doctrine to its readers, the Qur’an uses terms like Malik (King) repeatedly for God, only to highlight the fact that in an Islamic System only his authority would reign supreme.

Even logically, no one other than God can be sovereign. If people are considered to be the repositories of sovereignty, then the question arises on whom will, they are sovereign. It appears illogical to presume that someone be considered sovereign over his own self. If one person or a group of persons is considered sovereign then the question of the source of their sovereignty arises which is difficult to answer logically. From social point of view also only God should be sovereign; because if the sovereign is an individual or, are a certain group of individuals, he shall necessarily belong to a certain social or political group of people, who have their own interests and the group, would be tempted to serve them. When such a ‘sovereign’ is accepted as having legitimate authority to make laws it will not be easy for him to curb or control the temptation to serve the interests of his own group at the cost of the interests of others. Since Allah is the Lord, Creator and Sustainer of all mankind, He has no particular affiliations with any group. He has no personal interests to serve. Hence, His sovereignty cannot be but a shadow of blessing and mercy for the mankind.

From historical aspect too, only God should be the sovereign. A human sovereign (if there is really any) can make laws only in the light of his past experience and according to the historical insight of the past which makes him to take a certain step in a certain condition on a certain occasion; while the law he is going to make is enforceable only in the future about which he knows nothing. On the other hand, Allah is All-knowing who is aware of all things and forms that existed in the past or that will exist in future. He is beyond time and space. To him past is not past and future is not future; all is ever present to Him. Rather, all time is past in His eyes because He is the Creator of time, His laws, therefore, can bless the humanity with all good, prosperity and happiness.

Since Allah does not directly enforce His sovereignty in matters falling under the purview of the Shariah, as He in His infinite wisdom willed to allow some scope of freedom to human beings, He delegates certain authority, of course, on a limited scale, to the Ummah to be exercised within the limits and according to the injunctions prescribed by Him in the Shariah. This authority is termed in the Qur’an as Hukm. From the Islamic concepts of sovereignty and Hukm, emanates the concept of Amanah – or trust, indicating that the authority or the government is a trust. Government’s authority is not, as seen earlier an inherent right of Ummah. It has been delegated by the Sovereign to
accomplish certain assignments. Since the state authority is a trust, the head of the Islamic State is no more than a Trustee General who has same rights and obligations that a trustee usually has under the law of trust.

**Shura (Law Making Consultative Body) and Sovereignty**

We have already noticed that Islam grants limited authority to rule to the community of the believers through the Prophet. Thus, the *Ummah* raised by the Prophet is now the collective holder of this divine authority: this authority is limited and has to be exercised within the limits laid down in the Qur’an and the *Sunnah*. Within this framework, the *Ummah* is free to take whatever actions it may deem suitable and appropriate. *Shura* is the instrument of availing of this freedom for the benefit of the *Ummah* and the humanity at large. Thus, the role of *Shura* in preserving the ideology of Islam as a living force in ever-changing human society is evident. *Shura* has the freedom to enact whatever rules it may consider necessary for the good of the society in pursuance of the objectives of the *Shariah*. A companion of the Holy Prophet (peace be upon him) is reported to have said that every measure, which is considered good by the Muslims collectively is also good in the eyes of Allah. It is also an established legal maxim of Islamic jurisprudence that God’s commandments are all destined to be good and benefit of His servants. *Shura* represents that procedure by which the benefits of Divine commandments can be reaped.

**Role of Shariah to legislate - scope**

Legislation in its present western sense is something new to the Islamic legal traditions. If legislation means “laying down of legal rules by a sovereign or subordinate legislator” as Salmond has put it, then in that sense there has been no legislation in the history of Islam before the *Majallah* of the Ottomans and that too was not a piece of legislation in the sense that it laid down some new rules of law. What the *Majallah* did was not more than the rephrasing or redrafting of the already existing legal rules and arranging them in an appropriate order after reformulating them into the form of sections and subsections.

No doubt, there has always been a vast development and expansion in Islamic Law throughout the ages but this expansion was never the result of any legislative exercise in the modern sense. The nature of development and expansion in Islamic law is essentially different from the development and expansion of Anglo-saxon or, for that matter, any other contemporary legal and juridical system.

Islamic law is basically a part of a holistic system based primarily on a religious message contained in the Qur’an and the *Sunnah* – the two basic and original sources for all guidance. The principles laid down in the Qur’an and the *Sunnah* are, in fact, guiding signs or ‘limits’ (*Hudud*) within which human beings have to work out practical details and solution for given problems. The development of law after the Holy Prophet (peace be upon him) gave rise to principles of *Ijihad* – a principle which was approved by the Holy Prophet
(peace be upon him) himself towards the close of his life, *Ijma* – a principle discovered by the companions of the Prophet (peace be upon him) himself, *Qiyas, Maslahah, Istislah* etc. – principles later developed by the early Muslim jurists. Even a cursory glance at the history of Islamic law would show that entire development and expansion of Islamic law took place at the hands of non-official and private individuals – at times collective – efforts.

Before the *Majallah* there is no example in the whole legal history of Islam that a rule of law was ever laid down by a sovereign, a ruler or by an official of the state or by a person or persons appointed by a ruler or even elected by the people for that purpose. The entire exercise of law-making has been taking place at purely private level without intervention by the state or the masses. The interpretation of the Qur’an and the Sunnah and discovery of new rules of law in response to new situations and requirements was the job of the scholars, teachers, academicians and the jurists while the application of that store of legal rules to day-to-day problems was the province of the judiciary and its allied agencies such as *Ifta’* and *Hisbah* etc.

Whenever a new situation arose, scholars and jurists of the *Ummah* addressed themselves to the task and discovered the rule of law in regard to that situation applying the principles of *Ijtihad, Qiyas, Istihsan* and *Istislah* and giving arguments in favour and in defense of their conclusions. It was then upto the judge to accept the most sound and most rational of all such conclusions and to apply that conclusion to the question in issue. In some cases – especially in the early days of Islam – where the judge was himself a recognized, established and trustworthy scholar of the divine law he also participated in that process of law-making. It was in this way that the law continued to develop and expand without interference or pressure from the rulers. It was an open workshop in which every one possessing the required qualification could freely partake and advance his arguments which, if sound and based on original sources, were accepted both at popular and judicial levels. It was in this very manner that all major legal schools of thought came into existence.

It is not a mere coincidence that the founders of the such major schools were private individuals enjoying no official position or authority. Some of the jurists whose legal opinions are still followed by large number of Muslims and applied – though on a limited scale – by some contemporary courts were even persecuted by their contemporary rulers. In this respect the examples of Imam Ahmad ibn Hanbal and Imam Zaid ibn ‘Ali can be cited; these two celebrities were *personae non gratae* in the eyes of the rulers of their respective times and were persecuted for one reason or the other; yet the legal opinions expressed by them and the legal rules framed by them had their value not only in their own life-time but also centuries after their death. This tradition in the development of Islamic law which originated during the early days of *Khulafai-Rashidin* (rightly guided Caliphs) continued for about twelve hundred and eighty-five years. All the development of the law which is undoubtedly one of the richest treasuries of legal thought ever produced by any people or civilization took place according to this tradition, i.e. with purely private and non-official efforts without any interference or pressure.
from the governments. Some rulers did try to influence the development of law for one reason or the other, but Muslim jurists never allowed such influence to be effective. Here, the example of Harun-al-Rashid can be cited who tried to persuade Imam Malik to let the government adopt his *Muwatta* as the guide book for the courts. But it goes to the unrivalled credit of the great Imam that he preferred the freedom and supremacy of law to his personal acclaim and recognition. He refused to agree to the idea and saved the right of the jurists and scholars to exercise *Ijtihad* freely and independently according to their sincere and genuine understanding of the Qur’an and the Sunnah and the strength and soundness of their arguments without being influenced by any other force except their own conscience and fear of God.

The first outward departure from this tradition took place in 1287 A.H. 1869 A.D., when the Ottoman Sultan promulgated the first-ever codified piece of law in the history of Islam i.e. the second chapter of the *Majallah*. Although this was a departure from the tradition only in form and appearance and not in essence and reality, yet it paved the way for a real departure which the Muslims first tolerated and then accepted under the powerful influence of the western legal traditions.

After the World War-II, the States as emerged receiving independence from the Colonial Powers, adopted Constitutions in the western legal traditions contrary to the Islamic legal traditions. For instance, the Tunisian Constitution of June 1, 1959 is based on a combination of French Civil Law stemming from the period during which Tunisia was governed as a French Protectorate (1881-1956) and Islamic law (Shariah) based on the Qur’an and sayings of the Prophet Muhammad (peace be upon him) – the Hadith. Tunisian law reflects a blending of western and North African concepts, traditions and legal norms.

Similarly, the Constitution of Indonesia was written in June-August, 1945 when Indonesia was emerging from Japanese control at the end of World War-II. The 1945 Constitution set forth the Pancasila, the five national principles devised by Sukarno as the embodiments of basic principle of an independent Indonesian State. This Constitution has seen many amendments and several political reforms.

The Malaysian Constitution was devised by a Commission known as REID Commission which was formed in a Constitutional Conference held in London from 18th January to 6th February, 1966 by a Delegation of Malaysians with British High Commission in Malay and his Advisor.

The latest Constitution of a Muslim country is that of Afghanistan. Although Afghanistan (Afghan Empire) was made a State in 1747 by Ahmad Shah Durranji, the earliest Afghan Constitution was written during the reign of Amir Abdur Rehman Khan in 1890s followed by 1923 version. The current Afghan Constitution was approved in January 2004 after the 2003 Loya Jirga evolved out of the Afghan Constitution Committee as mandated by Bonn Agreement. The Constitution describes Islam as its sacred and State religion and no law is to contradict the beliefs and provisions of Islam. Though Shariah
is not specifically mentioned in the Constitution but the Hanfi jurisprudence is one of the six (6) branches of Shariah law, is being followed with the concession that Shia jurisprudence will apply in cases arising strictly between Shi’ites. Followers of other religions are free to exercise their faith and perform their religious rites within the limits of law and apostasy from Islam is punishable by death.

Though in some of the Muslim countries, like Indonesia, Syria, Algeria, Jordan, Lebanon, Libya and Morocco, there is no mention of Shariah in the Constitutions, yet in these countries as well as the other Muslim countries the Constitutions of which declare Shariah to be the source of legislation and adherence to the Holy Qur’an and the Prophet’s traditions as its basic principles, the movement to adopt Islamic economic, social and political norms is gaining ground among the Muslim masses. The citizens of the Muslim countries whether ruled by Monarchs, Kings, Military Dictators or so-called democratic setups, are getting wearied day by day and due to rampant corruption of their rulers, social injustice and crumbling social order, are becoming fodder of the terrorists nets, especially those terrorist organizations which are evincing sympathies of the masses on the slogan of enforcing rule of Shariah in the Muslim societies.

The mere mentioning of Shariah as the source of legislation in the Constitutions without providing social and economic justice and without ensuring enjoyment of rights by the common man, is not going to appease the citizens. The demand in the Muslim countries of the common man to provide justice to him through enforcement of Shariah, will continue to become popular base for the religious parties and others and will continue to divide the society on ethnical and sectarian basis.
For example see Maulana Abu’l A’la Maududi, *Qur’an Ki Char Bunyadi Istilahain*, Lahore, several editions; Mawlana Ghulam Allah Khan, *Tafsir-i-Jawahir al-Qur’an*, Rawalpindi.

See for further details, the present writer’s *Mukhamat-i-Alam-i-Qur’ani*, Islamabad, 2002, pp. 71-78.

**Istisna**
It is a contractual agreement for manufacturing goods and commodities, allowing cash payment in advance and future delivery or a future payment and future delivery. Istisna can be used for providing the facility of financing the manufacture or construction of houses, plants, projects, building of bridges, roads and highways.

**Ijtihad**
It refers to an endeavor of a qualified jurist to derive or formulate a rule of law to determine true ruling of the divine law in a matter on which the revelation is not explicit or certain, on the basis of Nass or evidence found in the Holy Qur’an and the Sunnah. Express injunctions have no room for Ijtihad.

**Ijma**
Consensus of all or majority of the leading qualified jurists on a certain Shariah matter in a certain age.

**Qiyas**
Literally it means measure, example, comparison or analogy. Technically, it means a derivation of the law on the analogy of an existing law if the basis (‘illah) of the two is the same. It is one of the sources of Islamic law.

**Maslahah**
Public interest.

**Istislah**

**Majallah**
A compendium of traditions (Hadith) of Holy Prophet.

**Ummah**
Muslim community.

**Ifta**
Ruling

**Hisbah**
Accountability.
The United Nations in Universal Declaration of Human Rights, 1948 (Universal Declaration) in Article 18 states, “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his/her choice.

The Quran, holy book of Muslims also declares in Ayat ________________ Verses

Despite above declarations and International Covenant on Civil and Political Rights, 1966; Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief 1981; and Human Rights General Comment number 22 on Article 18 of Covenant on Civil and Political Rights, intolerance amongst people, communities and societies is on increase.

***In some European countries (Norway, Denmark) caricatures depicting Prophet of Islam and the Holy Book as preachers of militancy, are being published in newspapers and electronic media in exercise of the right of freedom of press and freedom of conscience.

The blasphemy law which prescribes death sentence for those who revile the Prophet of Islam and other Prophets of Ibrahimi faith, in force in Pakistan and other Muslim countries, is being criticized as violative of Human Rights. So much so that even Pope Benedict XVII on 10th January, 2011 in public statement called upon Pakistan to scrap the Blasphemy Law saying that it served as a pretext for acts of injustice and violence against minorities.

There is no voice against those who in the West are continuously publishing sacrilegious and blasphemous caricatures to the great annoyance, and indignation of the Muslims around the world though the objective of “The Alliance of Civilizations” initiated under United Nations auspices is to connect people and organizations devoted to promoting dialogue among political, religious, media and civil society leaders, particularly between Muslims and Western societies, yet the sacrilegious campaign to malign Islam and the Prophet of Islam is continuing in different countries of Europe. The political leaders and Civil Society leaders are not using their influence to discourage these elements involved in injuring the feelings of Muslims, which is necessary for promoting peace and tranquility amongst the followers of different religions and beliefs.

The Muslims of the world appreciate the Corodba Initiative on improving Muslim-West relations; the Madrid Dialogue Conference, a Saudi-Spanish effort, the Assisi interfaith work of the Late Pope John Paul II and the Common World initiative of Muslim scholars and now the present Conference on Religion by the ICLARS in Santiago (Chile).
“Despite the significant progress achieved”, the Vice President of India, (Mr. Mohammad Hamid Ansari) in his address in New Delhi (February 22, 2010) in the Conference on “An International Dialogue between Islam and Oriental Religions”, states, “The record shows that interfaith dialogue has remained confined to the select few and has not percolated to the public at large.”

The Vice President emphasized on the need to go beyond tolerance; the imperative for religious concord in a framework of equality is evident and compelling. He added, this would be achieved only through a sustained, candid and uninterrupted dialogue without a syndrome of superiority or inferiority and with the objective of locating common values conducive to the maintenance of ethical standards essential for social harmony.

In the dialogue, the true picture of Islam, the teachings of Quran and the Prophet of Islam needs to be explained. When in Norway, Objectives of Sharia were discussed and explained, the Minister who had supported the publication of sacrilegious caricature admitted that he did not know that Islam stood of peace, tranquility and harmony amongst human beings.

The common man and leaders of public opinion need to be educated that if criticizing Holocaust is a crime punishable with imprisonment in the Western countries and the Liberal and Secular Societies have accepted such an act as crime obviously with a view to promote amity and peace in the society and in deference to Jews despite all claims of freedom of conscience and press, why not to respect the feelings of the Muslims who cannot tolerate reviling all the Prophets of Ibrahimic faith including the Prophet of Islam.

The National Socialism Prohibition Law, 1947 of Austria, as amended in 1992 provides:-

(from Tarjumaan-ul-Quran – page/9)

Many political personalities, journalists and researchers have been punished and imprisoned for violation of this law.

Two of the most important cases are, of British Historian David Irwing who was in March 2006 sentenced and awarded imprisonment for one year in jail and that of Wolfgang frolick who was sentenced to six years jail term in January 2008.

None of the European countries who are usually champion of the cause of human freedom as well as freedom of conscience and thought raised even a word of protest or offered political asylum.

The penal laws of Belgium¹, Czech Republic², Germany³, France⁴, Hungary⁵, Switzerland⁶, Luxemburg, Holland and Poland also declared the offence of denying, grossly playing down, approving or trying to excuse National Socialist Genocide or such other crimes punishable with imprisonment.

It is pertinent to point out that if denial or playing down or disapproving of a historical event or Law of Libel and Slander which is intended to safeguard the reputation and
respect of an individual or a citizen, are not violative of freedom of expression and thought, how then the law which ensures and safeguards the respect and sanctity of Prophets of Islam or the Prophets of Christianity or Judaism can be considered unnecessary restraint or curb on the so-called right of expression or freedom of thought.

A cursory glance over the sacred Books of Jews and Christians would also proscribe reviling of God Almighty or their Prophets. For instance, Exodus 22:28 says, “You shall not revile God.”[f0] The following verses appearing in Bible are also noteworthy:-

“And he that blasphemeth the name of the Lord, he shall surely be put to death, and all the congregation shall certainly stone him, as well as the stranger, as he that is born in the Land, when he blasphemeth the name of the Lord, shall be put to death (Leviticm 24:11:16)”

According to New Testament:-

“Whosoever I say unto you, all manner of sin and blasphemy shall be forgiven unto men: but to blasphemy against the Holy Christ, shall not be forgiven unto men (Mathew 12:31).”

5. Denial or Trivialization of Holocaust Law 2010.
8. Dutch Penal Code 137 c&d.
Afghanistan

Malaysia

Iran

Iraq

Egypt
www.egypt.gov.eg/english/laws/constitution/default.aspx

Saudi Arabia

Pakistan
www.pakistani.org/pakistan/constitution

Indonesia