RELIGION AND THE SOURCES OF LAW
SHARI’A IN CONSTITUTIONS

Preamble of the Constitution of the Islamic Republic of Pakistan:

Sovereignty over the entire “Universe” belonging to Allah alone, no question of fact and/or law can be raised as to the territorial jurisdiction of Allah irrespective of the place of cause of action.

The authority to be exercised by the people of Pakistan has to be:

(a). Within limits prescribed by Allah.

(b). The sovereignty vesting with Allah, the authority to be exercised by the people of Pakistan through chosen representatives as a “sacred trust”.

It means that the admitted sovereignty of Allah over the “Universe” being much wider and larger in its scope, territory wise and otherwise, the scope of the Constitution is limited as it relates only to the “Order of life of the Muslim people of Pakistan” to the exclusion of all that which does not fall within “the order of life of Muslims”. In other words, we cannot overstretch the scope of the Constitution i.e. beyond the “order of life Pakistan Muslims” (discussion about non-Muslims is out of scope of this article).

Therefore all the different creeds of Muslims, and different cultures, traditions and customs etc. existing in various parts of Pakistan including the tribal customs of Balochistan, Sindh, N.W.F.P, FATA & PATA are to be regulated as “order of life of the Muslim people of Pakistan” as the territorial jurisdiction of the Constitution under Art 246 & 247 extends to all the aforesaid areas.

The interpretative concepts of Ijtehad, Ijma, Qiyas are conspicuously absent from the preamble of the Constitution which relates to the “order of life of Pakistan, Muslim, Muslims” which should squarely fit within the teachings of and requirements of The Greater Constitution which is the Holy Quran.

A great misconception exists in the Western World as to whether Pakistan is a secular state or not. Inspite of, clear vision of the founders of Pakistan Muhammad Ali Jinnah & Alama Muhammad Iqbal, who wanted it to be a multicultural, tolerant, democratic and progressive state, Pakistan is wrongfully being labeled as a fundamentalist Muslim state.

In this context, it is imperative to understand the true meaning of the word “Secular”. The common and prevalent meaning of the word secular in the dictionaries of all major languages of Muslims – Urdu, Arabic, Turkish and Persian – ladeenia, ghair mazhabee, or irreligious and against religion. In contrast, none of the western dictionaries of English, French, Spanish and
Russain, etc. give this meaning to the word secular. They all give the following meanings:  

1. of or relating to the world or temporal as distinguished from spiritual,
2. of or relating to the state as distinguished from the Church and
3. not formally related or controlled by a religious body.

Having said this, we see three main features of western secularism:  

1. freedom of religion, i.e., no compulsion of beliefs;
2. equal status for all religions;
3. no interference by the state in religious matters or by the church in the affairs of the state, in other words separation of the state and the church.

As regards the first point, the Quran says in no uncertain terms that there is no compulsion in religion (Al-Baqra 2: 256) and tell the non-believers “to you by your religion, and to me by my religion” (Surah Al-Kafroon 109).

Caliph Umar declined to pray in the Church of Sepulcher, though asked to do so by the Archbishop of Jerusalem, on the ground that later Muslims may turn it into a mosque. Thus Islam is the first and perhaps the only religion to preach and practice secularism during the lifetime of the Prophet and Khulfa-e-rashedin when it was at the height of its power and could have forced itself on the people of other religions.

Similarly in regard to democracy the western perception that Islam is incompatible with democracy is actually based on the fact that only a few Islamic countries today practice democracy. But that has nothing to do with Islam which shows a preference for democracy over other forms of government. This is evident from the fact that the Prophet was “chosen” as ruler of Medina “by its people”. He had not conquered the city and imposed himself as a ruler. Then he never took the title of king even after regarding the city of Makkah and brought all of Hijaz under his rule.

Secondly, Allah did not instruct him to nominate his successor before his death as he had done, according to Torah / the Old Testament, in the case of Joshua before the death of Hazrat Musa and latter in the case of Saul and David (Hazrat Daud ). Thirdly, the Prophet himself did not nominate a successor though he could have easily done so and left it to the people to select their successor.

Thirdly, the first four caliphs of Islam were chosen by the people or their representatives and none of them was appointed king or tried to establish a dynasty by appointing his son as his successor. This practice was

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1 According to the Concise Oxford Dictionary, 7th ed. Printed in U.K secular = concerned with the affairs of this world; not sacred or monastic or ecclesiastical.

2 Karen Armstrong, “The Battle for God”. 
changed by Hazrat Muawwiya, who became the fifth caliph after Hazrat Ali and appointed his son Yazid as his successor in his own life time.

To sum up, Islam was the first religion to preach and practice secularism as far back as the 7th century CE when the law of the jungle was the norm of the day. Therefore, it is a great irony that the very people who consider themselves its guardians should denounce secularism. Similarly, Islam is not incompatible with democracy and, though it has not prescribed any political system, it favors selection of rulers by people, which is the most important characteristic of democratic system.

Let us take the example of Bangladesh.

The four state principles, including secularism, have been re-established following the SC of Bangladesh judgment on the Fifth Amendment. The Law Minister said, “If it is in conflict with the views of any political parties, the Election Commission would take action, including cancellation of the registration of religion based political parties.”

As stated earlier, in the scheme of things of an Islamic state, there is a Greater, Super Constitution, which is Quran and then there is man made Constitution, which is subservient to the greater Constitution under the doctrine of limited delegated authority and endowed upon man. Article 2 of the Constitution of Islamic Republic of Pakistan, 1973, hereinafter called “the Constitution”, states that Islam is to be the State religion. Article 2-A has been inserted in 1985 by making the “objective resolution” a substantive part of the Constitution. Chapter 1 of the Constitution pertains to the western style fundamental rights, which are put on a higher pedestal as the same is treated as fundamental fabric structure of the Constitution, which cannot be changed by any amendment. Amongst the fundamental rights, security of life and liberty of a person, safeguards against arrest and detention, prohibition of slavery, forced labor etc., protection against retrospective punishment, protection against double punishment and self-incrimination, inviolability of dignity of man etc., freedom of movement, freedom of assembly, freedom of association, freedom of trade business or profession and freedom of speech etc. are comprehensively provided for.

Article 7 provides the definition of State, which may not be found definitionally in Quran and Hadith but it is not un-islamic to have this definition or any other secular definition. The speech of Mr. Muhammad Ali Jinnah dated August 11th, 1947 in which he tried to expound a secular interpretation of Pakistani statehood cannot be deviated.

Finally, the history of Christianity and our own history should leave us in no doubt that only secularism will help us get rid of sectarian and communal strife which has played a major role in making Islam weak and ineffective as it is today. In the case of Mehmood Khan Achakzai Vs. Federation of Pakistan cited as PLD 1997 SC 426, the Supreme Court of Pakistan passed the following short order:

“What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a
touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment.

The Objectives Resolution was Preamble of the Constitution made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of government the main features envisaged are Federalism and parliamentary form of government blended with Islamic provisions. The eighth Amendment was inserted in the constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment, which demonstrates amply that this Amendment is ratified by implication and has come to stay in the Constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239. Article 58(2)(b) brought in the Constitution by the English Amendment, which maintains Parliamentary Form of Government has provided checks and balance between the powers of the President and the Prime Minister to let the system work without let any hindrance to forestall a situation in which marital law could be imposed”.

The Supreme Court further stated in para No. 14 of the detailed judgment that:

[quote] There is no dispute about the fact that basic structure as it can be presumed from reading the Articles in the Constitution as a whole and also preamble to find out the intention of constitution-makers as to what type of system of governance was contemplated in the Constitution. In order to find out the basic structure of 1973 Constitution, comparison cannot be made with a Sovereign Socialist Secular Democratic Republic. The other factors mentioned in the preamble of the Indian Constitution are: --

Justice, social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and opportunity;
and to promote among them all
Fraternity assuring the dignity of the individual and the unity and integrity of the Nation; [unquote]

Study of Constitutions of different countries shows that Constitutions are always made and promulgated keeping in view objective conditions and socio-economic requirements and sometimes in such Constitutions is provided specifically as to what the basic structure is and what is allowed to be amended or not amended on the ground that it would be contrary to the basic structure, Constitution and procedure is also provided therein for such purpose. In the Constitution of United States certain amendments to the Constitution are regarded to be within the exclusive purview of the Congress
and the Supreme Court has refused to interfere with them on the ground that doing so would amount to entering into political questions as in respect of such matters the Court as no power of judicial review. In support of the proposition reference can be made to the cases of:

2. Rhode Island v. Palmer (1920) 253 US 350;
3. Dillon v. Gloss (1921) 256 US 368;
4. Lesser v. Garmet (1922) 258 US 130 = 66 L. Ed. 505
5. US v. Sprague (1931) 282 US 716; and

Constitution of Germany is called the basic law of Federal Republic of Germany of which Article 1 covers basic rights and Article 20 provides that Articles are reproduced as under:

“Article 1.--(1) The dignity of man is inviolable. To respect and protect it is the duty of all State authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice, in the world.

(3) The following basic rights bind the Legislature, the executive and the judiciary as directly enforceable law.

Article 20.--(1) The Federal Republic of Germany is a Democratic and Social Federal State.

(2) All State authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.

(3) Legislation is subject to the Constitutional order; the executive and the judiciary are bound by the law.”

Both Articles 1 and 20 reproduced above indicate basic structure of German Constitution and further Article 79 envisages that basic law can be amended only by a law which expressly amends or supplements the text thereof and in clause (3) provides that amendment of Articles 1 and 20 is inadmissible which means that these two provisions are unamendable.

Para No. 26 of the judgment states that it is not necessary to dilate upon the case of Ziaur Rahman any further for the reason that at present we are concerned only with Objectives Resolution in the Constitution appended as preamble. Even in that capacity it invariably has remained preamble in all the four Constitutions including the Interim Constitution of 1972 and therefore, it has to be read for the purpose of proper interpretation in order to find out as to what scheme of governance has been contemplated. Let us assume that it does not authoritatively provide grund norm and also it does not describe specifically the basic structure of the constitution, even then also it does help in interpreting and understanding the scheme of governance and salient features of the Constitution which are described therein including
Islamic provisions, federalism and parliamentary form of government and fully securing independence of judiciary. Islamic provisions are very much embedded in the Constitution of 1973 as Article 2 thereof envisages that Islam shall be the State religion of Pakistan and Article 227 provides that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah. Further Article 228 provides for setting up Council of Islamic ideology. Similar provisions existed in Articles 197 and 198 of the Constitution of 1956 and Articles 199 to 207 of the constitution of 1962. Similar Islamic provisions existed in the Interim constitution of 1972 from Articles 251 to 259. In nutshell it can be said that basic structure as such is not preamble of the Constitution of 1973 but Objectives Resolutions as preamble of the Constitution and now inserted as the substantive part in the shape of Article 2A when read with other provisions of the Constitution reflects salient features of the Constitution highlighting federalism, parliamentary form of Government blended with Islamic provisions.

Article 20 of the Constitution entails freedom to possess religion and it is treated as a fundamental right just after Article 19 of the Constitution, which deals with freedom of speech and just before Article 21 which safeguards against taxation on the basis of any particular religion. Article 22 of the Constitution safeguards educational institutions from forcibly imparting particular religious instructions.

**Sources of Law**

The sources of law in an Islamic state are the Holy Quran, the Sunnah (acts done by Prophet Muhammad (PBUH), Hadith (precedents of Prophet Muhammad. PBUH), Ijmaa i.e. collection wisdom (a root to democracy), Qiyas i.e. intention behind legislation, Ijtehad i.e. interpretation which in the modern times may be called case law, or judge made law. The last Islamic source of law is Istaslah, which means reformatory legislation. Briefly, there are four sources of Islamic Law. They are (i) Quran; (ii) Sunna or Tradition; (iii) Ijmaa or consensus of opinion and (iv) Qiyas or analogical deductions. If the aforesaid sources of law are compared with the western legal sources, such as, may that be a common law or a civil law system, Custom, Precedent, Legislation, Statutory Interpretation etc., we do not see any divergence making a clear line between black and white areas. I am an exponent of universal national laws erasing the geopolitical lines. In any case, at present, we do have a minimum similarity amongst various Constitutions of states holding aloft the principles of democracy and human rights etc.

To be Continued……