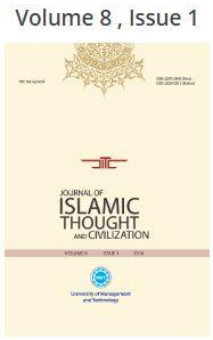

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The Debate of Procedural versus Programmatic Secularism; Reflections from Constitutionalism in Pakistan

Muhammad Danyal Khan*

Abstract

Basic structure of Constitution of Pakistan has always been a source of debate among the academic, parliamentary and judicial circles. The arguments are divided in secular and religious notions. The same debate is going on parallel in United Kingdom and across the world to define the domain of religion in modern constitutionalism. The author aspires to deal with the question of domain of religion in Constitutionalism of Pakistan by conducting a comparative analysis of various on-going identical debates in the United States, the United Kingdom and Egypt. The paper will aim at synthesising the debate of domain of religion in constitutionalism by defining potentials and limitations of religion in modern constitutionalism. This will be done by theoretical analysis of arguments of both parties; people who think religion as potential and the people who wish to put a limit to the role of religion in working constitutionalism. Most significantly the work will incorporate the innovative terminological differentiation of 'Procedural Secularism' from 'Programmatic Secularism' as defined by 104th Arch Bishop of Canterbury Dr Rowan Williams in 2006.

Keywords: Constitutionalism, programmatic Secularism, procedural secularism, secular, Pakistan

Introduction

Constitutions, all over the world, accommodate religions in their texts one way or another.[1] A constitution is reflection of modus operandi of a certain society about the way that society opts to live with co-existence.[2] More than 200 Constitutional documents refer to religion with the exception of Czech Republic whose constitution considers it irrelevant.[3] Modern Constitutionalism faced a good deal of complex questions and one of them was the domain of religion in plural societies and for this reason the process of constitution making was termed as 'building the ship at sea' by Elster.[4] Modern

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[1]Nathan J. Brown, "Constitutionalism, Religion, and Education," *American Behavioural Scientist, Vol.* 60, No 8. (2016): 1013-1035.

[2]"Constitutionalism." *Stanford Encyclopaedia of Philosophy* (Stanford: Stanford University, 2017)

[3]Nathan J. Brown, "Constitutionalism, Religion, and Education," *American Behavioural Scientist,* 1013-1035.

[4]John Elster, Claus Offe, and Ulrich K. Preuss, *Institutional Design in Post-Communist Societies: Rebuilding The Ship at Sea* (Cambridge: Cambridge University Press, 1998).

Constitutionalism is spread across accommodating approach named as 'twin tolerations'[5] for religion as in the case of the United States of America and the aggressive, hostile treatment of religion by French constitutional patterns. The polarisation of constitutional treatment of religion across the world has been defined by Dr Rowan Williams as procedural versus programmatic secularism.

Dr Rowan Williams, 104th Arch Bishop of Canterbury, defined his understanding of scope of religion in contemporary constitutionalism by starting the notion of Isaiah Berlin where the classification is done between 'Positive' and 'Negative' aspects of liberty. It is attributed that 'Negative Liberty' is where the state gets the policy of minimum intervention and does not prescribe the standards of morals; and 'Positive Liberty' is where the state aims at some ideals and objectives. He further takes his thesis of describing secularism to the point where a class of intellectuals at private and state level wish to liberate state ideals from religious guidelines exclusively. Dr Williams terms this approach as 'Programmatic Secularism' aiming at promoting 'Negative Liberty.' The second approach of having some ideals like rule of law, equality and fair play by the way of modern constitutionalism is termed as 'Procedural Secularism' by Dr Williams. The same debate is going on in Pakistan, where the argument related to the question of religious domain in constitutionalism is under debate since the inception of Pakistan.[6]

The argument of religion as one of the subjects or the sole object of constitutionalism in Pakistan has been a matter of debate since formulation of first Constituent Assembly. The arguments of both sides bear weight in term of their origin from the founders of Pakistan establishing 'intention of founding legislators'. In the view of these arguments, the constitutional interface transformed from one pattern to another both in legislative assemblies as well as judicial interpretations. This paper aims at analysing the domain of religion in Constitution of Pakistan. This will be achieved through a comparative analytical study of both Western as Well as Muslim Constitutional trends identical to the case of constitutionalism in Pakistan. The later part of the work will put forward a hybrid solution to the debate introducing the 'Procedural Secularism' to the existing debate of domain of religion in constitutionalism.

1.1. Research Questions

1. Is it possible to harmonise both secularism as well as religion in modern constitutionalism of Pakistan?
2. What are the factors contributing to the imbalanced status of religion and constitution in Pakistan?

[5]Alfred Stephen, "Religion, Democracy, and the 'Twin Tolerations'," *Journal of Democracy* 11, no. 4 (2000), 37-57.

[6]Hamid Khan, *Constitutional and Political History of Pakistan* (Pakistan: Oxford University Press, 2007), 37.

3. What are the limitations and potentials of the scope of religion in constitutionalism of Pakistan?

2. Literature Review

The prime work on the topic is done by Martin Wilhelm Lau in his Doctoral thesis titled ''The Role of Islam in the Legal System of Pakistan'[7] in 2002 that was later published in the form of a book. The work of Dr Lau focuses on judicial interpretations through various findings in cases before Constitutional Courts of Pakistan. Dr Lau gives a thematic account of data where role of religion was celebrated and discussed on the basis of personal affiliations of judges in their interpretations regarding role and status of religion in constitutionalism of Pakistan. Dr Rubya Mehdi has also addressed the same question in his work 'Islamisation of Laws in Pakistan'[8] and has given a brief account of role of religion in criminal, family and constitutional provision in socio-legal manner. A good deal of delegations on the same issue are done by Lord Binder in his work 'Religion and Politics in Pakistan'[9] published by University of California Press where he analysed the domain of religion historically. The work aims at describing series of events having impact on constitutionalism in Pakistan. 'The Political System of Pakistan'[10] by Khalid bin Saeed also gives an early account of impact of religion on constitution-making. Khalid has discussed various socio-political reasons behind Objective Resolution 1949 and early developments on constitutionalism of Pakistan. Charles H. Kennedy in his famous article titled 'Islamization and Legal Reform in Pakistan, 1979-1989'[11] also studied the process of Islamisation under military regime in Pakistan.

Most of the studies conducted on the same topic polarised the argument as some of them described absolute deletion of role or religion from constitutionalism while other studies argued objectivity of religion. This work aims at harmonising the domain of religion in constitutionalism through 'Procedural Secularism'.

2.1. Significance of Research

This research aims at presenting plurality of arguments accommodating both constitutional standards as law as well as religion as one of the subjects of regulating society. The research will try to harmonise the on-going argument on secularisation or Islamisation of constitution in Pakistan. The work will also be a pioneer in introducing

[7]Martin William Lau, *The Role of Islam in the Legal System of Pakistan* (London: Brill, 2005), 34.

[8]Rubya Mehdi, *The Islamization of the Law in Pakistan* (Routledge, 2013), 59.

[9]Leonard Binder, *Religion and Politics in Pakistan* (California: University of California Press, 1961), 90.

[10]Khalid bin Sayeed, *Political System of Pakistan* (Lahore: Oxford University Press, 1967), 293-308.

[11]Charles H. Kennedy, "Islamization and Legal Reform in Pakistan, 1979-1989," *Pacific Affair*, Vol. 63, No. 1 (1990).

the concepts of 'Programmatic Secularism' and 'Procedural Secularism' to the debate of domain of religion in constitutionalism of Pakistan.

2.2. Research Methodology

The study will not be theoretical but descriptive, as it will present a comprehensive behaviour of various constitutions. The comparative analysis will be conducted in abstractive manner. The review on the constitutional provisions regarding *Shari'ah* superiority clauses in various constitutions will be made by the use of jurisprudential doctrines, ratios prescribed in precedents and contemporary analysis by famous writers on the topic.

2.3. Religion, Secularism and Constitutionalism

There has not been a mutually agreed upon definition of religion but prima facie it is interpreted as spiritual commands to a certain group regarding their life.[12] These commands are immutable and considered divine through a revelation.[13] While secularism is always interpreted as something antidote to religion and is considered as the synonym of atheism. It is pertinent to mention here that many a constitutions like Constitution of the United State of America and other smartly operating constitutions accommodate both in a workable manner. Guy Haarscher considers secularism as something productive for constitutionalism if interpreted in a way of rule of law and equal protection of every citizen's legal rights.[14] He describes secularism in a way that state stands neutral and stops all kinds of discrimination at constitutional level and this non-discrimination operates even on religious level. Infact, he describes secularism as the saviour of religion, not otherwise.[15] Contemporary constitutionalism originates from the ideals elaborated by John Locke, the brain behind the United States constitutional development.[16] The very orientation of word is to make or constitute and it is termed as set of rules and principles to run a state.[17] To put in simple understanding, constitutionalism is the science of making constitutions; and contemporary constitutions comprise upon division of authority among various organs of state such as legislature, executive and judiciary; and the output in the shape of protection of fundamental rights of citizens of a certain state.[18]

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[12]Timothey P. Jackson, "Theology and Law Divorced and Reconciled: Aquinas, Luther, Rawls, and us," *Journal of Law and Religion* Vol. 31, No. 1 (2017) 71-78.

[13]Ibid.

[14]Guy Haarscher, "Freedom of Religion in Context," *Brigham Young University Law Review* (2002), 269-282.

[15]Ibid.

[16]"Constitutionalism," *Stanford Encyclopaedia of Philosophy*. Stanford: Stanford University, 2017.

[17]Jeremy Waldron, "Constitutionalism: A Skeptical View," Accessed November 9, 2017<https://ssrn.com/abstract=1722771>.

[18]Ibid.

3. Analysis of Role of Religion in Pakistan

Constitution of Islamic Republic of Pakistan 1956 included Objective Resolution in its preamble and defined the domain of religion in state very clearly.[19] This inclusion made it clear that the constitutionalism will be subject to Islamic Traditions.[20] Article 198 declared Islamic Traditions as primary law for Pakistan.[21] Article 25 of the same document put a duty on authorities to work for society where Muslims can lead their lives according to religious ideals.[22] Parallel to liberty for Muslims, the constitutional document introduced rule of non-discrimination based upon religion, race sex etc. By declaring Freedom of Religion, it further made it clear that the constitution will adopt the principle of non-discrimination in terms of religion.[23] This principle of non-discrimination is clearly explained in constitutional provision.[24] Many traditional scholars consider the provision contrary to Islam.[25]

2nd Constitutional document was made under the leadership of military regime and tried less scope of religion. Article 198 was not made in a way to secure Islamic supremacy. The scope of Islamisation was left to Council of Islamic Ideology with only recommendatory powers not mandatory.[26] This charter lost its popularity and met its fate by amendment in response to popular demand.

Constitution of Islamic Republic of Pakistan 1973 adopted Islamic framework, democracy as system of state and federal scheme of state. Once again Fundamental Rights were stressed and the protection was guaranteed without considering anything repugnant to their characteristics. The principle of non-discrimination was also given great statutes.[27] The domain of Objective Resolution was made persuasive rather binding but condition was stipulated for Muslim head of state.[28] Article 227 explained the compulsion of codification and conformity of laws with Islam.[29] The process of Islamisation was further strengthened by late military rule.[30] This rule interpreted

[19]Constituent Assembly was dissolved by Ghulam Muhammad, Governor General, after seven years of its formation. In July, 1955, a new Constituent Assembly was formed which 'ironed out' all differences in very short period and proposed first constitution after 9 years of establishment of Pakistan.

[20]Walid Iqbal, "Islamic Polity and the Constitutional Process," *A Quarterly Magazine for a Discerning Readership* (2013): 8.

[21]Constitution of Islamic Republic of Pakistan, Art. 198, 1956.

[22]Ibid., Art. 25, 1956.

[23]Ibid., Art. 7, 1956.

[24]Ibid., 8, 1956.

[25]Ayyab Mahmud, "Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice," *Fordham International Law*, 40, no. 1 (2013): 19.

[26]Constitution of Republic of Pakistan, Art, 204, 1962.

[27]Ibid., Art. 26, 1973.

[28]Constitution of Islamic Republic of Pakistan, Art. 41, 1973.

[29]Ibid., Art. 227, 1973.

[30]Provisional Constitutional Order 1981, PLD 1983-191.

Fundamental Rights in Islamic way.[31] It was stressed that, "Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why I consider the introduction of the Islamic system an essential pre-requisite for the country."[32] Objective Resolution was included in constitution as operative part. *Federal Shariat court*, *Shari'at Appellate Bench* took charge of Islamisation at judicial level.[33] Both courts led towards Islamisation of various provisions of Criminal, family and financial laws.[34]

3.1. Supra-Constitutionality in Constitution of Pakistan

Constitutional document in state is the document elaborating an apex civil contract that confers powers and authorities on various organs of state. This document has also been named as civil contract of certain state. It also elaborates the relationship of state with its people through providing fundamental rights. These fundamental rights also define the relationship of state with religion. This relationship in Pakistan has been a subject of legislative and judicial debate in case to defining domain of religion and state. Judicial precedents in Pakistan took various turns sometime taking religious domination such as declaring Article 45 that provides power of pardon to capital punishment as un-Islamic,[35] provisions 299-338 from Penal Code repugnant to Qur'ān and *Sunnah,*[36] Section 6, 7 and 4 of Muslim Family Laws was declared repugnant to Islamic Traditions,[37] financial transactions involving stipulation of interest were declared void[38] and interpretations declaring the question of repugnancy on the basis of Islam opened a discussion.

Constitution in its basic charter possesses supremacy over state. The Constitution of Islamic Republic of Pakistan is written and retains supremacy over the land. Recent Constitution of Pakistan was adopted in 1973. Initially, the basic structure of constitution was adopted on the lines of the Government of India Act, 1935 and the same practice is followed in later constitutionalism with adoption of federal, democratic and parliamentary form of government. Recent constitutionalism remained same in the Constitution of the Islamic Republic of Pakistan 1973 and Islam was taken as persuasive guideline by including Objective Resolution in preamble. By adopting the resolution as non-operative part, it remained a persuasive guideline for both legislature and judiciary and later after making it a part of constitution through 8th amendment, a debate started

[31]Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995), 188-190.

[32]Hamid Khan, *Constitutional and Political History of Pakistan,* 37.

[33]Constitution of Islamic Republic of Pakistan, Article 203, 1973.

[34]Hamid Khan, *Constitutional and Political History of Pakistan*, 37.

[35]*Sakina Bibi v Federation of Pakistan*, Lahore High Court (1992).

[36]*Gul Hassan v Government of Pakistan*, Peshawar High Court (1979).

[37]*Farishta v Government of Pakistan*, Peshawar High Court (1980).

[38]*Mahmood-ur-Rehnzan Faisal v Secretary, Ministry of Law*, Supreme Court (PLD, 1992).

both at legislative and judicial levels on domain of religion in constitutionalism of Pakistan.[39] The transformation from non-operative to operative part was made by military rule. The same debate is presented in various cases and one of the best debates is analysed here due to the constraint of space and word count.

3.2. Debate on Basic Structure; Mahmood Khan Achakzai and Others v. Federation of Pakistan

The domain of religion in constitutionalism of Pakistan was argued in this judgment. Constitution of Pakistan was discussed in a very vague manner. The judgement declares Pakistan as democratic, federal state with Islam as the basic characteristic of constitutional working. The judgement refers to Hakim Ali Khan Case [40] to define the domain of religion in state. Hakim Khan Case leads towards 'twin-toleration,' a concept where constitutionalism accommodates religion. The plea of appellant to declare repugnancy of Article 239[41] was turned down as it was declared that the legislation falls under authority of legislature. The judgement further settles that the charter of Islamic Traditions is not supra constitutional, unless taken and adopted by legislature.[42]

The findings in judgement elaborate a detailed comparison of basic structure of constitutionalism in Pakistan with India who takes socialist, secular and democratic charter for her constitution. Indian Constitution declares all laws void if they are in contradiction with fundamental rights. In the preview of Article 239, it has been made clear that legislative and constitutional framework is sole prerogative of legislature but they are not absolute as is the case of United Kingdom. The legislature in Pakistan takes various ideals like Islamic Traditions, federalism, and parliamentary democracy as basic charters of the state.

The view in this judgment makes the domain of religion in constitutionalism more paradoxical. On one way, it declares Islam and other characteristics as overriding on constitutional amendment and on the other hand, it abstains from intervening on the same basis. Making concluding remarks, the judgement declares that deciding the question of repugnancy of laws with Islamic Traditions is not the preview of courts rather is the prerogative of legislature.

3.3. Reflections on Domain of Religion in UK Constitutionalism

The status of religion is not estimated because of unwritten charter and parliamentary supremacy ideals of British Constitutionalism. Human Rights Act 1998 by the way of adopting European Convention of Human Rights inculcates freedom of

[39]*Chaudhary Tanbir Ahmad Siddiky v The Province of East Pakistan and others*, Supreme Court (PLD, 1968), 185.

[40]*Hakim Khan v. Government of Pakistan* (PLD, 1999 SC 42).

[41]Constitution of Islamic Republic of Pakistan, Art. 239, 198, 1956.

[42]*Mehmood Achakzai v. Federation of Pakistan* (PLD 1997 SC 426).

religion conscious. This is demonstrated in Article 9 of the same convention ensures freedom of religion without any discrimination to any religion or class. Religion and its freedom solely emerge from the actions of the parliament. The same can be illustrated through exemption of wearing of helmets to Sikhs during a motor-cycle ride.[43] The religious establishment of majority Christians is composed upon both Church of England and Church of Scotland.[44] Church of England possesses more influence but at the same time it draws its establishment from source of state and parliament. All appointments in Church of England are done by the parliament. Moreover, the parliament of the United Kingdom exercises a certain degree of control over Church of England through various Acts.[45] In the view of these arguments, it may be claimed that religious freedom is offered by state with full control of religious domain not otherwise. Parliamentary supremacy in United Kingdom is above the domain of religion.

3.4. 'Twin-Toleration'; United State Constitutionalism Trends

The concept of Separation of both religion and state with the guaranteed freedom of religion was introduced in the United State Constitutional framework.[46] This accommodating constitutional trend was termed as 'Twin-Toleration' by Alfred Stephen.[47] 1st amendment in United States Constitution introduced both religious freedom without any discrimination and explained the role of religion and state in United State Constitutionalism.[48] It introduced the principle of separation of state and church.[49] United Constitution is a good example of resolving the arguments between religion and state in modern constitutionalism. United State ideal of constitutionalism makes sovereignty the sole prerogative of people and starts with the term 'we the people of United State resolve…' This constitutional model puts religion under the popular democratic sovereignty model. The United State Model of relationship between states and religion aims at complete separation where both operate in their spheres taking no impact upon one another as self-floating. This model is often termed as 'Twin-Toleration.'

3.5. Adopting 'Procedural Secularism' to Constitutionalism in Pakistan

The role and domain of religion in politics has been domain of arguments both in Pakistan and other parts of the world based upon polarisation of ideas instead of plurality.

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[43]Motor-Cycle Crash-Helmets (Religious Exemption) Act, 1976.

[44]E. Norman, *Church and Society in England 1770-1970: A Historical Study* (Oxford: Clarendon Press, 1991), 457.

[45]I. Leigh, "Recent Developments in Religious Liberty," *Ecclesiastical Law Journal*, Vol. 65, No. 11 (2009): 65.

[46]Nathan J. Brown, "Constitutionalism, Religion, and Education," 1013-1035.

[47]Alfred Stephen, "Religion, Democracy, and the 'Twin Tolerations'," 37-57.

[48]Michael J. Perry, "Freedom of Conscience as Religious and Moral Freedom" Available at https://ssrn.com/abstract=2287436 or http://dx.doi.org/10.2139/ssrn.2287436 (Accessed on November 10, 2017).

[49]Ibid.

The secular arguments are mainly led by stating part of Muhammad Ali Jinnah's address, stating:

> You are free to go to your temples; you are free to go to your mosques or to any other place of worship in this state of Pakistan. you may belong to any religion or caste or creed that has nothing to do with the business of the state… we are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principal that we are all citizens and equal citizens of one state…in course of time Hindu would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.[50]

While the arguments regarding the role of religion in constitutionalism also bear weight and the ideas of founding fathers stating 'intention of founders' also gets a clear understanding of tangible role of religion in constitutionalism of Pakistan. The arguments bearing role of religion in constitutionalism are led by *Maulana Maududi*, who puts forward his famous six points as guidelines and popular demand for future constitutional making of Pakistan. It was demanded that future constitution must vest sovereignty to Allah that may be exercised by people as trust; *Shari'ah* inspired law and making existing laws in consonance with Islam.[51] The same was taken and incorporated in Objective Resolution 1949. It seems that the argument demanding secular constitutional setup, is inspired by 'Programmatic Secularism.' A complete dichotomy of state and religion is still an idea that is very scarcely put into practice in contemporary constitutionalism. The same is answered by Dr Rowan Williams by introducing the differentiation between Programmatic and procedural Secularism. Constitutionalism in Pakistan may take a benefit from this thesis.

Dr Rowan Williams in his famous lecture 'Secularism, State and Religion' forwarded his famous thesis to synchronise both religion and contemporary constitutionalism. He stated that every constitution is inspired by certain ideological objectives that cannot operate in isolation from people; and if people believe in some specific religion then the constitutionalism cannot isolate wishes of the masses. He attributed arguments of separation of religion or ending the role of religion from constitution as 'Programmatic Secularism,' which is bias towards religion and by ending role of religion is actually leading towards violation of the fundamental right of citizens. Furthermore, the idea of adopting ideals of rule of law, non-discrimination, equal protection of rights and fair trail along with freedom of religion and belief was termed as 'Procedural Secularism.' The same model of understanding secularism may help the debate of the religious domain in constitutionalism of Pakistan.

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[50]Khalid Bin Sayeed, *The Political System of Pakistan* (Houghton Mifflin Co, 1967), 142-160, 145.

[51]Kausar Parveen, "The Role of opposition in Constitution Making," *Pakistan Vision*, 11 no. 1 (2010): 142-160, 143.

Constitution of Islamic Republic of Pakistan introduces the model of constitutionalism making religion as the supreme guideline for all constitutional and legislative functions. But on the other side Article 20 states that:

> 20. *Freedom to profess religion and to manage religious institutions. —Subject to law, public order and morality-*
>
> *(a) every citizen shall have the right to profess, practise 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.*

The inclusion of non-discriminatory Right of Freedom of Religion may state that laws in Pakistan have been Islamised in Procedural manner rather programmatic manner. The relationship of religion and state in Pakistan may get more strength by inclusion of Procedural Secularism by accommodating both positive liberalism and Islamic standards.

4. Conclusion

Constitutionalism has fallen prey to the polarisation of thoughts. At some instances, moves of secularising constitution has arguments of Programmatic Secularism to exclude religion from constitutionalism absolutely; and that is quite hard as illustrated from global constitutional trends. While the process of Islamisation seems to be unable to draw a domain for religion and religious interpretations both at legislative and judicial level because of converse Programmatic Islamisation. The actual domain of religion in modern constitutionalism can be fixed in Constitution of Pakistan by adopting Procedural Secularism or Procedural Islamisation. In this way, the religious freedom will be secured by non-discrimination; and moreover, the state intervention into religion and religious activities will be curtailed.

This paper has presented an analytical account of novel idea of Procedural Secularism to the on-going intellectual debate of constitutionalism in Pakistan. Moreover, analysis of constitutional developments on the question of domain of religion in contemporary constitutionalism of Pakistan is presented with a comparative analytic study of various successful illustrations of constitutionalism.

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