

Shariat Misc. Application No.1/I/2011

The petitioner Mr. Nazir Ahmad Khawaja under article 203D of the Constitution of Islamic Republic of Pakistan has challenged Section 7 of the Election Law 2002 for being not in line with the Islamic Injunctions.

2. It is pertinent to reproduce the impugned section for the purpose of its examination in the light of Islamic injunctions:

Section 7: "The election for member of the National Assembly and the Provincial Assemblies shall be held on the basis of joint electorate."

3. The petitioner claims that the impugned law is repugnant to the injunctions of Islam and referred to verse Nos.9: 14, 2:128, 16:64 where the word قوم مومنين and the word قوم لا يؤمنون and القوم الكافرين occurred in verses 43:88, 16:107 clearly divided the people into two nations. He has also referred to a number of verses of the Holy Quran which need not to be repeated here. The petitioner has also referred to Objectives Resolution, Constitution of Pakistan, and Oath of the President of Pakistan and other provisions of the Constitution relating to the Islamisation of laws. According to him this country was librated in the name of Islam and on the basis of two nation theories. So, to hold election on the basis of joint electorate is the negation of this theory and contradictory to Islamic Injunctions. The petitioner has given references from the Holy Quran which relate to the theory that Muslim Ummah is a separate nation and non believers or non Muslim are a separate nation. The petitioner has not mentioned exact verses of the Holy Quran and tradition of the Holy Prophet to suggest that why this particular law is repugnant to the injunctions of Islam. He has only referred Articles of the Constitution pertaining to Islam and Islamization of laws in the country.

4. The petitioner had challenged this law through Shariat petition No.7/I/2002. On 7.4.2009, the petitioner had amended his petition by the Order of the Court and copy of this petition was sent to Federal Government for comments. On 19.10.2010, Shariat Petition No.7/I/2002 was dismissed as withdrawn on the written request of the petitioner. The Court had not ordered to file fresh Sh: Petition by withdrawing this petition. The reason for withdrawal, as mentioned by the petitioner was, not disposing of this petition by this court, even after the lapse of sufficient period. Now, the said petitioner has filed fresh Sh: Petition challenging the said law on the ground of its being repugnant to the Injunctions of Islam.

When we examine the impugned law, the following issues needs to be elaborated:

- 1) Jurisdiction of Federal Shariat Court.
- 2) Definition of citizen in the light of Islamic Laws.
- 3) Is non Muslim eligible to be elected as Member of Parliament?
- 4) Is non Muslim eligible to caste vote in favour or against Muslim candidate?

5. Election Law 2002 was promulgated to regulate election laws in accordance with the provisions of the Constitution. Under Articles 203B(c) of the Constitution of Islamic Republic of Pakistan, Constitution has been immune of scrutiny by this court. In this regard it is pertinent to reproduce Article 203D of the Constitution which discussed the jurisdictions of this court and then Article 203 B(c) which defined the Law which can be examined by this court.

**6. Article 203D of the Constitution of Islamic Republic of Pakistan 1973:
Jurisdiction of the Federal Shariat Court.**

(1). 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

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 the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the Federal legislative Lists, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:—

- (a) the reasons for its holding that opinion; and
- (b) the extent to which such law or provision is so repugnant;

and specify the day on which the decision shall take effect

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal there from may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,-

- (a) the President in the case of a law with respect to a matter in the Federal Legislative List or Governor in the case of a law with respect to a matter not enumerated in the said Lists, shall take steps to amend the law

so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

7. The word "law" has been defined in article 203B(c) of the Constitution as: "law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice procedure.

8. In the light of the above definition of "law" articles of the Constitution are immune of the scrutiny by this court. Article 50, 51(3&4) discussed the composition of Majlis Shoorā (parliament), allocation of seats and reserved seats for women and for non Muslims while article 106(3) of the Constitution discussed the number of seats reserved for non Muslims in various provinces. Article 51(2) and Article 106(2) discussed qualifications for a person entitled to vote. Both these articles qualified "citizen of Pakistan" to vote. Article 260(3)(a) and (b) of the Constitution defined the expression Muslims and non Muslims. Pakistan Citizenship Act, 1951 (Act No 2 of 1951) discussed various categories of citizens but has not differentiated between the status of Muslim and non Muslim citizen.

9. Under the Constitution every citizen is allowed to vote and every citizen is eligible to become Member of Parliament. It is therefore necessary to define citizen, his status, obligation and duties in the light of Islamic injunctions and to discuss whether every citizen- Muslim and non Muslim- is eligible to vote and become Member of Parliament.

10. Citizen of a Country means man's place of dwelling and stability- a place where he belongs. Hence linguistically, the citizen is every person who belongs to a country which he has adopted as an abode a home and a dwelling for his life and prepared himself to live therein.

11. In Arabic language the word "مواطنة" and جنسية has been used for citizenship.

defined "مواطنة" as: قاموس المصطلحات السياسية

"المواطنة" بأنها : مكانة أو علاقة اجتماعية تقوم بين شخص طبيعي ، وبين مجتمع سياسي (الدولة) ، ومن خلال هذه العلاقة يقدم الطرف الأول الولاء ، ويتولى الطرف الثاني الحماية ، وتحدد هذه العلاقة بين الشخص والدولة بالمساواة أمام القانون "الوضعي" في ظل هيمنة الدولة القومية. (قاموس المصطلحات السياسية)

Citizenship is a relationship between an individual and a state in which the individual owes allegiance to the state and in turn is entitled to its protection. This relationship is determined through equality before the positive law in accordance with the rules of sovereignty of State.

12. In general, full political rights, including the right to vote and to hold public office, are predicated on citizenship. Citizenship entails obligations, usually including allegiance, payment of taxes, and military service. An Egyptian scholar Dr. Raghieb al Sarjani discussed right of citizenship for non Muslim thus:

حق المواطنة هو من أجل الحقوق التي كفلها الإسلام لغير المسلمين في الدولة الإسلامية، والمواطنة التي نعنيها هي المرتبطة بالحدود الجغرافية وليس لها أي ارتباط بالهوية أو الدين أو الفكر. (الدرس الأسبوعي لفضيلة الدكتور راغب السرجاني بمسجد الرواس 7 يونيو 2011م بعنوان "حق المواطنة".)

The right of citizenship is established by Islam for the purpose to ensure these rights for non Muslim citizen of an Islamic State. By citizenship we mean that is related to geographical boundaries and has no nexus with idintity, religion or thoughts.

He argued that The Holy Quran in various verses used the word أخ brother of a particular nation for the Messengers. The meaning of brotherhood is to unite person of different beliefs due to one country. So non Muslims are brother of Muslims in citizenship because one country has united them. The following verses are worth mentioning:

{وَالِى عَادِ أَخَاهُمْ هُودًا}

Allah Almighty Says: To 'Ad, we sent their brother Hud. (7:65)

{وَالِى ثَمُودَ أَخَاهُمْ صَالِحًا}

To Thamud, (We sent) their brother, Salih. (7:73).

There is also a tradition of the Holy Prophet (SAWS) where in the Holy Prophet ﷺ did not stop or look down upon the words of Mafrooq Ibn 'Amr when he said to him before migration; "O brother of Quraish to what you invite us." And when Hirql sent his messengers to the Holy Prophet ﷺ, the Holy Prophet ﷺ called them, "O brother of Tanukh".

ولم يستنكف رسول الله ﷺ عندما قال له مفروق بن عمرو قبل الهجرة "إلهم تدعو يا أخا

فريش؟"، ولما بعث هرقل رسولا إلى رسول الله ﷺ فكان الرسول ﷺ يناديه ويقول هذا: "يا أخا

ثوخ"

13. From the above passage it becomes clear that citizenship is not based on religion. The Prophet Muhammad (SAWS) established a city-state in Madinah and enacted a Constitution that laid down the basic rights and duties of its citizens. This is a form of 'social contract'. Obedience to the law of the land is as a fulfillment of one's 'social contract' with the State, and the Quran emphasizes the obligation to fulfill contracts.

14. Islamic State is an ideological state and Islam is not a religion of isolation and its basic purpose is to promote justice and peace between people. Keeping in

view its specific ideology, its citizens can be classified into two categories:

- 1) those who become its citizens after accepting its ideological basis. They are called Muslims.
- 2) Those who assume its citizenship as a consequence of a treaty. They are called *Dhimmies* ذمى or *Mu'ahid* معاهد .

15. The Qur'an has alluded to this type of citizenship in the words الَّذِينَ عَاهَدْنَا

الَّذِينَ عَاهَدْنَا with whom you have concluded a treaty' (8:56). The Jews of *Madinah* are

implied here. This treaty was concluded with them by the Prophet (SAWS) when he became the ruler of *Madinah* after migration. Historians refer to it as the *Mithaq-i-Madinah*. Later on, similar treaties were concluded by the Muslims with other nations as well. Such treaties, of course, can be concluded upon different conditions depending upon the circumstances. In the *Mithaq-i-Madinah*, it was clearly stated that after accepting Muhammad (SAWS) as the ruler of *Madinah*, the Jews and the Muslims would be one nation. Their rights will be the same as the rights of the Muslim citizens of *Madinah*:

16. Dr Wahba al Zuhali a famous contemporary jurist discussed the issue of citizenship in the light of the famous charter of Madina:

وتكون المواطنة في الإسلام في أصل مفهومها أوسع من الحدود الجغرافية الإقليمية الضيقة للوطن الإسلامي، ويكون كل فرد مسلم أو معاهد مواطناً، لأنه عضو من الأمة الإسلامية، له كل الحقوق، وعليه كل الواجبات.

The real expression of the word citizen in Islam is very vast and beyond the geographical theory of limited territories. Every person, Muslim and Mu'ahid is a citizen because they

17. The relevant portion of the *Mithaq-i-Madinah* is reproduced bellow:

- هذا كتاب من محمد النبي بين المؤمنين والمسلمين من قريش ويثرب، ومن تبعهم، فلحق بهم
وجاهد معهم:
- 1 أنهم أمة واحدة من دون الناس.
 - 2 وأنه لا يجير مشرك مالا لقريش ولا نفسا، ولا يحول دونه على مؤمن.
 - 3 وأن من تبعنا من يهود، فإن له النصر والأسوة غير مظلومين ولا متناصر
عليهم؟
 - 4 وأن يهود بني عوف أمة مع المؤمنين، لليهود دينهم، وللمسلمين دينهم،
وللمسلمين دينهم: مواليتهم وأنفسهم، إلا من ظلم وأنتم، فإنه لا يُوتغ (يهلك) إلا
نفسه وأهل بيته.
 - 5 وأن اليهود ينفقون مع المؤمنين ما داموا محاربين.
 - 6 وأن على اليهود نفقتهم، وأن على المسلمين نفقتهم.

This constitutional document contains the issues relating to rights and obligations of citizen. It contains the permissibility of treaty for peace and protection of boundaries of the country among various tribes- residents/citizens of the state although they have enmity among themselves and prohibition of any kind of help to the pagan people rival community of Muslim state the first article declare the principle of citizenships that all the residents -Muslims and non Muslims are the citizen of the Islamic State. The second article prohibits the citizen of *Madina* state from the help of the pagan of *Makkah* state. The third article declare the permissibly of getting help from Jews and their rights on Muslim community against their enemies. The fourth article provides for united nationality of Muslim and Jews and that their problems are to be resolved according to the principle of Justice.

18. Ibn Hisham commented on this treaty that the Jews, according to this treaty stand accepted as one nation with the Muslims. As far as their religion is concerned, the Jews will remain on theirs' and the Muslims on theirs'. (*al-sirah al-nabawiyyah, Ibn Hisham, Vol 2, Pg 107*)

19. As for as fulfillment of the treaty is concerned Allah Almighty says:

(لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ، إِنَّمَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلَىٰ إِخْرَاجِكُمْ أَنْ تَوَلَّوهُمْ وَمَنْ يَتَوَلَّهُمْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ) (سورة الممتحنة آية: 8-9).

Allah does not forbid you as regards those who did not fight you on account of faith, and did not expel you from your homes, that you do good to them, and deal justly with them. Surely Allah loves those who maintain justice. Allah forbids you only about those who fought you on account of faith, and expelled you from your homes, and helped (others) in expelling you, that you have friendship with them. Those who develop friendship with them are the wrongdoers.

20. Hanafi jurists opined that *dhimi*- non Muslim citizen will be treated like a Muslim in matters relating to contracts/trades/business. So what is permissible for Muslim is permissible for non Muslim and what is not permissible for Muslim is not permissible for non Muslim(al fatawa al khariyah.Vol.1,Page 92)

21. Dr. Wahaba alZuhili writes: Non Muslim citizen (Dhimmis) are full citizens of an Islamic State (Athar al Harb fi al Fiqh al Islami p708,709)

All citizens of the Islamic State enjoy the *Shari'ah* rights and duties.

The State is forbidden from discriminating between the individuals in terms of rule, judiciary and management of affairs or anything similar. Every individual should be treated equally regardless of race, Deen, colour or anything else.

22. The Holy Prophet directed the Muslim who embraced Islam and were residents of *Dar Harb* to migrate to Islamic State (دارالإسلام) and live there and those who live in *Dar Harb* have been deprived from the right of citizenship of Islamic state. This Hadith clearly indicates that he who does not migrate to *Dar-al-Islam*, he will not enjoy the citizenship rights even if he is a Muslim. The Messenger of Allah (SAWS) invited them to come under the authority of Islam so that they may enjoy what the Muslims enjoyed and undertake the obligations which the Muslims undertook, for he

(SAWS)) said: "Then invite them to migrate from their household to the household of the *Muhajireen* and inform them that if they do so, they shall have all the privileges and obligations of the *Muhajireen*." This is a Shari'ah text stipulating that they should migrate to *Dar-al-Islam* in order to enjoy the same rights and fulfill the same obligations which apply to us, i.e. in order to be governed by the rules. Therefore, the Muslim who lives in *Dar-al-Harb* is not subjected to the rules; thus, he will not be granted the right of citizenship, for this can only be acquired by the individual if he moves to *Dar-al-Islam*, and he will be deprived of this right if he lived in other than *Dar-al-Islam*. The rules are also implemented upon the *Dhimmi* who lives in *Dar-al-Islam* and he will be granted the right of citizenship because he has chosen to settle in *Dar-al-Islam*.

23. Mohammad Asad also laid down that when the *Amir* was elected, he may be considered to have received a pledge of allegiance (*bay'ah*) from the whole community- that is, not only from the majority that had voted for him but also from the minority whose votes had been cast against him: for, in all communal decisions not involving a breach of any Shar'i law, the will of the majority is binding on every member of the community. (*The Principle of state and Government in Islam* ,page 69)

24. Now we come to the other issue that whether a non Muslim citizen is to be consulted in all matters being a member of parliament ?Fawad Abdul Mun'im Ahmad a contemporary jurist opined that in the beginning of Islam the "*Shura*" was confined to Muslim members and no Muslim due to his enmity with Islam and possibility of high treason and so many other problems were not consulted in all matters. But it does not mean that they were not qualifying for membership of *Shura*. Because in the subsequent periods they have been consulted in important matters. He further stated that our opinion is that in present non-Muslim may be consulted in worldly matters like business, trade, ets, if it is evident that they do not violet rules / injunction of Shariah because in these days majority of parliaments are constituted for wordily affairs / matters. Therefore

(مبدأ المساواة في الإسلام، non Muslim may not be prevented to participate in parliament. الدكتور فواد عبدالمنعم أحمد ، ص ٣٤١، نقلا عن (روح الإسلام) للسيد أمير علي ، ط 61، 158-159/2 (

25. Dr. Abdul Hakim in his important book *الحريات العامة* discussed the issue of participation of non Muslim in parliament stated that in the beginning of Islam due to the circumstances of that time non Muslim have not been consulted but when the circumstances changed gradually the Muslim Rulers started to consult them. The Arabic text is as under:

(ولم يثبت في صدر الإسلام اشتراك الذميين في البيعة أو الشورى ، وقد كان ذلك متمشياً مع ظروف بدء الإسلام وإحاطة الدولة الإسلامية بأعدائها من اليهود والروم المسيحية -- مما لم يكن مقبولاً أن يلجأ النبي والخلفاء بعده إلى استشارة أهل الذمة -- ولكن الخلفاء في العصور اللاحقة كانوا يستشيرون أهل الذمة في الشؤون التي لا تتعلق بالعقيدة -- ولم يرد في القرآن والسنة نصوص تمنع من ذلك مما يرجح أن المنع كان - مرحلياً - ينتهي بزوال أسبابه -- ولذلك فلا نرى مانعاً في عصرنا الحاضر من مشاركة أهل الذمة للمسلمين في حق الشورى والانتخاب فيما لا يختص بشؤون العقيدة وما يتصل بها) (الحريات العامة ، ص ١٣٤).

(It is not proved whether the non Muslim citizen participated in pledge of allegiance or not ? this was because to the circumstances of that time that the Holy Prophet did not consult the Jews, Christ and *Romies* because these people were residing in surrounding to the Islamic State. But the rightly guided caliphs in subsequent periods consulted *dhimies* in matters not related to beliefs and that no verse of the Holy Quran or traditions of the Holy Prophet (SAWS) prohibited Muslims to get assistance from non believers. Therefore it can be presumed that this prohibition was gradually removed and when causes disappeared, the rule also changed therefore we do not see any prohibition in our era from participation of *dhimis* in right of participation in vote and membership in parliament as far as it is not pertaining to beliefs.)

There is another opinion which is against the first one. The followers of this opinion argue that Islam is an ideological state and non Muslim should not be given key posts. - (الأستاذ محمدأسد: منهاج الإسلام فى الحكم ، ص 84) In support of this opinion They argue that Allah Almighty Says:

(أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ)

O you, who believe, obey Allah and obey the Messenger and those in authority among you. (4:59)

(يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَتَّخِذُوا بِطَانَةَ مَنْ دُونِكُمْ لَا يَأْلُو نَفْسًا حَبَالًا وَدُّوا مَا عَنِتُّمْ قَدْ بَدَتِ الْبَغْضَاءُ مِنْ

أَفْوَاهِهِمْ وَمَا تُخْفِي صُدُورُهُمْ أَكْبَرُ) (الآية 118 سورة آل عمران)

O you who believe, do not take anyone as an insider but those from among your own selves. They would spare no effort to do you mischief. They want you to be in trouble. Malice has come out of their mouths while what is concealed in their hearts is still worse. We have made the signs clear to you, if only you understand.

وقوله تعالى : (يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَتَّخِذُوا الْيَهُودَ وَالنَّصْرَى أَوْلِيَاءَ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ وَمَنْ يَتَوَلَّهُمْ

مِنْكُمْ فَإِنَّهُ مِنْهُمْ إِنَّ اللَّهَ لَا يَهْدِي الْقَوْمَ الظَّالِمِينَ) (الآية 51 من سورة المائدة)

O you who believe, do not take the Jews and the Christians for intimate friends. They are friends to each other. Whoever takes them as intimate friends is one of them. Surely, Allah does not take the unjust people to the right path.

These verses prohibit getting help from *dhimies* and to share information with them.

Therefore it is *wajib* that the key post in an Islamic state should be given to Muslim only. After discussing the opinion of the jurist for and against, Dr. Abdul Hamid concluded:

ولكن حتى على التسليم بشمولها لأهل الشورى فإننا نقول أن وجود بعض من أفراد أهل الذمة في مجلس الشورى الذي يضم أغلبية من المسلمين لا يغير من الأمر شيئاً . فلا يزال طاعة أولى الأمر من المسلمين باقية ومعمول بها حسب نص الآية خاصة وأن القرارات الصادرة من المجلس إنما تكون بالأغلبية ، فالطاعة إنما تكون لهذه الأغلبية المسلمة وقوله تعالى (منكم) من باب التغليب أو الغالب الأعم. خاصة وأن الظروف المختلفة في العصر الحاضر تدعو إلى مثل هذا التعاون والمشاركة من قبل الأقليات للدولة بإخلاص وولاء -

Even if we admit the arguments of the opponent school of thought, we then say that presence of a few persons in parliament could not change / affect the decision of majority. Hence obedience of Muslim ruler prevail the minority opinion. And word *مِنْكُمْ* in the verse denote to the general predominance. Particularly in these days the assistance provides by non Muslim demands their participation in the affairs of the country.

After discussion on the opinion of both the schools of thought he concluded:

نرى انه لا مانع من مشاركة اهل الذمة في عضوية المجالس النيابية في الدولة الاسلامية اذا كانت المصلحة العامه تقضى بذلك .(الشورى واثرها في الديمقراطية) (دراسة مقارنة 325-

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I see that there is no prohibition for dhimies to participate in political activities and become Member of Parliament in Islamic state, if a public interest demands so.

26. Another issue which needs to be discussed is that in case a non Muslim is eligible to vote and became Member of Parliament whether this is absolute right or there is some restriction on it?

Federal Shariat Court while discussing the arguments of parties in Shariat petition Nos. 13/L/1988 etc. stated "To vote for a person is to give *Shahadat* and

Muslim should be bold enough to give true *Shahadat* without fear or favour. Such was the line of argument of the objectors. In this connection Ayat 135 of Sura Nisa (4:135) was also quoted:-

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا فَلَا تَتَّبِعُوا الْهَوَىٰ أَن تَعْدِلُوا وَإِن تَلَوْا أَوْ تَعْرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا ﴿١٣٥﴾

“O you who believe, be upholders of justice - witnesses for Allah, even though against (the interest of) your selves or the parents, and the kinsmen. One may be rich or poor, Allah is better caretaker of both. So do not follow desires, lest you should swerve. If you twist or avoid (the evidence), then, Allah is all-aware of what you do”.

(4:135)”(PLD1990 FSC1 at page 25)

Mufti Muhammad Shafi' commenting on verse 10 of surah al Ma'idah discussed the status of casting a vote in favour of a candidate seeking election to assemblies, councils and public bodies. According to his opinion casting a vote is has three status. The first one is it is like a testimony in which the voter bears witness that, in his or her knowledge and estimation, the particular candidate is worthy of becoming a representative or spokesperson of the country and its people, both in terms of his ability and merits and in terms of his honesty and trustworthiness as well.

There is yet another way of looking at the casting of votes to elect Representatives in accordance with the Holy Qur'in. This is called '*Shafa'ah*' (recommendation or *Sifarish*). It means that the voter approves of the candidate of his choice and recommends that he should be elected as a representative. The injunction of the Holy Qur'an relevant to this situation has appeared earlier in the words given below:

مَنْ يَشْفَعْ شَفَاعَةً حَسَنَةً يَكُنْ لَهُ نَصِيبٌ مِنْهَا وَمَنْ يَشْفَعْ شَفَاعَةً سَيِّئَةً يَكُنْ لَهُ كِفْلٌ مِنْهَا

Whoever makes a good recommendation, there shall be for him a share from it (in the Hereafter). And whoever makes a bad recommendation, there shall be for him a share from it -(4:85).

It means that anyone who makes a good, true and justified recommendation, then, he too will get a share from the good deed of the person he has recommended. And a person who makes a bad recommendation, that is, favours someone undeserving and bad to succeed through his recommendation, then, he too shall get a share from the bad deeds of the person he has recommended. Thus, when a candidate like this will, during his tenure of office, go on doing what is wrong and impermissible, it is obvious that the curse of his evil doings will fall on the voter as well.

The vote has a third status in the sight of the Shari'ah of Islam - that of advocacy (Wakalah). This is, as if, the voter makes the candidate his representative and agent on his or her behalf. But, had this agency been connected with one of his personal rights and the gain or loss from it would have affected his person alone, then, he would have been responsible for it personally. However, that situation does not prevail here, because this agency concerns rights which the entire nation shares with him. Therefore, should a person contribute to the success of an undeserving candidate by voting for him as his representative, then, the sin of bulldozing the rights of the entire nation rests on his shoulders.

27. To recapitulate, the vote has a three-pronged status: Shahadah (evidence), Shafa'ah (Recommendation) and Wakalah (Advocacy or representation in common rights). Under all three conditions, voting for a good and deserving person brings great reward the fruits of which are bound to reach the voter. (Ma'ariful Qura'an, Vol. 3, Page 88-89)

اتفق الفقهاء على اشتراط كون الشاهد مسلماً ، فلا تقبل شهادة الكافر على مسلم: لأنه متهم في حقه ،

وأجاز الحنفية والحنبلية شهادة الكافر في الوصية في السفر ، لقوله تعالى:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنَكُمْ إِذَا حَضَرَ أَحَدَكُمْ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا

عَدْلٍ مِّنْكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ

وأجاز الحنفية خلافاً للجمهور شهادة أهل الذمة بعضهم على بعض إذا كانوا عدولاً في دينهم ، وإن

اختلفت ملتهم كاليهود والنصارى .- (فتح القدير 6/41) ، لما روى ابن ماجه عن جابر بن عبدالله : ((إن النبي

ﷺ أجاز شهادة أهل الكتاب بعضهم على بعض)) (أخرجه ابن ماجه في سننه عن جابر بن عبدالله : أن

النبي ﷺ أجاز شهادة أهل الكتاب ، بعضهم على بعض (نصب الراية : 4/85) (الفقه الاسلامي وادلته ،

الدكتور وهبة الزحيلي ، جلد 6 ، صفحه 563)

All the jurists are unanimous in their opinions that 'Islam' is a condition for a witness; therefore evidence of non Muslim is not admissible against a Muslim because he is blamed in favour the right of Muslims. However Hanafi and Hanbli jurist permitted that evidence of non Muslim in cases of will during traveling is admissible for the following verse of the Holy Quran: O you who believe, when death draws near one of you, that is, at the time of making a will, the evidence (recognized) between you shall be of two witnesses from among you, or of two others not from you.(5:106) Hanafi jurists also permit evidences of *Dhimies* against each others if they are just ('adil) according to their religion although their religion is also different like Jews and Christ. This is permitted by the Holy Prophrt in a tradition narrated by Jaber Ibn 'Abdullah in Ibni Maja that evidence of the people of Book against each other is permissible(Nasb al Rayah4:85).

The following traditions of the Holy Prophet also prohibit the admissibility of evidence of non Muslim against Muslims.

عن أبي هريره قال ، قال رسول الله صلى الله عليه وسلم ، لا يتوارث أهل ملتين شتى ، ولا تجوز

شهادة ملّة على ملّة الا ملّة محمد ، فانها تجوز على غيرهم .

Narrated by Abu Hurarah that the Holy Prophet ﷺ said that

the followers of different religions do not inherit each others and

evidence of one *Millat* is not admissible against the other *Millat* except

that the evidence of *Millat* of Muhammad ﷺ is admissible on others.

(السنن الكبرى للبيهقي ، جلد دهم ، ص 163)

عن ابى سلمة بن عبدالرحمن قال : قال رسول الله صلى الله عليه وسلم ، لا تترث ملة ملة ، ولا تجوز

شهادة ملة على ملة ، الا امة محمد صلى عليه وسلم ، فان شهادتهم تجوز على من سواهم .(مصنف

عبدالرزاق ، جلد هشتم ، ص ۳۵۷)

Narrated by Abu Salma bin 'Abdur Rahman that the Holy

Prophet ﷺ said that the followers of different religions do not inherit

each others and evidence of one *Millat* is not admissible against the

other *Millat* except that the evidence of *Millat* of Muhammad ﷺ is

admissible on others.

28. In the light of the above discussion, if we consider the status of vote as *Shahadah* (evidence), then all the jurists are unanimous in their opinions that non Muslim is not a '*adil* عادل and his evidence in normal circumstances should not be admissible against a Muslims. Therefore we may conclude that joint electorate system is not in line with Islamic injunctions.

29. Now, the question arises whether any law protected by the Constitution or any law from the family of the Constitution could be examined by the Federal Shariat Court or not? In this respect, two judgments of the Federal Shariat Court are referred.

30. In a Shariat Petition filed by B. Z. Kikauas Versus the State, the House of Parliament and Provincial Assemblies, Election Order 1977, representation of People Act and provision of Political Parties Act, had been challenged for being repugnant to the Injunctions of Islam. This petition was dismissed with the following observation:

“The Federal Shariat Court is not empowered to examine and decide any question concerning Constitution, Political Parties Act, having been made in implementation of various provisions of the Constitution, hence, beyond the jurisdiction of this Court. (PLD-1981-FSC-Page-1)

31. Then, in another Shariat Petition, entitled Muhammad Salahuddin Vs. State, divergent view was taken by this Court. The Court pleased to examine certain

provisions of the Political Parties Act, representation of People Act and House of Parliament and Provincial Assemblies Election Order 1977 and declared Sections 13, 14, 49, 50 and 52 of the representation of People Act as repugnant to the Injunctions of Islam. Regarding Jurisdiction of this Court, it was held that:

“Provisions of law which are not part of the Constitution and belong to the family of ordinary laws enacted in furtherance of the object detailed in the Constitution. If these laws are found repugnant to the Holy Quran and Sunnah, we have powers to strike them off and to suggest modification to bring them in line with the concept of Shariat without causing violence to the Constitution restraint. (PLD-1990-FSC-1 at page. 7)

32. In the light of above judgments, the question regarding jurisdiction is a bit clear and hence this court has jurisdiction to examine provisions of laws from the family of the Constitution. The petitioner has challenged Section 7 of the Election Law 2002 not the Constitution. Therefore this court has jurisdiction to examine this law in the touchstone of Islamic Injunctions.

33. We may conclude from the above discussion that Muslim and non Muslim both qualifying for citizenship of an Islamic State. They both are eligible to cast vote but vote of a non Muslim in favour of Muslim is against the injunctions of Islam. Non Muslim is also eligible to become Member of Parliament and can participate in worldly matters but can not participate in proceedings/issues relating to the beliefs of Muslims.

The previous petition (sh. petition No.7/I/2002) was not decided on merit but was dismissed as withdrawn. Rule 15 of the Federal Shariat Court (Procedure) Rules 1981 states that petition not to be rejected for absence or death of the petitioner etc. It can be presumed that Shariat petition may be decided on merits. Presence of petitioner

is immaterial. In the light of above discussion this petition may be treated as Shariat petition and may be decided on merit.



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