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RESTRUCTURING THE BALLOT BOX: A COMPARATIVE STUDY OF CRIMINAL DISENFRANCHISEMENT LAWS AND ISLAMIC LEGAL POSITION

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Abstract

Modern Democratic state theory has transformed the world replacing traditional political systems. It is working fine in many regions, but on the other hand is problematic and still in transition in other geo-political locations. Modern European states are enjoying the fruits and benefits of the democratic system, but it has not made any significant changes in many South-American states, Africa and South Asia for instance. Among many reasons is the system of voting and adult franchise. Article 25 of ICCPR discourages “unreasonable restrictions” on voting rights. But the question remains, that what are the “reasonable restrictions”, which the ICCPR is in a way allowing, in the light of modern and Islamic laws. It is an established fact that a legal or political system which is working perfectly in one place may not align with another geo-political location. It would be unwise to universalize systems, so as to imposing them worldwide equally.

In the above argued debate, we would see that granting ‘the right to vote’ to every adult citizen may work fine in states with perfect conditions, whereas it may produce disastrous results in others. That has given rise to the modern concept of criminal disenfranchisement. It is not surprising that we find explicit evidence of this phenomenon in traditional and contemporary Islamic law interpretations. Both modern and traditional Islamic political scientists have laid

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down the qualifications for potential candidates and “restrictions” on voters. I would try to analyse and find the Islamic principles for disenfranchisement. For this purpose, I have chosen the model of US laws of disenfranchisement of felons as a precedent, as these laws are best articulated and implemented there, plus the bulk of case laws on the issue are also from the US courts.

It is not surprising to note that Islamic traditional law is not so primitive as it seems, rather we find deep logical debates, conclusions and rulings on many of the so-called modern issues. That is because of a rich history of juristic writings, fatwas, interpretations of divine texts and case laws spread over a span of thirteen hundred years (612AD till 1920AD).

Keywords: Disenfranchisement, voting rights, elections, ballot box, Felony, witness, representation, Islamic political law, constitutional law.

Research Question

One of the most serious criticisms against modern democratic franchise system is granting Freedom of vote to every citizen. It is argued that the existing model is not producing true and ideal representation in many countries and specifically the global south. So, what are the ‘reasonable restrictions’ on voting rights, in the light Islamic and modern democratic laws and ICCPR?

Why Restructure?

Even though modern democratic model of elections is the most popularly accepted mode of franchise, there are many serious arguments against the system which remain unanswerable.

One of the core debates is the Quality vs. Quantity. It has been reasoned that giving equal weightage to the opinion of an intellectual and a layman does not seem rational. Similarly, setting no specific standards for candidates is also surprising. We have strict standards for

managers of a company, the commander of forces and the Chief justice, but how odd it is to select a person with no special qualities to command them all. The same debate is found in the Urdu poetry of Dr. Iqbal the Poet of East:

“[modern] Democracy is a form of Government in which, heads are counted but not weighed⁵⁸.”

The second most debated issue is the irrationality of the voters. It is widely known that voters are ill-informed and unable to foresee the betterment of the citizens’ interests, rather they are influenced by some issues on which they are biased. For instance, the personal charisma of a certain candidate, the highly expensive election campaigns which only a few could afford. Thus, an ordinary voter would cast a vote just in exchange for a solution of his domestic problem⁵⁹. The problem does not lie only in lack of knowledge, rather the judgements made by them based on it tends to be very poor. As the ‘median voter theorem’ works, only a few people are making the decisions⁶⁰.

Another dilemma mostly faced by the developing world is the illiteracy rate. Although Lipset has found that the mass population in most democratic societies are literates⁶¹, the opposite if proven, shatters the whole argument. A country where a large majority remains uneducated, morally and socially corrupt, and unwise has a least possibility to have an ideal elected leader, in an inclusive franchise system. As a result, it ends up ruled by a handful of corrupt politicians, who have an agenda of personal interests. Pakistan is a good (or a bad) example of the fact where

⁵⁸ Dr. Allamah Muhammad Iqbal, *Zarb-i-kaleem, jamhōriyat* (chap, 11)

اس راز کو اک مرد قلندر نے کیا فاش ہر چند کہ دانا اسے کھولا نہیں کرتے
جمہوریت اک طرز حکومت ہے کہ جس میں بندوں کو گنا کرتے ہیں تو لا نہیں کرتے

⁵⁹ Bryan caplan, *from friedman to Wittman: the transformation of Chigago political economy* (2005)

⁶⁰ Allan H. Meltzer and Scott F. Richard, “A rational theory of the size of government” (Journal of Political Economy, vol89)

⁶¹ Lipset, *Political sociology* (1957)

two families are ruling since the last 27 years⁶², and one family has solely dominated in the province of Sindh, where education is most scarce⁶³. They are doomed by the rulers for decades, but despite that, they then campaign and shout slogans in their support; all of that because they are influenced by the mass marketing of political parties and a little amount offered to them for as a bribe to campaign for the party.

These problems which are still widely debated and discussed have been answered in the Islamic mode of representation. The solution is two-fold: restricting the right to vote and setting qualifications for candidates. As it is not possible to deeply discuss and find a practical and legally sound solution for both the issues, thus, in this paper I will only focus on the former of them. It is here where we find the legal notion of “Criminal Disenfranchisement”

The ICCPR Factor

It is common knowledge that this is one of the most essential fundamental right explicitly recognized globally. Almost All Un members have signed ICCPR, which contains article 25:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*⁶⁴,⁶⁵

⁶² <<http://www.dawn.com/news/736761>>, (Published 24 July 2012, accessed 14 December 2016)

⁶³ <<http://www.dawn.com/news/1146425>>, (Umair Javed, Published Nov 24, 2014 02:57am, accessed 14 December 2016)

⁶⁴ ICCPR, chapter III, article 25. General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49)

⁶⁵ (The Government of Pakistan has not ratified article 25 of ICCPR),

<http://iccpr.sojhla.org/?page_id=145>, accessed 12 December 2016

<http://www.bayefsky.com/html/pakistan_t2_ccpr.php>, accessed 12 December 2016

Fundamentally, the convention allows “reasonable restrictions” to be incorporated in laws, which clearly allows Disenfranchisement.

1. Disenfranchisement of felons: Definition

*“Felon disenfranchisement laws are constitutional or statutory restrictions on the right to vote after one has been convicted of a felony and are applied to felons residing in a particular state regardless of the state in which they were convicted.”*⁶⁶

1.1. Development of Criminal disenfranchisement in ancient times

We can find a long history of Criminal disenfranchisement in Rome and Greece, similarly in English law of Attainder in Medieval Europe⁶⁷.

In ancient Greece, for instance, imposition of the status of *atimia* (literally outlawry associated with the loss of rights either temporarily or permanently) upon criminal offenders carried with it the loss of many citizenship rights.⁶⁸ which included the loss of suffrage and the right to serve in the Roman Army (a desired opportunity), in medieval Europe. Thus, the legal doctrine of “civil death” not only resulted in a complete loss of citizenship rights, but also it left offenders, in extreme cases, exposed to injury or death, since they could be killed by anyone with impunity⁶⁹. But it has taken centuries for the world to fight its way into attaining this right. I would only hint towards the historical events in the US.

⁶⁶ US Sentencing commission, *preuhs* (2001)

⁶⁷ Erin M. Kerrison Criminology, Law and Society “THE COLOR OF SUFFRAGE: Voter Disenfranchisement, Power Threat Hypotheses and Modern Democracy”.(hereafter Erin M.Kerrison) <<https://sites.sas.upenn.edu/kerrison/files/concept.published..pdf>>

⁶⁸ *ibid*

⁶⁹ *ibid*

1.2. Historical development in the US

It is crucial to recall that before the fourteenth amendment in 1868, black men and women were not legally recognized or protected as citizens, rather citizenship was limited to white, property-holding men⁷⁰.

The fourteenth amendment served as a deterrent for the equal protection of basic rights for American citizens, unless a citizen was found guilty in acts of rebellion against the country. Finally, the fifteenth amendment enacted that citizens' suffrage rights would not be restricted based on race alone, unless someone has committed a crime against state.

In 1901 the Alabama constitution expanded the list of crimes under which voting rights were curtailed, other states followed the suit. The list of crimes which provoked disenfranchisement included:

“treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretences, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature...[and] any crime involving moral turpitude.”⁷¹”

It will be a very interesting to know that the grounding of disenfranchisement in The Islamic law would hold many similarities to the above-mentioned crimes, as we shall discuss further in clause 5 of this paper.

But later, in the US the list of Felony crimes shrunk to a minimum, and many of the above stated crimes are not included in Felony currently⁷².

⁷⁰ *ibid*

⁷¹ Alabama constitution, article 8, section 182, (drafted in 1901)

⁷² Jason Schall, “The Consistency of Felon Disenfranchisement with Citizenship Theory”, (Harvard BlackLetter Law Journal, Vol 22, 2006)

1.3. Categories of disenfranchisement

Felon Disenfranchisement Today Reflecting an absence of national standards, there is wide variation in state laws regarding voting rights for felons and ex-felons. Four categories of criminal offenders are distinguished by state disenfranchisement laws^{73, 74}:

Class 1	convicted felons who are currently incarcerated
Class 2	felons who have been previously incarcerated and released from prison under parole supervision;
Class 3	felons sentenced to probation rather than prison (and thus never incarcerated)
Class 4	ex-felons who have completed their entire sentence and no longer have any official contact with the criminal justice system

In the US, as per one estimate, there are more than 4 million Americans currently disenfranchised due to felony convictions (2 percent of the voting-age population), and that number is likely to keep growing in the future (Keyssar 2000, 308).⁷⁵

⁷³ Erin M. Kerrison

⁷⁴ Manza-uggen, "Punishment and Democracy: Disenfranchisement of Non-incarcerated Felons in the United States, symposium US elections (p494)

⁷⁵ Politics and the "Purity of the Ballot Box": *An Examination of Felon and Ex-felon Disfranchisement Laws in the U.S., 1960-1999*, (hereafter Purity of the ballot box)

1.4. Global Legal Precedents

It is not only the US which has such laws rather there is a sizeable list of countries having these laws up to some extent. Below is a rough index for the purpose (the original report consists some 28 countries)⁷⁶.

		Selective Restriction (some felons may be banned from voting while in prison)	Complete Ban on Voting While in Prison (felons can vote upon release from prison)	Post release Restrictions (felons are banned from voting even after release from prison)
1	Argentina		×	
2	Brazil		×	
3	Bulgaria		×	
4	Estonia		×	
5	Hungary		×	
6	India		×	
7	New Zealand		×	
8	Russia		×	
9	United Kingdom		×	
10	United States	×		×
11	Pakistan*		×	
12	Australia	×		
13	Belgium	×		×
14	France	×		
15	Germany	×		
16	Italy	×		
17	Armenia			×
18	Chile			×

⁷⁶ Human Rights Watch, ‘The sentencing Project, “Current Impact of Disenfranchisement laws”’ <<https://www.hrw.org/legacy/reports98/vote/usvot98o-01.htm>> accessed 10 November 2016, (hereafter The sentencing Project)

We can deduce that many European countries allow selective ban, less countries -mostly non-European- put complete ban on felon prisoners, and only a few countries allow post-prison ban as well, among them is the US.

1.5. Arguments Against disenfranchisement laws

As mentioned above, fundamentally, article 25 ICCPR allows “reasonable restrictions” to be incorporated in laws, which clearly allows Disenfranchisement. The debate doesn’t end here, rather it is the starting point of a current legal debate, that would be the grounds to temporarily or permanently bar a citizen from his right to vote. Many legal scholars are constantly criticizing Disenfranchisement laws, terming them unconstitutional.

Erin M. Kerrison has argued that the rate of incarceration in the US ‘disproportionately’ comprises of racial majorities. A study shows that out of the 4.7 million citizens denied the right to vote in the presidential elections of 2000, 2 million are black⁷⁷.

But this argument will also raise another issue that as to why black men are more incarcerated than whites? Moreover, If the reality is that a certain minority is more involved in crimes than the majority, and thus have a larger proportion in jail, would this actually amount to discrimination? If they should not be disenfranchised, then why shall they be incarcerated?

The attorney general of Florida in 2011 has responded to this argument as:

“For those who may suggest that these rule changes have anything to do with race, these assertions are completely unfounded. Justice has nothing to do with race. In a recent case, the 11th U.S. Circuit Court of Appeals examined the historical record and soundly rejected the argument that Florida’s prohibition on felon voting was originally motivated by racial discrimination.”

⁷⁷Erin M. Kerrison ,(n 8) p8

In another paper by Antoine Yoshinaka and Christian R. Grose, it has been claimed that there is a lot of ‘politics involved in these laws, and politicians use them as a tool to drive the turnout in their favour’⁷⁸. But one could ask that is this the only law which is used by political parties to achieve their goals? So, should we purport to abolish all laws used in this manner? Secondly, if the ballot box remains excluded from the votes of felons, would this drive the poll results in a better direction or worse? Thirdly, the Human rights watch has also expressed its concerns on this legal issue, arguing that the widespread and historical practice in the United States of denying the vote to convicted citizens while they are in prison—or even while on probation or parole—has received little scrutiny. To many legal scholars, the practice may seem an inevitable concomitant of incarceration or a legitimate additional punishment for a crime⁷⁹.

Despite all the criticism in the detailed HRW report, one could not find concrete grounds for ascertaining a clear criterion on when to disqualify someone from the right to vote. If even felons are entitled of casting votes, who else would be “restricted” from the right? On the other hand, what is the authority behind generalization of the right to vote or freedom to vote? Or speaking more bluntly, does the UN holds an imposing authority to decide the boundaries of a right, such that no nation has the right to challenge those limits or definitions of a right? To have a proper insight we need to critically analyse disenfranchisement laws.

1.6. ‘Ratio Legis’ behind criminal disenfranchisement: Is it compromising the right to vote?

Rights are respected until they infringe the rights of other law abiding citizens. Whereas, a citizen guilty of felony, or, other similar heinous crimes has lost his right by his own action. He

⁷⁸ Purity of the Ballot Box (n 16)

⁷⁹ The sentencing Project (n 18) p1

is no longer a trustworthy person who should be allowed to participate in this highly trustful activity to decide the representative of a nation⁸⁰. Similarly, if depriving a prisoner of certain other rights including some fundamental rights are not deemed to be a violation, (such as right of trade, right of movement, assembly, etc.) same should be applied in this case

Now, I shall try to summarize the traditional and modern Islamic approach on voting rights.

2. Qualifications of Candidates and Voters: Traditional Islamic Perspective

Traditionally in Islamic political science theory the ruler is known as *Khalifa*, *Şultan*, *Ĥaakim* or *Imaam*. Voting of the Imam or qualifying as a candidate is not the right of all citizens of the state, both are conditional with strict guidelines, to ensure that the ruler elected through the process would be a man of high wisdom, respect, rightful and just. Voting was not structured per the modern democratic institution, rather they were a limited group with three strict conditions, who would elect or select their ruler. The first was that they must be just (This term has a very specific meaning in Islamic law, i.e. A Quality which abstains a man from committing acts of moral turpitude constantly. Thus, if someone commits such sinful acts occasionally, and is not known as a man of immoral character in the society, he would remain an *A'dil*⁸¹). The second condition was they must have adequate knowledge to comprehend who has the right to imamate. The last condition is that they possess such wisdom and insight which will lead them to choose the person who is most fit for imamate, and who is most skilled in affairs related to the management of the state⁸².

On the other hand, the conditions of to-be *Imaam* or a head-of-State are even more concise and rigid for the same reason described above. Although there is a slight difference in standard

⁸⁰ Roger Clegg, JD, "President and General Counsel of the Centre for Equal Opportunity", (Debate held by the Legal Affairs Debate Club, 1 November 2004)

⁸¹ Ahmed al-Fayyomi, *Al-Misbah ul Muneer*, "Adalah", (Vol2, p397, Al-Maktaba Al ilmiyya, Beirut)

⁸² Mawardi, Abu-AlHasan, d. 1058, *Al-Ahkaam-us-Sultaniya*. Translated by Asadullah Yale, Phd,(p17, dar-ul-hadith, Cairo)

criteria for the purpose among jurists at different junctions of history and in variable circumstances, nevertheless, the following are considered to be the most authentic of them.

Firstly, he should be “*A ‘adil* (just)”, meaning he has not been convicted for major sins and crimes. Secondly, he should be a mujtahid(authority/expert) in Islamic law to deduce the solutions of fresh arriving cases in the light of *fiqh*. However, later some jurist has softened the condition by replacing the word “knowledgeable” instead of “*Mujtahid*”. Thirdly, his prime senses such as hearing, sight and speech must be sound, enabling him to a just assessment of events. Fourthly, safe from any major physical disability. The fifth is that he must be skilful in organization of people and management of offices. Sixth is bravery and courage, enabling him to defend the territories, and launch offense when necessary. Finally, the seventh is that he should belong to a higher dynasty^{83, 84}

But as discussed earlier adopting this juristic approach could lead towards a dichotomy between traditional and modern nation theory. It is utterly difficult to legislate laws of previous paradigms in their original form in modern times. For this reason, we must find an alternative Islamic legal approach which is somewhat in harmony with modern legal constitutional paradigm.

3. Modern Status of ‘Vote’ in Islamic Jurisprudence

Although there are scholars who altogether reject the whole modern democratic electorates structure⁸⁵, but majority of the modern *Fuqaha’* (jurists) approve but recommend certain fundamental changes the overall system, to align the modern phenomena with the traditional

⁸³ *Ibid*, 12

⁸⁴ Muhammad bin ibrahim bin Abdullah al-Tuwaijari, *Musua’a Fiqh Islami (encyclopedia for Islamic fiqh)* (Vol5, p293, bait ul afkaar, 2009)

Islamic position discussed above. In Pakistan, this theory was first given by the previous Grand Mufti of Pakistan, *Muhammad Shafi‘ Usmani*.

According to his view, the first set of conditions deal with the candidates. Islamic law as always stressed to the point that the elected or selected ruler should be the finest in terms of honesty, good characteristics, piousness, etc. To attain this degree, the decision of the masses is not the sole factor; rather it can be quite misleading producing disastrous results. The whole concept of mass adult franchise rests on a perfect scenario where the masses are educated, honest, diligent, aware of the character of the representatives. However, this is rarely the case even in developed nations. The candidates arise on the power of wealth, part politics and massive expensive campaigns, this leads to an autocratic type rule⁸⁶.

To overcome this major flaw there must be leading guidelines for candidates. Apart from the traditionally fixed criterion, we can find these guidelines today in some modern constitutions also. The constitution of Islamic republic of Pakistan also offers some very specific attributes⁸⁷.

Before discussing the second issue which is on the voter side, *Mufti Shafi‘* has analysed the Status of voter in Islamic law. The vote according to him consists of three legal contracts. The first status of voter is that he is giving a *Shahadah* (testimony), which is a divine obligation to be given with complete justice and honesty, as it is a grave sin to act as a false witness. The second position of vote is intercession. A righteous intercession is rewardable, while a malicious one is punishable. Finally, the third position is of a *Wakeel* (principal for an agent in contract of

⁸⁶Usmani, Shafi‘‘, Mufti, *Jawahir-ul-fiqh*, (vol5 p532, “vote ki shar‘i hathiyat”) (hereafter Shafi‘ Usmani, vote)

⁸⁷ Constitution of Pakistan, Article 62,63:

It states that the potential candidate should be a person of good moral character, possesses adequate knowledge of Islamic principles regarding governance, sagacious, righteous, non-profligate, honest; he has not been convicted in a crime involving moral turpitude or false evidence. It also stresses the need for the candidate to be a patriot, who is not known to be involved in activities against the basic ideology of the state. Similarly, a person is disqualified if he has been convicted by the court for presenting false evidence, charges of corruption, misuse of power within a span of the last five years Recently, a condition of a minimum education up to graduation level was also added to the list in 2002, but it was later declared void by the Supreme court.

agency). He is appointing the candidate as an agent to lead the country per the constitution on behalf of the masses.

Mufti Shafi' has further discussed some of the legal implications of the status of vote discussed above, basing on the following verses of Quran:

*“O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So, follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted.”*⁸⁸

*“and seek two A’adil (trustworthy) witnesses among yourselves.”*⁸⁹

In the light of the above verses and traditions of Holy Prophet the following rules have been deduced:

1. Not casting a vote is a sin, as being witness in such cases is mandatory.
2. Voting with *malaise*, i.e. choosing a candidate arbitrarily, one who in the opinion of the voter does not fulfill the qualities of an ideal ruler is also prohibited.⁹⁰

This Juristic Interpretation of the democratic right to vote was accepted by major jurists, *Dar-ul-ifta's* (centres for fatwa), and muftis in Pakistan, India and Bangladesh.⁹¹

⁸⁸ Al- Quran, *Surah Nisa'*, (4:135)

⁸⁹ Al-Quran, *Surah Talaq*, (65:2)

⁹⁰ Shafi' Usmani, *vote* (n 28) p53

⁹¹ This includes:

- (1) darulifta Darululoom Karachi,
- (2) darulifta Jamia-tur-rasheed Karachi,
- (3) darulifta khair-ul-madaaris, multan,
- (4) Justice Mufti Muhammad Taqi Usmani,
- (5) Mufti Khalil Ahmad Razi Qasmi,
<<http://www.fikrokhbar.com/index.php/enlightenment-news-article/item/11431-intekhabat-me-vote-voter-aur-ummidwar-ki-shayi-haisiyat>> accessed 1 November 2016
- (6) Mufti Khalid Husain Nemwi Qasmi, Darul-uloom Deoband, India
<http://www.darululoom-deoband.com/urdu/magazine/new/tmp/06-<Jamhuri%20Nizam%20Me%20Election_MDU_03_March_13.htm>, accessed 6 October 2016

4. Disenfranchisement – A Modern Islamic Approach

There are some further legal consequences to this theory, which Mufti Shafi‘ did not unveil. Such as, would this result in restructuring the ballot box in an Islamic paradigm or not?

The most relevant characteristic, which could be a corner stone would be voters’ status of being a “witness”. In Islamic Law Being a witness is not a general right, which could be enjoyed by each citizen, rather there are bars and restrictions as to who is qualified to witness or bear testimony in court. The Islamic courts only accept the proof by a witness who is “*A’adil*”. Thus, all those persons who are found guilty of major sins and crimes or have been proved guilty of presenting false evidence would fall into the category of disenfranchisement.

All the four juristic schools of interpretations namely *Hanafi*, *Maliki*, *Shaf’iy* and *Hanbaliy* despite agreeing that *A’dalah* is a basic requirement for the validity of a testimony in court, differ in its definitions in some secondary details⁹². The person who is disqualified from testimony is termed as “*Faasiq*”. One of the most accepted definition of “*Faasiq*” is one defined by Imam *Shaf’i*, the founder of *Shaf’i* fiqh himself:

“*a person who mostly fails to fulfill his Islamic obligations and/or is mostly found guilty of major sins/crimes and acts of moral turpitude.*”⁹³

A very modern definition of *A’adil* has been incorporated in the constitution of Pakistan 1973. Although the context is “qualification for members of Parliament”, nevertheless the condition of *A’dalah* (Trustworthiness) is mandatory for the candidates as well as voters in Islamic law, as discussed earlier in this article:

“(d) *He is of good character and is not commonly known as one who violates Islamic Injunctions.*

<<http://www.nawaiwaqt.com.pk/lahore>, 06/10/2016>, accessed 6 October 2016

⁹² Religious ministry of Kuwait, *Musua’ al fiqhiyya al-kuwaitiyya*, (vol26, p223) [the fiqh encyclopedia, 36 volumes]

⁹³ Imam Shafa’i, *Kitaab Al-umm*, (vol7, p48); Muzni, *Mukhtasarul muzni* (vol5, p256)

... (g) *He has not been convicted for a crime involving moral turpitude or for giving false evidence*⁹⁴”

4.1. Status of non-Muslims

They would also be disqualified based on felony crimes. But, there are some crimes which are specific to Muslims only, non-Muslims are not criminalized on those grounds, such as consumption of wine or pork.

The constitution of Islamic republic of Pakistan article 62 has also mentioned some other exceptions for non-Muslims:

“provided that the disqualifications specified in paragraphs (d) and (e), shall not apply to a person who is a non-Muslim, but such a person shall have good moral reputation.”⁹⁵”

5. Conclusion: proposal for legislation in Pakistan

Nevertheless, it can be concluded that elements of criminal disenfranchisement can be explicitly found in Islamic Law. A criminal or more precisely a Felon falls in the category of a “*Faasiq*”, who has lost his right of witnessing, as every felony is a major sin.

In Pakistan, there are laws which clearly state the Qualifications and disqualifications of Members of Parliament, which is one side of the two-folded face of an Islamic Democracy. But, as disenfranchisement is concerned, there are no such laws passed by the legislature.

I would propose that these laws should be incorporated in Pakistan, because of the arguments produced in this paper, and in order to be in-line with the Islamic characteristics of Pakistani

⁹⁴ Article 62, Constitution of Islamic republic of Pakistan, edition 2012

⁹⁵ Ibid

democratic society. In this regard, only the convicts who have been found guilty of felony shall be disenfranchised. The post-prison disenfranchisement would also be decided by the court. Finally, a felon shall be re-enfranchised after a maximum of 5 years after his release. This time span has been mentioned in the constitution of Islamic republic of Pakistan, Art62,63.

It should be considered that the modern democratic structure is not the objective, rather it is a prime mode to fulfill justice, good governance and equality in the world. Thus, the challenges in implementing democracy in the global south and more specifically the Islamic world lies in a custom-built model for these regions. It is unworkable to impose the model of the developed world in a copy-paste manner.

We have seen that the concept of disenfranchisement is not alien to modern norms, rather these laws are found in at least 28 countries globally. We have discussed the position of these laws in US in detail and reached a conclusion that these are in conformity with Islamic principles. As we have seen that a consensus could be acquired in restructuring a model which is at harmony with both the democratic spirit and traditional Islamic political values. An effort for this purpose has already been made in some countries like Pakistan, Malaysia and Iran with a new brand named as “Islamic Democracy”.

In the words of Najib Ghadbian, it is high time that the world should recognize this genuine need and therefore, approve and promote a version of democracy which best suits the cultural, religious and regional values of a country. Otherwise, it will continue to fail in its desired objectives in the Islamic world, for democracy based on Islamic principles is much better than autocracy or kingship, at least it holds leaders accountable⁹⁶.

⁹⁶ Najib Ghadbian, ‘Democracy or self-interest’, (Harvard international review, 6 July 2003)