

REFLECTIONS ON PAKISTAN'S EXPERIENCE
OF SEPARATISM

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It is very unfortunate to point out that the thorny issue of autonomy in Pakistan is yet to be resolved. Why we have failed to resolve this issue is a question which has no definite answer. Maybe we have lost the will to resolve this issue. So, what is at stake for us as a nation. Should we accept the prediction of the author of the Twin Era of Pakistan as fait accompli. Prediction is a theoretical academic exercise and here we would avoid indulging in it. Therefore the best course left for us is to re-examine the thorny path of our historical journey which ultimately led to the establishment of Bangladesh as a separate entity.

During the years of Ayub's regime there was no change in the already deprived status of the people of East Pakistan and they were continually denied access to their democratic rights. Besides, this period of almost eight years saw the development of a level of exploitation unsurpassed in the post-independence era. It was in this socio-political climate that the Six-Point Formula was introduced which Sheikh Mujib-Ur-Rehman explained as "our demand for survival." In fact, the six-Point Formula was a landmark in the history of political changes in Pakistan. This formula, unlike previous ones, did not call upon the central government to do more for the Bengalis, rather it asked the authorities to let the Bengalis act for themselves.

Rahman argued,

"Time has come for making East Pakistan self sufficient in all respects".¹

The Six-Point Formula, on the basis of which autonomy for East Pakistan (now the sovereign state of Bangladesh) was demanded, may be cited as an example of 'supra-regional autonomy' as following.

1. Re-introduction of parliamentary form of government and universal adult franchise
2. A federal form of government with only two departments: Defence and Foreign affairs, to be lodged with the central government and all residual powers to reside in the two states, East and West Pakistan.
3. Separate currencies and state bank for the two states.

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33. *Al-Mausu'at al-fiqhiyyah*, 28:276.
34. Salih Abdus Sami': *Jawahir al-iklil*, 2:296.
35. Ibn Juzai, Abu al-Qasim Muhammad b.Ahmad, *al-Uwanin al-fiqhiyyah*, p.288, N.D. Salih Abdus Sami', *Jawahir al-iklil*, 2:296.

13. Al-Katani, 'Abd al-Hai b. 'Abd al-Kabir, *al-Taratih al-idriyyah*, 1:446, *al-matba'ab al-wataniyyah*, al Rabat. ND.
14. Ibid.
15. Salih Abdul Sami' *Jawahir al-iklil*, 2:296, 3rd edition, *matba'ab Mustafa al-bahi*, Cairo, 1947/1366, Al-Dardir, *al-Shtrh al-kahir* on the margin of *Hashiyah al-Dusuqi*, 4:355, *marba'ab 'Isa al-babi*, Beirut, *Rabi al-awwal*, 1804/1219.
16. Ibn Quddamah, Abu Muhammad, 'Abd Allah b. Ahmad b. Muhammad, *al-Mughni*, 5:540, *marba'ab al-Imam*, Cairo, N.D.
17. Ibn Qayyim, *Zad al-ma'ad*, 2:106.
18. أنه إعطاء مثل الشيء إن كان من المثليات وقيمة إن كان من القيمات (مجلة الاحكام العدلية ص ٤١٦)
19. Al-trabilish, 'Ala al-din, 'Abu al-Hasan, 'Ali b, Khalil, *Mu'in la-bukkam fi ma yataradadu bayna al-khasmayn min al-ahkam*, p.238, Haji Abd al-Ghaffar & sons, Qandahar, Afghanistan, Al-Haskafi, 'Ala al-din, Muhammad, al-Dur al-mukhtar sharh Tanweer al-absar, 4:475, *marba'ab munshi* Nol Kishwar, Lakhnau, 1877/1294.
20. Ibn Farhun, Burhan al-din, Ibrahim b. Ali, *Tabsirat al-hukkam fi usul al-aqdiyyah wa manahij al-ahkam*, on the margin of *Fath al-ali al-malik* of Alish Muhammad Ahmad, 2:348, *marba'ab Mustafa al-babi*, 2nd edition, Cairo, 1937/1356.
21. Islamic publications, *Aham fiqhi faysalay* (Urdu), p.85, India, N.D.
22. Islamic publications, *Aham fiqhi faysalay* (Urdu), p.85,
23. Ibn Qayyim, *Zad al-ma'ad*, 2:109.
24. Ibn Quddamah, Abu Muhammad, 'Abd Allah b. Ahmad b. Muhammad, *al-Mughni*, 5:540, ND.
25. Salih Abdus Sami', *Jawahir al-iklil*, 2:296, Ibn Quddamah, *al-Mughni*, 5:441.
26. Islamic publications, *aham fiqhi faysalay* (Urdu), p.85.
27. Ibn Qayyim, *Zad al-ma'ad*, 3:109.
28. Ibn Farhun, *Tahsirat al-hukkam*, p.348.
29. Sayed al-Sabiq, *Fiqh al-sunnah*, (on the margin) 2:581, ND.
30. Islamic publications, *Aham fiqhi faysalay* (Urdu), p.85.
31. *Al-Mausu'at al-fiqhiyyah. wazarat al-awqaf wa shu'un al-Islamiah*, 28:277. Al-Khaskafi, *al-Dur al-mukhtar*, 5/43-44.
32. *Al-Mausu'at al-fiqhiyyah*, 28:276.

4. The doctor/surgeon is responsible, if made short falls, exceeded his limits or operated at improper time and place.
5. In normal circumstances permission from the patient of his guardian is necessary, otherwise the physician/surgeon will be held responsible for his/her unauthorized etc.
6. The physician/surgeon is responsible for all types of coercion he/she made for the purpose of medication, which resulted in any sort of harm to the patient.
7. Public servants are not liable for *daman*, as they are like servants who work on behalf of their masters as their representative, but they shall be penalized for any sort of negligence, shortfall or exceeding their limits by imprisonment or through lashes for the purpose of discipline.

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12. Ibn Maja, *Sunan*, 2:257, *Maktabah al-Islami*, 3rd edition, Beirut, 1988/1408-09.

in the factory, a government official and the driver of the vehicle, every one working in his perimeter.

The same author further says:

الأصل أن الشخص مسئول عن ضمان الضرر الذي ينشأ من فعله لا عن فعل غيره^{٢٣}

In fact a person is liable for *daman* of the harm emerged from his own act and not of the others.

The author of *al-dur al-mukhtar* says:

ولا يضمن ما هلك من عمله المأذون فيه، لأن المنافع متى صارت مملوكة للمستأجر، فإذا أمره بالتصرف في ملكه، صح، يصير نائباً منابه، فيصير فعله منقولاً إليه، كأنه فعله بنفسه، فلهذا لا يضمنه وإنما الضمان في ذلك على مخدومه^{٢٤}

He (the doctor) is not liable for *daman*, if death occurs as a result of his permitted act, because the benefits are the property of the employer. If he (docotor) is being allowed to do so, it is legal and he/she becomes assistant to him and therefore, he/she is not liable for *daman* while his master is liable.

Regarding the responsibilities of the medical staff working under the control of the government or any other legally authorized organization, the author of *al-qawaneen al-fiqhiyyah* says:

فإن كان عارفاً فلا يعاقب على خطئه، وإن كان غير عارف، وغر من نفسه، فيؤدب بالضرب والسجن-^{٣٥}

He/she will not be penalized on his/her mistake, if knew (the medical science). If knew not and be mistaken, then/he she can be disciplined either through lashes or by imprisonment.

Conclusion:

1. According to Islamic teachings the remedial measures of an unauthorized (Legally) medical practitioner is forbidden.
2. A competent doctor/surgeon is not liable for *daman* or penalty under the Islamic law, if he/she did medical care or operated honestly, with the best of his/her abilities, good intention and with care and caution which resulted in death or any harm to the patient.
3. Negligence, professional dishonesty, incompetence and unawareness of the nature of the remedies makes the doctor/surgeon liable for retaliation, *daman* or penalties.

permission while *quadi* Abu Muhammad considered that, as *qatl-e-khata*, liable for *daman*.

Sayed al-Sabiq says:

إذا مات لا يجب عليه القود ويجب الدية لأن العلاج كان بإذن المريض ٢٩

He (the doctor) is not liable to retaliation but liable for *diyyah* if the patient dies as a result of his/her medication, because it was carried out with the consent of the patient.

In this connection the following recommendations were made by the Muslim scholars participated in the seminar held at Aligarh University from 22.10.95 to 24.10.95.

If the patient is unconscious and his/her guardians are not present on the spot and the doctor feels that an urgent operation is necessarily required to protect the life or an organ of the patient and did operate without permission, which resulted in the damage, the doctor is not liable for *daman*.³⁰

Responsibility of the doctors/staff involved in the vaccination of the masses.

As for as the working medical staff (including doctor) is concerned, they are usually employees of the government or legally recognized organizations. Although it is clear that the ruler has the authority and guardianship over his countrymen under which he can give such orders in their interest, in such cases the liability if so, is upon the employer, i.e., the government or the organizations.

Al-Mausu'ah al-fiqhiyah quotes:

لو كان بأمر السلطان لا يضمن، وجهه: أن له لا ولاية عامة، يصح أمره لدفع الضرر العام^{٣١}

There is no liability if it is conducted by the order of the ruler because he has general rule (guardianship) and lawful authority over them for removing of the common suffering.

The following quotation is self explanatory in this respect:

ضمان الشخص لأفعال التابعين له: ويتمثل هذا في الخادم في المنزل، والطاهي في المطعم، والمستخدم في المحل، ولعامل في المصنع والموظف في الحكومة وفي سائق السيارة لما لكها كل في دائرة عمله^{٣٢}

Liability of a person for his/her subordinates: It is similar to the servant in the house, a cook in the mess, an employee in the firm, worker

science and did medication without any short fall but with out the permission of the patient. For example, if a child was circumcised with out the permission of his guardian or a old man by compulsion or when he was asleep or gave medicine to a patient by coercion and as a result damage or defect emerged or did medication without proper permission,..... In all these cases he (the doctor) is responsible as applicable.

Following are the recommendations of the scholars participated in the seminar held at Aligarh University from 22.10.95 to 24.10.95.

Even the competent doctor is liable for *daman* if the operation became harmful or fatal while made without the permission of his/her guardian.²⁶

No liability if medical care made by a competent doctor with proper permission

Ibn Qayyim says:

طبيب حاذق أعطى الصنعة حقها ولم تجن يده فتولد من فعل المأذون من جهة الشارع ومن جهة من يطبه تلف العضو أو ذهاب صفة فهذا لا ضمان عليه اتفاقاً فإنها سراية مأذون فيه وهذا كما إذا ختن الصبي في وقت وسن قابل للختان وأعطى الصنعة حقها فتلف العضو أو الصبي لم يضمن²⁷

It is agreed (among the jurists) the there is no liability on the part of the competent doctor/physician, legally permitted (by the *Shari'a*), who is not involved in evil activities. fulfilling his professional duties at the best of his/her abilities and either naturally or consequently the patient dies or any of his organ destroys or any ability vanishes. It is because, the process was permitted, like the circumcision of a child, made at the proper time and age, while medication was made with the best of his abilities and as a result the organ or the child himself spoiled, in which there is no liability.

Following is a rear view not endorsed by other scholars:

وإذا أذن النرجل لحجام يفصده أو تختن ولده أو البيطار في دابة فتولد من ذلك الفعل ذهاب نفس أو عضو أو تلف الدابة أو العبد فلا ضمان عليه لأجل الإذن قال ابن راشد وحكى القاضي أبو محمد رأيه بال ضمان لأنه قتله خطأ²⁸

If a person allowed the barber for undergoing of a venesection (opening of a vein) or to circumcise his son or to the veterinary surgeon for an animal; which resulted in the loss of life or an organ or animal or human being. According to Ibn Rashid there is no *daman* because of the

The person has the right of medical practice, who has the knowledge and expertise in the field (of medicine) and his knowledge and expertise, is recognized by a competent authority. practice in this profession (medication of the patients) is unlawful without proper knowledge and experience.²¹

They further conclude:

The person not permitted for medical practice by the Islamic law, if does so and as a result an extra ordinary harm occurs to the patient, is liable for *daman*.²²

Competent doctor in the field of medicine and surgery, showing insufficiency/ inadequacy in his act, exceeding his limits or acts without permission.

Al-Khatabi says:

لأعلم خلافا في أن المعالج إذا تعدى فتلف المريض كان ضامنا^{٢٣}

There is no disagreement (among the Muslim jurists) that the doctor is held responsible when exceeded his limits and as a result the patient died.

Ibn Qudamah says:

فأما إن كان حاذقا وجنت يده مثل أن تجاوز.... أو قطع في غير محل القطع..... أو في وقت لا يصلح فيه القطع منه وأشبه هذا، ضمن فيه كله^{٢٤}

If he/she (the doctor) is competent and harmed some one due to exceeding of his/her limits (in medical care) or operated at improper place and time or similar to it, is held responsible for all his doing.

Deficiency on the part of the doctor or medication/cure made without permission.

The author of *Jawahir al-iklil* says:

علم قواعد الطب وقصر في تطبيقه، فسرى التلف أو التعيب أو علم قواعد التطبيق ولم يقصر ولكنه طب المريض بلا إذن منه كمالو ختن صغيرا بغير إذن وليه أو كبيرا قهرا عنه، أو هونائمه أو أطعم مريضا دواء قهرا عنه فنشأ عن ذلك تلف و عيب، أو طبته بإذن غير معتبر.... فإنه في ذلك كله بضمن ما ترتب عليه^{٢٥}

If knew the medical science and made short fall in the medical care (of the patient) which resulted in damage or defect, or knew the medical

Ibn Qayyim is also of the same opinion as he says:

أما الأمر الشرعي فإيجاب الضمان على الطبيب الجاهل فإذا تعاطى علم الطب وعلمه ولم يتقدم له به معرفته فقد هجم بجهله على إتلاف الأنفس وأقدم على التهور على ما لم يعلمه فيكون قد غرر بلعليل فيلزمه الضمان لذلك وهذا إجماع من أهل العلم^{١٧}

The legal order as per *shar'ia* law lays the responsibility on the incompetent doctor, when he tries for medical knowledge and its practical aspect and can not get it. As a result, he/she (the doctor) causes deaths because of his/her skill, which he does not know, that amounts to the deceiving of the patient and makes him/her liable for *daman*.¹⁸ There is consensus of the scholars on this matter.

In the under developed societies there are different types of professionals who carry out different types of remedies. They are also responsible for their acts if not competent. The author of *mu'in al-hukam* gives an example in this regard:

مسئلة حجام: قال الآخران في عينك لحما إن لم تزله عميت عينك فقال أنا أزيله عنك فقطع الحجام لحما من عينه وهوليس بحاذق في هذه الصنعة فعميت عين الرجل يلزمه نصف الدية-^{١٩}

The barber's case: One said to another that there is flesh in your eye if not removed you will be blind (or you will lose your eyesight). He (the barber) said that he would remove it and removed the flesh form his eye, but he was not expert in the field (medical treatment). He lost his eye sight. He (the barber) is liable for half of *diyah*.

Ibn Farhun endorses the said idea, he says:

أما إذا كان جاهلاً أو فعل غير ما أذن له فيه خطأ أو يجاوز الحد فيما أذن له فيه أو قصر فيه عن القدر المطلوب ضمن ما تولد عن ذلك^{٢٠}

The doctor/*tabib* is held responsible for the consequences of his act when he is unaware (of the required knowledge) or get mistaken as a result of an unauthorized act or exceeded his limits, although he was permitted or did show deficiency in the required skill.

The participants Muslim scholars of the 8th seminar held at Aligarh University from 22.10.95 to 24.10.95 agreed upon the following suggestions:

”من تطب ولم يعلم منه طب قبل ذلك فهو ضامن“^{١٢}

Who so did medication of some one with out prior medical knowledge is held responsible.

Thus prior knowledge of the medical profession is essential for the medication of an ailing or affected person. The author of *al-taratib al-idariyyab* says:

وفي رواية لأبي نعيم من تطب ولم يكن بالطب معروفا فأصاب نفسا فما دونها فهو ضامن^{١٣}

In the narration of Abi na'im, “who so did perform medication (on some one) without knowing the (medical) knowledge which resulted in the death or any sort of lesser harm to a person is held responsible.

He again quotes:

وقال ابن طرحان هذا الحديث فيه احتياط و تحرز على الناس و حكم سياسي مع مافيه من الحكم الشرعي، وقوله تطب أي تعاطي علما الطب ولم يكن من أهله ومعناه من تعاطي علم الطب ولم يتقدم له به استعمال ومزاولة وتدرّب مع الفضلاء فقتل بطبه فهو ضامن-^{١٤}

Ibn Tarhan said that there is caution, protection of the people and political order in this *hadieth* as well as the religious order. Here medication means that the doctor is responsible, if he does practice medical treatment without (medical) qualification, i.e. one who does medical treatment without the practical knowledge, schooling and experience with the scholars, when some one dies because of his remedial measure.

The following quotation will clear any sort of ambiguity in this regard. The author of *Jawahir al-iklil* says:

يضمن الطبيب إن جهل قواعد الطب أو كان غير حاذق فيها، فدلوي مريضاً وأتلفه بمداواته أو أحدث به عيباً^{١٥}

The doctor or tabib is held responsible, if not acquainted with the principles of the medical knowledge or given medicine to the patient without expertise and as a result of his medication the patient dies or get defected.

Ibn Quddamah says:

أن يكونوا فزى خلق في صناعتهم ولهم بها بصارة ومعرفة لأنه إذالم يكن كذلك..... كان فعلا محرما فيضمن سرايته^{١٦}

They (doctors) ought to be experts (medical sciences) and must have perception and knowledge in their field, if not so the act (medical treatment) is forbidden and they will be held responsible for its running through.