

Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan

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1. Introduction:

The legal cum judicial system in Pakistan is characterized by two outstanding features vis a vis Islamic law: firstly, the courts of the country implement the law laid down by the legislature, and secondly, if there is no law enacted on any point particularly with respect to personal matters the courts derive the rules of Islamic law from works of authority and put them into operation. The reason for such a mixture is embedded in the colonial period where the legal cum judicial system was structured as such. After the independence, Pakistan has retained that system on the same pattern albeit some cosmetic changes here and there. It must be admitted at the outset that the changes brought about by some legislative instruments are not mere cosmetic as they have reshaped the entire jurisprudence in that particular area, e.g. hudood laws. As a whole the above assertion with respect to dual characteristics of Pakistani legal cum judicial system is beyond any reproach.

When someone is apprised of the above mentioned dual characteristic of the Pakistani legal cum judicial system, then it is natural to inquire what sort of source material is relied upon by the courts to find out an authentic view point of Islamic law on a particular issue. It is this important but unexplored question which has been made subject of analysis in this paper. For the purposes of exploring the frequently relied upon books of Islamic law by the courts, the author has carried out an inquisitive and careful analysis of the reported decisions of the superior judiciary in Pakistan.(1) After having found the frequently relied upon Islamic law books on the basis of their recurrent referencing in the reported cases, the paper has selected some of them for analysis in this paper. This selection is informed by the consideration of space for analysis available in a paper as well as relative frequency of referencing of such books. The paper discusses the origin of the selected books. It attempts to comprehend the background in which these books were written as their background individually as well as collectively is instrumental for elevating the status of these books in Pakistan's legal cum judicial system. By and large, the paper is a genealogical analysis of the books written in a particular socio-political

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provides' remedies for the infringement of these rights and freedoms. In Shariah, it is the legal obligation and duty of people in power to look after and protect the rights of the people.

In Islam human rights have been conferred by Allah, the Almighty God of universe through His word, the Quran and through His final Messenger Muhammad (SAW). they carry special sanction behind them. They are permanent, sacrosanct and inviolable and in no way or in no circumstances can be withdrawn, modified reduced, amended or suspended on any pretext. No king no head of state or chief executive, no parliament or legislature and no Qadi or court has any authority to violate these rights. Whereas on the other hand rights in the West human rights are the result of legislation by the parliament of a state, which recognizes such rights only for its citizens.

The Charter and proclamations of the United Nations cannot be compared with the rights sanctioned by God, for the former are not obligatory on anybody, while the latter are an integral part of the Islamic faith .The U.N. Charter only provides for protection and encouragement of human rights; it neither guarantees these rights nor ensures their observance. It places no obligation upon the member States to put it into effect. The five super powers are still preserving their veto powers. It is merely declaratory and not mandatory.

The Violation of human rights by the USA and NATO forces and their unlawful interference in Iraq, Egypt, Afghanistan etc and occupation of Kashmir by India are the clear examples of double standards of the big powers and ineffectiveness of the UN.

From the above discussion, it is abundantly clear that the rights proclaimed in the Quran and the appeal made by the Messenger of Allah (SAW) about more than 1400 years ago in his Farewell Sermon with respect to human rights is much more appropriate and comprehensive as compared to the rights proclaimed and guaranteed by the West and Human world organizations.

"إن أحب الناس إلى الله يوم القيامة وأدناهم منه مجلسا إمام عادل ، وأبغض الناس إلى الله وأبعدهم منه مجلسا إمام جائر." (58)

"The one who will be dearest to Allah and nearest to Him in station on the Day of Resurrection will be a just Imam (ruler) and the one who will be most hateful to Allah on the Day of Resurrection and will receive the severest Punishment (or will be farthest from Him in station) will be a tyrannical Imam (ruler)"

These ahadith of the Messenger of Allah Muhammad (SAW) plainly state the rights of the people over their rulers, on the fulfillment of which rests the latter's whole future life. Their excellence or degradation on the Day of Judgement is entirely dependent on how justly or unjustly they treat their subjects, and how much interest they take in the welfare of the people and in safeguarding their rights and privileges.

3.IMPLICATIONS:

Human right in Islam is considered very important and sacred in Islam law. The concept of Human right has been discussed in all the sources of Islamic law beginning from Quran to ijihad. Human rights concept in Islam is as old as man himself. Islam has declared and guaranteed it 1400 years ago and every Muslim is bound to accept and follow them.

Shariah has a unique concept of human rights, which emerge from the concept of obligations. The emphasis of Islam is on duties rather than rights. The rights and duties are in fact, two sides of same coin. They are so co-related that they cannot be separated. All the believers owe a duty to God and as a result of fulfilling these obligations they gain certain rights and freedoms. Islam has an integrated and unitarian approach towards rights and obligations.

Islam regards human rights as an integral part of faith. A man cannot be considered religious in the true sense of the word, if he does not take care of the rights of his fellowmen. The measure of judging a man's religiosity is how he deals with people, not how much he prays.

Human rights granted by Islam are not confined to citizens of any one state. They are to be enjoyed by the Muslims as well as non Muslims all over the world without any discrimination. In a true Islamic state these rights are enjoyed by all of its citizens and cannot be violated by the state or another individual. No war no emergency and no crisis can authorize anybody including the state to suspend or abrogate the fundamental rights given by the Quran and Sunnah to the Muslim citizens and non Muslims living in an Islamic state.

Islam not only guarantees human rights and fundamental freedoms to the Muslims and non-Muslims but, at the same time,

of abuse is entitled to redress. Both sovereign and subject are equal before the law. The subject has no obligation to obey the sovereign if the latter deviates from the law.(53)

The Messenger of Islam Muhammad (SAW) explained in detail the implications for unjust rulers who ignore the rights of their subjects and enjoy committing excesses against the people, by saying:

”كلكم راع ومسئول عن رعيته ، فالإمام راع وهو مسئول عن رعيته ، والرجل في أهله راع وهو مسئول عن رعيته ، والمرأة في بيت زوجها راعية وهي مسئولة عن رعيته“

“Everyone of you is a shepherd, and everyone of you will be questioned about those under his rule: the Amir (ruler) is a shepherd and he Will be questioned about his subjects, the man is a ruler in his family and he will be questioned about those under his care and the woman is a ruler in the house of the husband and she will be questioned about those under her care”.(54)

”ما من عبد استرعه الله رعية ، فلم يحطها بنصيحة ، إلا لم يجد رائحة الجنة“ (55)

“Any governor in charge of Muslim subjects who does not protect them with good counsel will not smell the fragrance of Paradise”.

”ما من أمير عشرة إلا يؤتى به يوم القيامة مغلوله يداه إلى عنقه ، أطلقه الحق أو أوبقه.“(56)

“He who has been ruler over the ten people will be brought on the Day of Resurrection shackled till justice loosens his chains or his tyranny brings him to destruction”.

”ويل للأمرء ، ويل للعرفاء ، ويل للأمناء ، ليتمنين أقوام يوم القيامة أن ذوائبهم كانت معلقة بالثرى، يتذبذبون بين السماء والأرض ، ولم يكونوا عملوا على شيء.“ (57)

“Woe to the governors, woe to the chiefs, woe to the supervisors! On the Day of Resurrection, people will wish their forelocks were tied to the Pleiades, that they were swinging between heavens and earth, and that they had never exercised any rule”.

Egypt to Madina where he complained to Umar,(RA). Umar,(RA) summoned the Governor of Egypt and said:

”مذكم تعبدتم الناس وقد ولدتهم أمهاتهم أحرارا .“ (47)

“Since when have you taken upon yourself to make people slaves who are born free”?

In an Islamic culture the state has the responsibility of enforcing these rights of the individuals based on principles of Adl and Ihsan, guaranteed by Shariah. The purpose of an Islamic state is not merely to protect its citizens but also to achieve social justice.(48)

In Islamic Shariah, it is the legal obligation and duty of the people in power to look after and protect the rights of the people. If they fail to enforce them, and start denying the rights that have been guaranteed by God or make amendments and changes in them, or practically violate them while paying lip-service to them, they are sinful. In many ayat of the Holy Quran warning has been issued against those who are involved in persecution and violations of human dignity. They are reminded again and again to implement the laws of Shariah and to observe justice by dealing with others.(49)

The Quran in this regard proclaims as:

﴿وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ﴾ (50)

“Those who do not judge by what Allah has revealed are the disbelievers” (kafirun).

The second ayah in this regard speaks as:

﴿وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ﴾ (51)

“And whosoever does not judge by that which Allah has revealed, they are the wrong-doers” (zalimun) .

While a third Ayah in the same chapter says:

﴿وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْفَاسِقُونَ﴾ (52)

“And whosoever does not judge by that which Allah has revealed, they are the evil-livers” (the rebellious) (fasiqun)

Since in Islam, Allah is the Absolute Sovereign, there is no room for rulers to be above the law, for kings who do no wrong, for monarchs who enslave men. The man who abuses his power will pay for it and the victim

language, and even creed". Every man, whether he belongs to this country or that, whether he is a believer or unbeliever, whether he lives in a forest or in desert, has certain basic human rights simply because he is a human being. These rights have been given to all without any distinction of caste, creed or color.(40)

In a true Islamic state "these rights are enjoyed by all of its citizens and cannot be violated by the state or another individual. No war no emergency and no crisis can authorize anybody including the state to suspend or abrogate the fundamental rights given by the Quran and Sunnah to the Muslim citizens and non Muslims living in an Islamic state".(41)

Messenger's (SAW) declaration of human rights, proclaimed in his last sermon is a clarion-call for all mankind of the universe, irrespective of caste and creed, devoid of any narrow nationalistic ideas of the present day.(42)

Muslim theologians have divided rights into two categories: 'Huqooq Allah', (the rights of Allah) and 'Huquq al-Abad', (human rights).(43) 'Islamic approach to balancing the rights of Allah and the rights of the individual is objective in the sense that it seeks to protect the interests of both the individual and the community under the umbrella of justice'.(44)

Islam not only guarantees human rights and fundamental freedoms to the Muslims and non-Muslims both but, at the same time, provides' remedies for the infringement of these rights and freedoms.(45)

In his first official speech, Abu Bakr(RA) said:

"إني قد وليت عليكم ولست بخيركم فإن أحسنت فأعينوني وإن أسأت فقوموني،
الصدق أمانة، والكذب خيانة، والضعيف فيكم عندي قوي حتى أرجع عليه حقه
إن شاء الله، والقوي فيكم ضعيف عندي حتى أخذ الحق منه إن شاء الله
إني قد وليت عليكم ولست بخيركم فإن أحسنت فأعينوني وإن أسأت فقوموني،
الصدق أمانة، والكذب خيانة، والضعيف فيكم عندي قوي حتى أرجع عليه حقه
إن شاء الله، والقوي فيكم ضعيف عندي حتى أخذ الحق منه إن شاء الله"

"O People: I have been appointed ruler upon you, while I am not the best of you. If you see me with truth, help me, and if with falseness set me right. The strong among you, in my opinion, is weak until I snatch the right from him and the weaker among you, in my view, is the strong, unless I redress his wrong."(46)

Abu Bakr 's (RA) policy was continued by his successor Umar,(RA) the second Caliph of Islam. Once, the Governor of Egypt incarcerated a citizen unjustly. The injured managed to escape from prison. He went from

mankind, and who so gave life to one, it shall be as if he had given life to all mankind”³⁵

The right to personal dignity is further substantiated by the Qur’anic prohibition of slanderous accusation (qadhf)

﴿وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ﴾ (36)

“And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever. They indeed are liars and rebellious.”

Advancing the concept of human right and dignity of person, the Quran reads as:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرْ قَوْمٌ مِّنْ قَوْمٍ عَسَىٰ أَن يَكُونُوا خَيْرًا مِّنْهُمْ وَلَا نِسَاءٌ مِّنْ نِّسَاءٍ عَسَىٰ أَن يَكُنَّ خَيْرًا مِّنْهُنَّ وَلَا تَلْمِزُوا أَنفُسَكُمْ وَلَا تَنَابَزُوا بِاللُّغَابِ﴾ (37)

“O you who believe! Let not a group scoff at another group, it may be that the latter are better than the former. Nor let (some) women scoff at other women, it may be that the latter are better than the former. Nor defame one another, nor insult one another by nicknames”.

It is a unique concept of human right presented by Islam, having no example of it, at least in the western concept of human rights. In the views of Rashid Ahmad Jullundhri:

“Islam wants to create a society based on a deep sense of moral responsibility and justice in order to preserve human dignity accorded to man by God”.(38)

The human history is evident of it that the Holy Messenger Muhammad (SAW) for the first time bestowed all those fundamental rights to man which were necessary to elevate him on the highest pedestal of humanity. He “granted humanity that Charter of liberty, fraternity, equality, justice, dignity, peace, and what not, which lent grace, politeness and beauty to the life of man.(39)

Human rights granted by Islam are “not confined to citizens of any one state. They are to be enjoyed by the Muslims as well as non Muslims all over the world without any discrimination”. “Islam does not restrict these rights and privileges to the geographical limits of its own state or to the people of its own faith. It has a universal concept of fundamental rights which is for the whole mankind irrespective of color, race, territory,

“ Prostrate yourselves before Adam”

This commandment of Allah implies that every born baby should be cared for and properly treated as an honorable human being. When he grows up he should be treated as a free man that is guarded by the dictates of the glorious Shariah which honors his life and guards him against prison, killing or even insult.(31)

Man has been placed on a very pedestal in the Divine scheme of creation. The Qur’an provides ample testimony of the exalted status accorded to man.

﴿وَسَخَّرَ لَكُمُ اللَّيْلَ وَالنَّهَارَ وَالشَّمْسَ وَالْقَمَرَ وَالنُّجُومَ مُسَخَّرَاتٍ بِأَمْرِهِ﴾ (32)

“And He has subjected to you the night and the day, and the sun and the moon; and the stars are subjected by His Command.”

No Further evidence is required in the pages of the Quran which high-lights the dignity and right of Man, thus we read:

﴿فَإِذَا سَوَّيْتُهُ وَنَفَخْتُ فِيهِ مِنْ رُوحِي فَقَعُوا لَهُ سَاجِدِينَ﴾ (33)

“So when I have made him and have breathed into him {Adam} of My spirit, then fall down prostrating yourselves unto him.”

Muslim jurists have made a detail study of human rights. Even the rights of animals did not escape their attention. In addition to the rights of parents, neighbors, children, wives, they also discussed civil rights Every Citizen of a Muslim state has the right of a decent living and of holding property In addition he has freedom of opinion, profession and movement. No one can deprive him of these rights. Life is a divine gift, whose sanctity must be observed.

The Quran emphasizing the fundamental rights of an individual to life and personal dignity proclaims that:

﴿وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ﴾ (34)

“Kill not a soul which Allah has made sacrosanct save in the cause of justice.”

﴿مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا﴾

“Whosoever killed a person not in retaliation of murder, or (and) to spread mischief in the land, it shall be as if he had killed all

When Muslims speak about human rights in Islam, they mean rights which are bestowed by Allah in the Holy Quran; rights which are divine, eternal, universal and absolute; rights which are guaranteed and protected through the Shariah. The rights which are not subject to any alterations or modifications, and there is no scope for any change or abrogation.(23)

Islamic concept of human rights is essentially based on the idea of human dignity and equality of mankind. The dignity of a person is considered very important and basic right of the individuals in Islam law.(24)

Human rights in Islam are concerned with the right of the individual, the level of self esteem that secures personal identity and promotes human community. While the pursuit of human dignity is universal, its forms are designed by the cultures of people.(25)

Islam regards human rights as an integral part of faith. A man cannot be considered religious in the true sense of the word, if he does not take care of the rights of his fellowmen. The measure of judging a man's religiosity is how he deals with people, not how much he prays.(26)

In Islamic jurisprudence human rights are to some extent more than the ordinary civil rights, they are based on the Principles of Adl, Ihsan and Istihsan. All the rights determined by the Quran and the Sunnah shall be deemed fundamental rights for the Muslims.(27)

The Qur'an gives us a clear concept of the human rights and it demands that the rights be safeguarded in such a way that not only the individual gets his rights but along with the individual the society should also evolve, become better, a more civilized.(28)

The concept of human right receives clear exposition in the Qur'an which says:

﴿ولقد كرمنا بني آدم وحملناهم في البر والبحر ورزقناهم من الطيبات وفضلناهم على كثير ممن خلقنا تفضيلاً﴾ (29)

“Verily we have honoured the children of Adam. We carry them on the land and the sea, and have made provision of the good things for them, and have preferred them above many of those whom we created with a marked preferment”

According to Quran, the Almighty Allah has given to humankind dignity and honour over all of His creation. Allah Almighty honoured Man by making the angels kneel before Adam, the first man.

﴿اسجُدوا لآدم﴾ (30)