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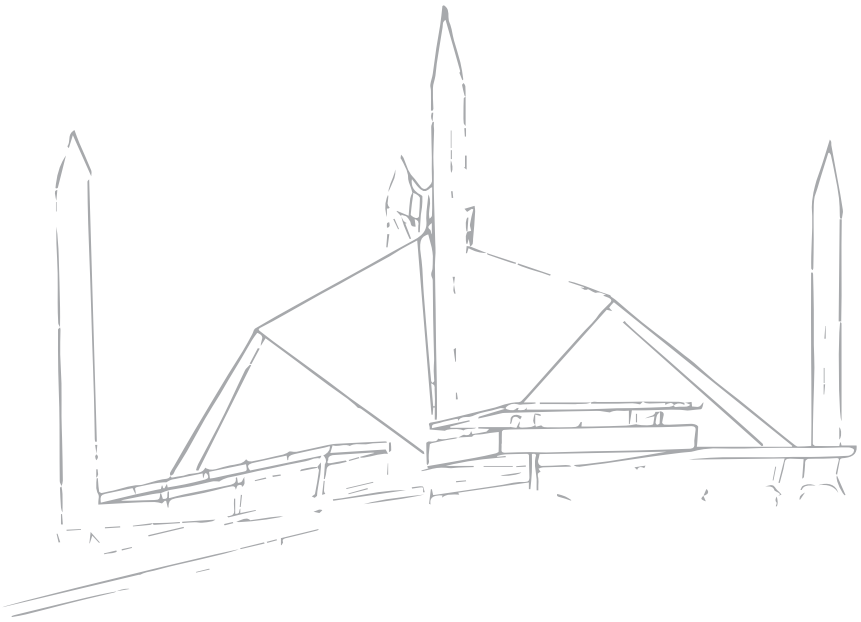

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GENERAL PRINCIPLES OF CRIMINAL LAW AS EXPOUNDED BY IMAM SARAKHSI

Dr. Muhammad Mushtaq Ahmad*

In an earlier essay about the methodology of the Hanafi School, we have shown in detail that this methodology primarily relies on the general principles of law. We have also explained that these principles are used not only for understanding the detailed rules of the law but also for extending the law to new cases through the methodology of *takhrij*. Now in this paper, we have compiled some of the important general principles of the Hanafi law of *hudud* from the *Kitabl al-Hudud* of *al-Mabsut* by Shams al-A'immah Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi. For the sake of convenience, we have categorized these principles in various sets and have given examples of the application of the principles in the footnotes. We have also retained the original Arabic wording of the principle coined by Imam Sarakhsi as we believe that he masters the art of legal drafting. We hope that these principles will illustrate the line of reasoning adopted by the Hanafi jurists for developing criminal law, particularly of *hudud* and *qisas*.

On the Use of Reason

١. الحد بالقياس لا يثبت -[١]

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[1]Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 9:86. A question may be raised here about the *hadd* of *shurb*, which according to the famous narrative about the decision of 'Ali (Allah be well-pleased with him) was fixed on the analogy of the *hadd* of *qadhf*. Even the analogy seems loose and not strictly in accordance with the conditions laid down by the jurists for analogy: "the one who drinks, loses senses; the one who loses sense, makes calumny; hence, I see the punishment of calumny for him" (Ibid., 9:82). The Hanafi jurists assert that the *hadd* of *shurb* was not fixed by *ra'y*; it was fixed by the practice of the Prophet (peace be on him) as understood by his companions (Ibid., 24:55). As explained elsewhere, the opinion of a companion is a binding source of law for the Hanafi School. (Muhammad Mushtaq Ahmad, "Significant Features of the Hanafi Criminal Law," forthcoming in *Journal of Islamic and Religious Studies*.) Here it is not just a solitary opinion; rather, as the Hanafi jurists look at it, this was the how the companions by a consensus understood the intention of the Lawgiver. Hence, the later jurists simply assert that *hadd* is either fixed by the Qur'an, the *Sunnah* or the

1. *Hadd* is not created through analogy.

٢. اثبات الحدود وتكميلها بالقياس لا يكون ـ[٢]

2. Creation and completion of *hudud* through analogy are not valid.

٣. شرط الحد بالرأى لا يمكن اثباته ـ[٣]

3. No condition can be added to *hadd* on the basis of reason.

On the Authority of the Ruler

٤. الامام متعين للنيابة عن الشرع ـ[٤]

4. The ruler is entrusted with authority for enforcing the *Shar'*.

٥. ليس للامام ان يضيع الحد بعد ما ثبت عنده ببينة -[٥]

5. The ruler does not have the authority to vacate a *hadd* after it is proved before him in accordance with the prescribed standard of evidence.

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consensus (Muhammad Amin Ibn 'Abidin al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar* (Riyadh: Dar 'Alam al-Kutub, 2003), 6:3).

[2] *Al-Mabsut*, 9:50. Sarakhsi mentions this principle in the context of the additional punishment of expulsion along with lashes for the convict of *zina* and asserts that some of the jurists who consider this expulsion as part of the *hadd* punishment argue on the basis of *qiyas* that expulsion deters the culprit and the purpose of the *hadd* punishment is deterrence. However, Sarakhsi refutes this argument on the basis of this principle asserting that addition to the *hadd* punishment on the basis of *qiyas* is not possible in the same way as the *hadd* punishment originally cannot be established through *qiyas*.

[3] Ibid., 9:46.

[4] Ibid., 6:94. Interestingly, the Objectives Resolution accepts this principle and holds that governmental authority is a "sacred trust" which the people of Pakistan shall use within the "limits prescribed by Allah" as "sovereignty over the entire universe belongs to Allah".

[5] Ibid., 9:84 Hence, Article 45 of the Constitution of Pakistan is repugnant to Islamic law, if it includes the power to pardon or change the *hadd* punishment and also if it includes the power of pardoning or changing the *qisas* punishment even when neither the victim nor (in case of his death) any of his legal heirs waives or compounds the right of *qisas*. In *Hakim Khan v The State*, PLD 1992 SC 595, the Supreme Court could not resolve this issue and referred it to the Parliament which did not as yet come up with any solution. Hence, the issue remains unsettled. Section 18 (iii) of the Protection of Women Act, 2006, repealed Section 20 (5) of the Offence of Zina Ordinance and, thus, authorized the government to pardon the *hadd* punishments awarded under this Ordinance. The Federal Shariat Court in its decision on the compatibility of the provisions of the POWA with Islamic law simply ignored these provisions.

٦. ان هذاحق الله تعالى ، يستوفيه الامام بولاية شرعية ، فلا يشاركه غيره فى استيفاءه ـ[٦]

6. This [*hadd*] is the right of Allah which the ruler enforces by virtue of the authority given to him by the *Shari'ah*; hence, no other person shares this authority with him.

On the Characteristic Features of the *hudud* Punishments

٧. الحد أقرب الى السقوط من الاثم -[٧]

7. *Hadd* is more likely to dissolve than sin.

٨. الحدود لا تقام بالأيمان-[٨]

8. *Hudud* cannot be imposed on the basis of oaths.

٩. مبنى الحدودعلى التداخل -[٩]

9. *Hudud* inherently require concurrent enforcement (*tadakhul*).

١٠. الحد لا يتجزأ، فاستيفاؤه لا يكون الا باتمامه ـ[١٠]

10. *Hadd* is indivisible; hence, it can only be deemed enforced when it is enforced completely.

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[6] *Al-Mabsut*, 9:94. Hence, if the ruler – above whom there is no other ruler, commits a *hadd* crime, the punishment cannot be imposed on him (Ibid., 9:121-22).

[7] Ibid., 9:61. It means that if a person cannot be deemed to have committed sin, such as a child or an insane person, *a fortiori* he cannot be given the *hadd* punishment. Sarakhsi mentions this principle while negating the criminal liability of a woman who is coerced to sex and asserts that as she cannot be held sinner *a fortiori* she is not liable for the *hadd* punishment.

[8] Ibid., 9:59. Thus, if the accused denies the commission of the *hadd* crime but refuses to deny this on oath, he cannot be given the *hadd* punishment, if there is no evidence against him in accordance with the prescribed *nisab*.

[9] Ibid., 9:81. Hence, if a person more than once commits the same *hadd* crime before the whole of the *hadd* punishment is enforced on him, he can only be given the remaining part of the *hadd* punishment. The rule for *ta'zir* is different as the culprit is liable to separate punishments for separate instances of committing a *ta'zir* crime ('Ala' al-Din Abu Bakr b. Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), 9:274).

[10] Sarakhsi, *al-Mabsut*, 9:55. Thus, if the *hadd* crime of *qadhf* is proved only by the confession of the accused and he retracts from his confession before the completion of eighty lashes, he is not deemed to have received the *hadd* punishment and as such he is not regarded as disqualified for giving testimony against others.

١١. الحدود فى ما دون النفس لا تقام فى حالة المرض ـ[11]

11. *Hudud* which do not entail death punishment cannot be enforced when the convict is ill.

On the Effect of *Shubhah*

١٢. اذا امتنع وجوب القصاص للشبهة ، وجبت الدية فى ماله ـ[12]

12. When due to the presence of *shubhah* it becomes impossible to enforce *qisas*, *diyah* must be paid out of the property of the convict.

١٣. الأموال تثبت بالشبهات ـ[13]

13. Financial obligations are enforced even in the presence of *shubhah*.

On the *Hadd* of *Qadhf*

١٤. من قذف حيا ثم مات ، لا يقام عليه حد القذف ـ[14]

14. The *hadd* of *qadhf* is not enforced on the one committing *qadhf* against a living person who dies following the allegation (*qadhf*).

١٥. من قذف ميتا ، يلزمه الحد ـ[15]

[11]Ibid., 9:84.
[12]Ibid., 9:72. However, in the absence of *shubhah*, *qatl-e-amd* attracts only the *qisas* punishment and *diyat* can be imposed on the murderer only as a result of a compromise between the legal heirs of the victim and the murderer with the mutual consent of both parties. In such case, the *diyah* is paid only by the murderer and his *'aqulah* is absolved from sharing his liability (Ibid., 9:72).
[13]Ibid., 9:85. Thus, a *ta'zir* crime is also proved in the presence of *shubhah* (Kasani, *Bada'i' al-Sana'i'*, 9:274) because the *ta'zir* crimes, like financial obligations, relate to the right of individual.
[14]Sarakhsi, *al-Mabsut*, 9:55. This rule applies where the one against whom the allegation of *zina* was made dies before making a complaint against the calumniator and even he dies after making the complaint. In the former case, only the *maqdhuf* had the right to file a complaint and as he died without doing so, the case ends with that. In the second case, even when the *maqdhuf* dies after making the complaint, the case ends because the law deems it a right of God, not of the *maqdhuf*; hence, it cannot be inherited by his legal heirs (Kasani, *Bada'i' al-Sana'i'*, 9:250).

15. The *hadd* of *qadhf* is enforced on the one who commits *qadhf* against a dead person.

١٦. الحاكى للقذف عن غيره لا يكون قاذفا ـ[١٦]

16. The narrator of the *qadhf* of another person does not thereby commit *qadhf*.

On the *Hadd* of *Zina*

١٧. الزنا فعل يختلف باختلاف المحل والمكان والزمان ؛ و ما لم يجتمع الشهود الأربعة على فعل واحد ، لا يثبت ذلک عند الامام ـ[١٧]

17. *Zina* is an act which varies for different subjects in different places and times; hence, unless the four witnesses agree on one act, it is not proved before the ruler.

١٨. الزنا ليس الا وطء متعرعن العقد والملک وشبههما ـ[١٨]

18. *Zina* is nothing but intercourse in the absence of the contract [of marriage], or ownership [of the slave-girl] or the form of any of them.

١٩. ان مكنت نفسها من فاعل لم يأثم ولم يحرج ، فلا يلزمها الحد ـ[١٩]

19. If the woman allows a person to commit intercourse with her who does not thereby commit sin or is not guilty, she is [also] not liable to *hadd*.

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[15]Sarakhsi, *al-Mabsut*, 9:55. This is because accusing his death without ever punished for committing *zina* proves his chastity (*ihsan*) and accusing a chaste Muslim amounts to *qadhf*. In this case his living heirs are aggrieved persons and as such they have the right to file complaint (Ibid., 9:130).

[16]Ibid., 9:76. If Mr. A says that Mr. B alleged Mr. C of having committed *zina*, A is a reporter and his 'reporting' does not make him liable for the *hadd* of *qadhf*. On the other hand, if Mr. A, believing the allegation of Mr. B against Mr. C as true, informs someone else saying: 'Mr. C committed *zina*', this is not mere report and it attracts the *hadd* of *qadhf*. Sarakhsi gives this principle while explaining the rule that although *shahadah 'ala al-shahadah* does not prove the crime of *zina*, the reporters of the original testimony are not liable for the punishment of *qadhf* even if original witnesses shall be liable for the *hadd* of *qadhf* if their number is reduced from four (See Principle no 45 below).

[17]Ibid., 9:69.

[18]Ibid., 9:62.

[19] Ibid.

٢٠. المعتبرحال [الزانى والزانية] فيما يقام من العقوبة بعد تقررالسبب۔[20]

20. When the cause of the punishment is established, the legal status of the couple is considered for the purpose of imposing the punishment.

٢١. المباشرللفعل هوالرجل ، والمرأة تابعة ۔[21]

21. The act of intercourse is ascribed to the man and the woman acts as a subsidiary.

٢٢. ان لم يكن اصل الفعل زنا فهى لا تصيرزانية ، لأن ثبوت التبع بثبوت الأصل۔[22]

22. If the primary act is not *zina*, she does not become *zaniyah* because the subsidiary act is proved only when the primary act is proved.

٢٣. الزنا فعلان من الرجل والمرءة ، وانما يقام الحد على كل واحد منهما بفعلہ۔[23]

Zina comprises two separate acts: one by the man and the other by the woman; and each one of them is punished for his or her own act.

٢٤. قولنا (ان الزنا فعلان) يعنى من حيث الحكم ، فاما فى الحقيقة فالفعل واحد۔ ولهذا لو تمكنت الشبهة من احد الجانبين ، يصيرذلک الشبهة فى اسقاط الحد عن الآخر۔[24]

When we say: "*Zina* comprises two separate acts," we mean: for the purpose of legal consequences. Otherwise, in reality, it is one act. Hence, if *shubhah* becomes the obstacle for enforcing the punishment on one party, it also becomes *shubhah* for saving the other party from the punishment.

[20] Ibid., 9:63
[21] Ibid., 9:62 Hence, if the man is not liable for the *hadd* punishment of *zina*, his woman partner is also saved from this punishment. This is explained by the principles which are corollaries of this basic principle.
[22] Ibid.
[23] Ibid., 9:77. This is an explanation of the legal principle that everyone is punished for his/her own wrong.
[24] Ibid.

٢٥. زنا المكرَهة لا يوجب حد الزناعليها بحالٍ۔[٢٥]

24. *Zina* with a woman who is coerced does not make her liable for *hadd* under any circumstances.

٢٦. لا شركة للمرءة فى الفعل اذا كانت مكرَهة ۔[٢٦]

25. When the woman is coerced, she has no share in the act [of *zina*].

٢٧. الوطء فى غيرالملک لا ينفک عن عقوبة أوغرامة ۔[٢٧]

26. Intercourse without lawful ownership must have either of two consequences: punishment or dower.

On Resident and Alien Non-Muslims

٢٨. الكفارلا يخاطبون بالشرائع وما هو خالص حق الله تعالى ۔[٢٨]

27. Religious obligations and pure rights of Allah are not imposed on non-Muslims.

٢٩. معنى قولنا (الكفارلا يخاطبون بالشرائع) : العبادات التى تتبنى على الاسلام ۔ فاما الحرمات ، فثابتة فى حقهم ۔[٢٩]

[25] Ibid. This is the rule even if the coercion (*ikrah*) was imperfect (*naqis*), as explicitly asserted by Kasani (*Bada'i' al-Sana'i'*, 10:109). If a man is coerced to commit *zina*, the *hadd* punishment cannot be imposed on him but only if *ikrah* was complete (*tamm*), as imperfect coercion will not suspend this punishment for him (Ibid.). This distinction again is based on the principle mentioned above that *zina* is primarily ascribed to man and that woman is deemed facilitator.

[26]Sarakhsi, *al-Mabsut*, 9:77. This is very important principle for the purpose of ascertaining the nature of the so-called *marital rape* from the perspective of Islamic law. The spouses act as "partners" in sexual intercourse and here the principle of law says that when she is coerced she is not a partner; hence, the husband must not commit sexual intercourse with his wife without her consent. However, to call it "rape" and entail criminal liability for the husband goes much beyond what this principle means. The very purpose of the contract of marriage is to allow sexual intercourse; hence, the presence of consent is legally presumed which is enough for negating criminal liability. What is meant here is simply that husband should not coerce wife to sex; but *marital rape* is an oxymoron from the perspective of Islamic law.

[27]Ibid., 9:86. Thus, where the *hadd* punishment cannot be enforced because of the presence of *shubhah*, dower must be imposed on the man.

[28]Ibid., 9:64. This becomes the basis for recognizing some kind of "personal law" for non-Muslim inhabitants of the Muslim territory.

The meaning of our statement: "Religious obligations are not imposed on non-Muslims" is: rituals which are built upon Islam. As far as the prohibitions are concerned, they are established against them.

٣٠. المستأمن ملتزم لحقوق العباد ـ[٣٠]

28. The alien undertakes to fulfill the rights of individuals.

٣١. المستأمن ما التزم شيئا من حقوق الله تعالى ـ[٣١]

29. The alien does not undertake fulfilling any of the rights of Allah.

٣٢. الربا مستثنى من كل عهد ـ[٣٢]

30. *Riba* has been excluded from every treaty.

٣٣. حد الزنا يقام على اهل الذمة ـــ لأن الذمى من اهل دارنا وملتزم احكامنا فيما يرجع الى المعاملات ـ[٣٣]

31. The *hadd* of *zina* is imposed on the peope of *dhimmah*… because *dhimmi* is among the people of our territory and has undertaken to abide by our laws in matters other than worship.

٣٤. من كان من اهل دارنا فهوتحت يد الامام حقيقةً وحكماً ، حتى يمنعه من الرجوع الى دارالحرب ، فيقيم عليه الحد ايضاً ـ[٣٤]

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[29] Ibid. Hence, *hadd* punishments are imposed on them, except where an act punishable with *hadd* is deemed permissible by the religion of the non-Muslims, such as drinking wine.

[30]Sarakhsi, *al-Mabsut*, 9:128. As such, the *hadd* of *qadhf* can be imposed on aliens because it also involves the right of individual even if the right of God is predominant in it (Ibid., 9:64). The same is *a priori* true of the *qisas* punishment because the right of individual is predominant in it (Ibid.).

[31]Ibid., 9:64. Thus, the *hudud* punishments, other than the *hadd* of *qadhf*, are not enforced on him.

[32] Ibid. This cardinal principle of Islamic law means that although Muslims are bound to fulfill the treaty obligations towards non-Muslims, they are not permitted to accept a condition about the payment of *riba* (interest) and that every such condition in a treaty is null and void for Muslims. Under no condition whatsoever shall interest be permitted in Muslim territory. This, then, becomes one of the least essentials for declaring a territory as *Dar al-Islam*. The Prophet (upon him blessings and peace), for instance, accepted other conditions which the people of Ta'if laid down for submitting to the rule of Muslims, except the condition of permitting *riba*. Similarly, one of the reasons for the expulsion of the Jews of Khaybar by 'Umar (God be pleased with him) was that they indulged in interest-bearing transactions.

[33]Ibid., 9:65.

32. The one who is from among the people of our territory is under the control of the ruler, physically as well as legally, so that he can stop him from going to a foreign territory; hence, he can impose *hadd* on him.

٣٥. [المستأمن] ليس تحت يدالامام حكماً ، حتى لا يمنعه من الرجوع الى دارالحرب ـ[٣٥]

33. The alien is not legally under the control of the ruler so that he cannot stop him from going back to his home territory.

On Testimony

٣٦. بمجرد الدعوى لا تقام العقوبة على أحد ـ[٣٦]

34. Punishment cannot be imposed on any person on the basis of complaint alone.

٣٧. لا شهادة للخصم ـ[٣٧]

35. The litigating party does not have the right to testify.

٣٨. ما ينكره المسلم ، لا يثبت بشهادة اهل الذمة ـ[٣٨]

36. What a Muslim denies is not provable through the testimony of *dhimmis*.

٣٩. فيما يجب حقاً لله تعالى ، تمام القضاء بالاستيفاء ـ[٣٩]

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[34] Ibid.
[35] Ibid.
[36] Ibid., 9:124.
[37] Ibid., 9:77.
[38] Ibid., 9:49.
[39] Ibid., 9:55 Thus, an accused may retract from his confession, or a witness may retract from his testimony, before the punishment is completely enforced after which the remaining punishment shall not be enforced and, as noted earlier, the accused shall not be deemed to have received the *hadd* punishment. Thus, he does not become disqualified for giving testimony (Ibid., 9:80-81).

37. In what is obligatory as the right of Allah Most High, judgment is accomplished when the sentence is enforced.

٤٠. الشهادة لا تكون حجةً موجبةً ما لم يتصل بها القضاء ـ[٤٠]

38. Testimony does not become a binding argument unless it is accompanied by judgment.

٤١. العارض بالشهود قبل القضاء ، كالمقترن بأصل الاداء ـ[٤١]

39. A legal impediment arising concerning the witnesses before the judgment has the same legal effect as the one arising at the time of the recording of testimony.

٤٢. العارض بعد القضاء ، فيما يندرئ بالشبهات ، كالعارض قبله ـ[٤٢]

40. In what is not enforced in the presence of *shubhah* [i.e., *hudud* and *qisas*], a legal impediment arising after the pronouncement of the judgment has the same effect as the one arising before such pronouncement.

٤٣. رجوع الشاهد بعد القضاء قبل الاستيفاء ، فيما يندرئ بالشبهات ، كالرجوع قبل القضاء ؛

وفيما يثبت مع الشبهات ، كالرجوع بعد الاستيفاء ـ[٤٣]

41. In what is not enforced in the presence of *shubhah* [i.e., *hudud* and *qisas*], the retraction of a witness [from his testimony] before the enforcement of punishment has the same effect as that of retraction before the pronouncement of judgment; and in what is

[40]Ibid., 9:54.
[41] Ibid. Thus, if a witness was trustworthy at the time of giving testimony but loses this characteristic because of committing a major sin after giving testimony before the enforcement of the complete punishment, his testimony becomes unacceptable and the remaining punishment must not be enforced.
[42] Ibid. This is because, as noted above, in the cases relating to rights of God, the judicial proceedings do not end with the pronouncement of the judgment but, rather, continue till the punishment is enforced completely.
[43] Ibid. The distinction stems from the basic presumption that in the rights of God, judicial proceedings continue till enforcement, while in the rights of individual judicial proceedings end with the pronouncement of the judgment.

enforced in the presence of *shubhah* [i.e., *ta'zir* and *siyasah*], it is as if he retracted after the enforcement of the punishment.

٤٤. الشهادة على الشهادة بدل ، والأبدال منصوبة للحاجة ، ولا تقام الحدود بمثله ، لأنها مبنية على الدرأ ـ[٤٤]

42. Testimony about testimony is a substitute; substitutes are accepted on the basis of need; *hudud* are not imposed on such basis because they are meant to be suspended [in such a situation].

٤٥. التعزيرغيرمسقط للشهادة ـ[٤٥]

43. *Ta'zir* punishment to a person does not disqualify him for testimony.

٤٦. الثابت بالبينة ، كالثابت باقرارالخصم ـ[٤٦]

44. What is proved through testimony is like what is proved through the confession of the other party.

٤٧. الشهادة على الزناقذف فى الحقيقة ، ولكن بتكامل العدد يتغيرحكمها ، فيصيرحجة الحد ـ[٤٧]

45. Testimony of *zina* is *qadhf* in reality; but its legal status changes when the [required] number [of witnesses] is accomplished and it becomes the proof for *hadd*.

On Delay in Filing Complaint

٤٨. حد الزنا لا يقام بحجة البينة بعد تقادم العهد ، وكذلک كل حد هومحض حق لله تعالى ـ[٤٨]

46. The *hadd* of *zina* is not enforced on the basis of testimony after a long period is lapsed; and the same is the rule for every *hadd* which is the pure right of Allah Most High.

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[44]Ibid., 9:76.
[45]Ibid., 9:80. It is only after a person is given the complete *hadd* of *qadhf* that he becomes disqualified for giving testimony in any case in future.
[46]Ibid., 9:97.
[47]Ibid., 9:104. Thus, if three witnesses give testimony but the fourth one abstains, the first three are given the punishment of *qadhf*.
[48]Ibid., 9:79. This is because the filing of a complaint after a long period creates a doubt the benefit of which goes to the accused.

٤٩. هذه الحدود تقام بالاقرار بعد تقادم العهد ـ[٤٩]

47. These *hudud* are imposed on the basis of confession even after the lapse of a long period.

Miscellaneous

٥٠. الناس أحرارفى كل شىء الا فى أربعة : فى الشهادة ، والعقل ، والحد ، والقصاص ـ[٥٠]

48. People are presumed free [not slaves]in every matter, except four: in testimony, blood-money, *hadd* and *qisas*.

ثبوت الحرية لمجهول الحال باعتبارالظاهر ، وهو ان الداردارالاسلام --- أو باعتباراستصحاب الحال من حيث ان الناس أولاد آدم وحواء عليهما السلام ، وهما كانا حرين ـ وهذا يصلح حجة لدفع الاستحقاق ، لا لاثبات الاستحقاق ـ[٥١]

Proof of the freedom of an unknown person is the apparent position as the territory is the territory of Islam… or it is on the basis of the presumption of continuity as all humans are the descendants of Adam and Hawwa', peace be on them both, and they both were free. This presumption is valid for repelling an obligation, not for creating a right.

٥١. حرمان الميراث جزاء على القتل المحظورعقوبةً ـ[٥٢]

[49] Ibid.

[50] Ibid., 9:91. As explained in the next para, the presumption of freedom is based on the presumption of continuity which the Hanafi School considers valid for negating an obligation, not for creating a right. Thus, a free person is competent to become a witness but this competence is not established by the presumption of freedom. On the same ground, in case of *qatl-e-Khata'* the presumption of freedom for a deceased is not deemed enough to entitle him to full *diyah*; because of the presence of *shubhah*, the killer shall be liable only to pay half *diyah*. Similarly, in case of *qatl-e-amd*, if a deceased is deemed free, his killer becomes liable for *qisas* punishment which again is suspended by *shubhah*. Finally, if the accused in a *hadd* case is free, he is given full punishment while a slave is given half punishment; thus, because of *shubhah* the presumption of freedom is not deemed enough for awarding the full punishment.

[51] Ibid., 9:92.

49. Deprivation from inheritance is a result of a culpable homicide as punishment.

٥٢. العاقلة لا تعقل العمد ـ[٥٣]

50. The *'aqilah* does not bear the responsibility of intentional wrong.

٥٣. الفعل فى محل مباح لا يكون سبب وجوب الضمان ـ[٥٤]

51. An act performed on a permissible subject does not become a cause for the obligation of compensation.

٥٤. المباحات تتقيد بشرط السلامة ـ[٥٥]

52. Permissible acts are restricted by the condition of harmlessness.

٥٥. أمرنا ببناء الأحكام على ماهوالظاهرالمعروف ـ[٥٦]

53. We have been ordered to build determine legal consequences on the basis of the apparent and well-known position.

٥٦. ان المخلوق من ماءالزنا له من الحرمة والعهد ما لغيره ـ[٥٧]

57. The one created from the water of *zina* has the same sanctity and protection as others have.

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[52]Ibid., 9:71. Under this principle, the killer is liable to deprivation from the inheritance of the deceased even in case of *khata'* because even in this cases he is liable to offer expiation (*kaffarah*) which is an indication of the culpability of the act. Pakistani law confines deprivation from inheritance to *'amd* and *shibh al-'amd* (Section 317 of PPC).
[53]Ibid., 9:72.
[54]Ibid., 9:71.
[55]Ibid., 9:73.
[56]Ibid., 9:78.
[57]Ibid., 9:84.

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

Ahmad Afnan Alam*

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 weighed*[58]*."*

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 problem[59]. 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 decisions[60].

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 literates[61], 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

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[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 طرزِ حکومت ہے کہ جس میں بندوں کو گنا کرتے ہیں تولا 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 years[62], and one family has solely dominated in the province of Sindh, where education is most scarce[63]. 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 Europe[67].

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 impunity[69]. 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 men[70].

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 currently[72].

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[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 disfranchised 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 elecctions (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 black[77].

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."

[77]Erin 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 crime[79].

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 nation[80]. 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 state[82].

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, beruit)
[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 structure[85], 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 rule[86].

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 attributes[87].

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

[86]Usmani, 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]

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[88] Al- Quran, *Surah Nisa', (4:135)*
[89] Al-Quran, Surah Ṭalaq, (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.fikrokhabar.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 details[92]. 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, o6/10/2016>, accessed 6 October 2016

[92] Religious ministry of Kuwait, *Musua' al fiqhiyya al-kuwaitiya,* (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 purpose 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 sprit 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 accountable[96].

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[96] Najib Ghadbian, 'Democracy or self-interest', (Harvard international review, 6 July 2003)

RIGHT TO REMAIN SILENT: COMPATIBILITY WITH SHARĪ‘AH AND POSITION IN PAKISTAN

Zishan Haider*

Abstract

Miserable situation of the rule of law and the protection of fundamental human rights are the common problems of entire Muslim world. Their misery cannot be separated from them unless they sort out certain basic points they are confused with. One of such points is whether the fair procedure towards justice is more important than the justice itself. Protection against compulsion to self-incrimination is a component of the right to fair trial, but, in fact, it is not strictly confined to the trial. It comes into consideration at the very arrest of a suspect, has enormous significance during investigation; and, after all, attracts to the court's procedure. Sunnah of the Prophet Muhammad (May peace and mercy be upon Him)[97] provides a strong shield to the accused from being compelled to incriminate him. On the basis of Holy sayings and practices of the Prophet Muhammad, Sharī‘ah promotes the right of suspects and accused.

Keywords: Fair trial, Self-incrimination, Extra-judicial confession, fundamental rights in Pakistan, Islamic law of confession, comparative study of law.

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[97] In order to maintain smoothness of the language of paper, Supplication shall not be repeated with every repetition of the Holy Name of Prophet Muhammad (ṣallallāhu ‘alaihiwasallam) but it is intended with every repetition of His Holy Name.

Introduction

To remain silent before investigating and judicial authorities and deny to answer their questions is recognised as one of the fundamental human rights. The title "right to remain silent" or "right to silence" cannot be traced out very back in the world history of legal development in respect of human rights protection. This title got prominence by and caught attention in US Supreme Court's decision in *Miranda v. Arizona*,[98] but it doesn't mean that this right has been invented thereby. The rationale behind this right is very old and considered to have its roots back in the history of the development of common law. This paper introduces the gradual growth of the concept and the rationale behind the idea of right to remain silent through centuries and in different areas as per the available references to the history.

This paper is divided into three parts. First part discusses the meaning and scope of the right to remain silent, its historical growth through centuries in Western world and the different aspects of this right. Second part discusses the approach of Islamic law on this right as to show whether it is compatible with the norms of *Sharī'ah*. This is the most important part of the paper because it is essential to investigate the *Sharī'ah* perspective regarding a modern concept or new interpretation of a right if we have to emphasise its applicability in a Muslim country, especially when that right happened to be developed in Western world. Third and the last part describes the constitutional status of "right to remain silent" in Pakistan and its applicability on statutory laws. This part also discusses the practical position of this right in legal process during the investigation of a suspect by police and trial of an accused before court or commission.

[98](1966) 384 US 436.

Western right to remain silent: growth and scope

Although the title of "right to remain silent" is not old enough but the right protected thereunder is ancient. This is to protect a person from criminal liability caused by unfair trial. Its roots can be traced out in the Latin maxim *"nemo tenetur seipsum accusare"* which means that "no one is bound to accuse himself."[99] This maxim watered the English courts to grow the trend of disapproving the practice of compelling accused to confess the guilt.[100]*Cullier v. C*[101]is one of the oldest cases on record in which this maxim was quoted. The importance of this maxim is evident by the words of Coleridge J, who said,[102]"[A] maxim of our law as settled, as important and as wise as almost any other in it."[103] Fifth Amendment of the US Constitution[104] is considered the first constitutional advancement towards the protection against compulsion to criminate oneself, providing that "[n]o person shall […] be compelled in any criminal case to be a witness against himself." By the virtue of the Fifth Amendment, courts of United States added a great contribution in exploring and expanding the concept of protection against self-incrimination.

Although the US Constitution and courts thereof had a great contribution in promotion of the protection against self-incrimination, but it is "not exclusively a US concept"[105] as already have been observed. The European Convention on Human Rights (ECHR), 1950 approved

[99] Black's Law Dictionary, 8th Ed: Garner, A. Baryan (Ed. In Chief), (App. B – Legal Maxims) p. 1737. There are other related maxims like "accusare nemo debet se, nisi coram Deo" meaning "no one is obliged to accuse himself, except before God", see p. 1703; "no one is bound to arm his adversary against himself", see ibid, p. 1037.
[100] It was held by Lord Eldon in Ex Parte Symes, [1805] 11 Ves 521 at 525 (B), that no man can be compelled to answer what has any tendency to criminate him. See also R. v. Scott, (1856), Dears & B 47, 169 ER 909.
[101]Cullier v. Cullier, (1582-1603) 78 ER 457.
[102] In R v. Scott, (1856) Dears and B CC 47 at p. 61 (A).
[103] See ibid. It is quoted by Punjab (India) High Court in Pakhar Singh v. The State, AIR 1958 P H 294, 1958 CriLJ 1084.It is also observed therein that in common law countries, the nemo tenetur principle guarantees at least five rights of the defendant in a criminal trial: (1) the right to remain silent; (2) the right not to be called to testify; (3) the right to speak to an attorney before incriminating oneself; (4) the right not to be coerced into inculpating oneself; and (5) the right not to incriminate oneself in a judicial proceeding.
[104] Amendment 5 – Trial and Punishment, Compensation for Takings; Ratified on 12/15/1791.
[105] See Berger, Mark, Europeanizing Self-Incrimination: The Right to Remain Silent in The European Court of Human Rights, Columbia Journal of European Law, (2016) vol. 12, p. 241.

protection of an accused in respect of fair trial.[106] Following the tone of two highly esteemed documents – US Constitution and ECHR, International Covenant on Civil and Political Rights (ICCPR), 1966 adopted the idea of protection against self-incrimination providing that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the [guaranty] … [n]ot to be compelled to testify against himself or to confess guilt".[107] The said provision of ICCPR resulted in a worldwide acceptance of this protection as a fundamental human right and now a clause of protection against self-incrimination can be found in many of the state constitutions that contain a chapter of fundamental rights.[108]

Miranda v. Arizona,[109]a highly appreciated and equally criticized[110] case of US Supreme Court, has an exclusively vital role in suggesting for the right to protection against self-incrimination a more attractive expression of "right to remain silent" or "right to silence". This case held that it is incumbent on Police to intimate to the suspect at the time of arrest certain rights[111] first of these being right to remain silent if he wishes so to avoid answering the questions put to him which may tend to incriminate him. This intimation of rights is frequently termed as *Mirandarule* or *Miranda warning* which is one aspect of the right to remain silent.[112] The right includes the right to deny answers against incriminating question throughout the legal process – from arrest to the final decision of the court. Hence, it is the duty of the state

[106]See Art. 6 of ECHR, 1950.
[107] Art. 14(3)(g) of ICCPR, 1966.
[108] For example, Art. 13(2) of the Constitution of Islamic Republic of Pakistan, 1973; Art.20 (3) of the Indian Constitution, 1949; and Constitutions of many other countries.
[109](1966) 384 US 436.
[110] Miranda's case is one of the most criticized and most misunderstood criminal procedure cases in American legal history, see Yale Kamisar, How Earl Warren's Twenty-Two Years in Law Enforcement Affected his Work as Chief Justice, 3 Ohio Study Journal of Criminal Law, 11, 26 (2005).
[111]A criminal suspect in police custody must be informed of certain constitutional rights before being interrogated, viz.,(i) the Suspect must be advised of the right to remain silent, (ii) the right to have an attorney present during questioning, and (iii)the right to have an attorney appointed if the suspect cannot afford one. See Miranda v. Arizona,(1966) 384 US 436.
[112]R v. Director of Serious Fraud Office, ex parte Smith, [1993] AC 1, at 30

machinery to provide the suspect or accused an atmosphere where s/he feels free from compulsion to confess the guilt.

The rationale behind excluding self-incriminating statements obtained through torture and violence during investigation by Police is that confessions obtained through torture or force may, most probably, be untrustworthy; because a suspect, obviously, would wish to give the statement according to the desires of Police just to get rid of the pain and mistreatment.[113] It is not only torture and violence which makes the confession unreliable but a confession is also unaccredited if it is based on some improper inducement, threat or promise, or if it was made to a Police Officer, or was made at a time when the accused was in the custody of a Police Officer.[114] Thus it is better to ensure right of accused to silence to avoid all above mentioned malpractices and consequently avoid miscarriage of justice.[115] The idea not only protects innocents from false confessions under compulsion, but also protects a guilty person from aggravating his offense by misrepresentation of the incident either mistakenly or due to the stress or fear. The protection would be active not only during investigation in Police custody, but also during trial in the court.[116]

Another argument supporting the idea of right to silence is that punishment without sufficiently proving the guilt is a barbarous act which must have no place in a civilised society. This argument is based on the fundamental right under presumption of innocence as provided in

[113] See In re: Gault, 387 US 1, 47 (1966) where it was held that "the privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."

[114] See cases Abdul Ghani v. E, 1931 LJ 63: 133 IC 55; IllahiBaksh v. E, 16 PR 1886 Cr; Rambit v. E, 65 IC 849: 1922 A 24; In re:B Titus, 1941 M 720; Sidheswar Nath v. E, 56 A 730; In re: ArunchalaReddi, 55 M 717: 138 IC 240; Arizona v. Fulminante, 499 US 279, 285–86 (1991).

[115] Saunders v. United Kingdom, (1997) 23 EHRR 313.

[116] US Supreme Court held that defendant's right not to testify at trial is justified because of his "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him". See Wilson v. US, (1893) 149 US 60, at 66.

Universal Declaration of Human Rights (UDHR) and adopted by ECHR[117] and ICCPR[118] that "[e]everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law…".[119] If one looks deeply into the whole debate, he may conclude that a very basic doctrine of the "presumption of innocence" is providing back to this right, like it works behind many rules and laws regarding procedural justice. Since the accused is presumed innocent, he would have to remain silent and let the state machinery prove the accusation against him through independent collection of evidence. That's why the burden of proof lies on the prosecution. A maxim has also been under practice of English judges for centuries which read as: "*Better that ten guilty persons escape, than that one innocent suffer.*" William Blackstone is thought to be the author of this maxim,[120] that's why it is also known as "Blackstone's ratio". On the basis of this ratio, a practice developed that "benefit of doubt is to be given to accused". It is a rule of prudence founded on public policy as the consequences of an erroneous conviction are much more serious both to the accused and society than the consequences of an erroneous acquittal.[121] This practice has its strict application in criminal prosecutions which causes the judges to require high degree of proof for convicting accused and mere preponderance of evidence is not enough to sustain a verdict like that is in civil cases.[122]

Right to remain silent empowers the accused, to some extents at least, to "exert some control over the course of the interrogation"[123] and aims to protect him from the likelihood of false confessions and subsequently unjust convictions. However, the possibility of this right to be

[117] Art. 6 (2) of ECHR, 1950.
[118] Art. 14 (2) of ICCPR, 1966.
[119] Art. 11 (1) of UDHR, 1948.
[120]SeeBest, WM, The Principles of the Law of Evidence**,** 5th Ed, London, 1870, § 49, 440; see also Muhammad v. E, (1922) 25 CrLJ 938; per Holroyd, J in Sarah Hobseon's case, 1 Lewin CC 261; and In Re: TaritKanti, AIR 1918 Cal 988: 45 IC 338.
[121] Best, The Principles of the Law of Evidence,§ 95.
[122]Edara Venkata Rao v. EdaraVenkayya, 1943 M 38(2): 207 IC 163.
[123]Moran v. Burbine, (1986) 475 US 412, 426.

abused by cunning criminals cannot be excluded.[124] Suggestions have also been proposed by some experts that the substance of the *Miranda* warnings should be reconsidered.[125]In England the police have a legal duty to inform the accused of his privilege against self-incrimination.[126]General Assembly of the United Nations adopted a special convention on this topic titled as *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*[127] which placed special emphasis on the definitions of "torture" as well as "cruel, inhuman or degrading treatment or punishment" under Articles 1 and 16 respectively. These two Articles read as under:

Article 1. *(1) For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

Article 16. *(1). Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In*

[124] Stephanos Bibas, The Right to Remain Silent Helps Only The Guilty, 88 IOWA Law Review, vol. 421, 2003, p. 421.
[125] See Godsey, Mark A, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, Minnesota Law Review, vol. 90, 2006 pp. 781–825.
[126]Under the provisions of Police and Criminal Evidence Act, 1984.
[127] Adopted on 10 December 1984 and came into force on 26 June 1987.

particular, the obligations contained in Article 10, 11 , 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

***(**2). The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.*

In 2012, the General Assembly also passed a resolution on *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*.[128][129] Guideline 3[130] of this Convention reads as: "The states should introduce measures to promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent."[131]

Compatibility with *Sharī'ah*

The Concern of this part is to find out answer to the question whether the right to remain silent, as contemplated and demonstrated by Western law and embodied in International Instruments, is compatible with *Sharī'ah*? When one would have to lay stress on applicability of certain right in a Muslim society or Muslim majority area, the check of the compatibility of that right with *Shai'ah* becomes very important because Muslims usually show reluctance in adopting a right, especially a legal one, unless *Sharī'ah* confirms the same. Perspective of *Sharī'ah* shall be traced out here by discussing the relevant portion of the Holy Qur'ān, the adjudications of Prophet Muhammad incases put before Him and by analysing the practices and opinions of

[128] www.unodc.org/documents/justice-and-prison-reform/UN_principles_andguidlines_ on_access_to_legal_aid.pdf last accessed 20.011 2018

[130] Titled as: "Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence."

[131] See Article 43 of United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012.

Muslim jurists. The Holy Qur'ān say, "O ye who believe!stand out firmly for justice, as witnesses to Allāh, even as against yourselves, or your parents, or your kin, and whether it be [against] rich or poor…"[132]Now what is meant in this verse by the phrase "even as against yourselves"? Has this verse made mandatory for Muslims to be witness against themselves or to confess the guilt? It is also important to investigate that can an authority like *qāḍī*or *'āmir* compel a suspect to confess the guilt?

Confession and its Retraction: Abūal-Mandhar– MoulāAbūZar– reported that AbūUmayyah narrated that a thief was brought before the Holy Prophet and he confessed to have committed theft but he was not in possession of the stolen property. On this the Prophet said that he thinks he has not committed theft. The Prophet repeated this twice but the man each time replied, why not, he did commit theft. The Prophet gave verdict of amputation of hand and then said to the thief, "Say, I beg forgiveness from Allāh and make woe not to repeat the act." Then Prophet said, "May Allāh accept his repentance, Allāh accept his repentance."[133]

The practice of Prophet Muhammad is very clear in respect of confession of guilt in a case of confession by a person named Mā'iz.[134]Mā'iz came forward to the Holy Prophet and confessed that he has committed adultery. The Holy Prophet ignored him by turning His face to other side but he remained confessing until he confessed four times. Even after his confession four times, the Prophet asked Mā'izcertain questions to get satisfaction regarding soundness of his mind. After all this, the Prophet ordered for execution of *ḥadd* punishment.[135] According to another chain, it is reported that the Holy Prophet sent someone to his folks to enquire into his

[132]Al-Qur'ān, 4:135 (as translation by Abdullah Yusus Ali).
[133]Al-Bayhiqī, Abū Bakr, Aḥmad bin Ḥussain, Al-Sunan al-Kubrā(hereinafter Al-Bayhiqī), Beirut, 2003, Ḥadīth no. 17275-6.
[134] 'uraib bin Malik famous as Ma'iz.
[135] SeeAl-Bukhārī, Muhammad bin Ismā'īl, Al-Jāmi' Al-Musnad Al-Ṣaḥīḥ Al-Mukhtaṣar (hereinafter Al-Bukhārī), Beirut, 1422 AH, vol. 8, pp. 165, 167, Ḥadīth no. ٦٨١٥, ٦٨٢٥.

mental health.[136]A point worth focusing in this case is that even after the Prophet have inquired about the soundness of confessor's mind, He further investigated the offence of adultery asking the confessor certain questions, like; (*i*) may be you have just kissed her, (*ii*) or just watched her body, (*iii*) or just touched her body. The confessor didn't retracted so Prophet finally asked him, "Do you really know what constitutes the offence of *zinā* (adultery)?" After all this satisfaction, the Prophet gave order for his execution under the *ḥadd* of *rajam* (stoning to death).[137]This is the best evidence of the fact that Prophet Muhammad considered the confession as a very serious matter and took great care in basing on it the punishment of *ḥadd*. Confession *per se* has not been considered the proof of offence, rather it was relied after getting satisfaction regarding the truthfulness of confessor's statement by questioning him and the soundness of his mind.

The story of the confession of Mā'izhas another aspect that is found in the narration by Ibn Shahāb (one of the narrators) who said "One who had heard Jābir bin 'Abdullah saying this, informed me thus: "I was one of those who stoned him. We stoned him at the place of prayer (either that of Eid or a funeral). When the stones hurt him, he ran away. We caught him in the *ḥarrah* and stoned him (to death)".[138] The Holy Prophet is reported to have argued on this chasing and catching him again and have him stoned, "Why didn't you people let him go? Perhaps, he begs forgiveness from Allāh."[139]This argument shows that He have regarded this try to escape as a retraction of confessionary statement. According to ImāmShāfi'ī, if a man runs away when stones are flung at him, stoning should be stopped, and if the offender contradicts his confession, he should be let off, but if he sticks to his words, then he should be stoned again until

[136]AbūDā'ūd, Al-Sajistānī, Sulaymān bin Al-Ash'ath, SunanAbīDā'ūd (hereinafter AbūDā'ūd), Beirut, 2009, vol. 4, p. 146, Ḥadīth no. 4421; Mālik bin Anas, Al-Aṣbaḥī, Imām, Al-Muwaṭṭā, Abū Dhabi, 2004, vol. 5, p. 1196, Ḥadīth no. 3036.
[137]Al-Bukhārī, vol. 8, p. 167, Ḥadīth no. 6824.
[138]Ibid. Ḥadīth no. 6826.
[139] Ibn-i-AbīShaybah, Abū Bakr, 'Abdullāh bin Muhammad, Al-Muṣannaffī al-Aḥadīthwa al-Āthār (hereinafter Ibn-i-AbīShaybah), Riyadh, 1409 AH, vol. 2, p. 161, Ḥadīth no. 648.

he dies. Thus according to AbūḤanīfah, Shāfi'ī and others, a confection loses its power if retracted by the confessor.[140] Names of Caliph Abū Bakr and Umar are also given by Al-Māwardī to have the same opinion.[141]However, ImāmMālikdoes not subscribe to this opinion and says that a person who has made confession of his offence, *i.e.,zinā,*should be stoned to death even if he is to be chased.

Compulsion to Self-incrimination: There arises a question whether Muslims are compelled to incriminate themselves and duty bound to confess their crimes and offences? The same story of Mā'iz guides us in this regard. The part of his story relevant to this question is that after when he has been executed, the Prophet addressing another person named Hazāl said, "Verily, it would have been better for you, if you had concealed it".[142] Ibn-i-Munkadir narrated that Hazāl had asked Mā'iz to go to the Holy Prophet and to tell him the offence that he had committed.[143] It shows that it was not an ideal situation for the Holy Prophet to execute someone on his sin if there be a tendency to let Him avoided punishment by sinner's remaining silent on that.

The phrase "even if it be against yourself" as used in the above referred verse of Sūrah Al-Nisā[144]of the Holy Qur'ān, relates to the confession or admission of owing rights of others while appearing as a witness for them.[145] This is held obligatory upon Muslims under this verse when they were asked to appear as witness by the party.[146]Ibn-i-Kathīr argued under this verse that a person when called in the court and asked to answer a question, he must say truth even if

[140]Al-Māwardī, Ab al-Ḥasan, Alī bin Muhammad, Al-Ḥāwī Al-Kabīr, Beirut, 1999, vol. 13, p. 210.
[141]Ibid.
[142]AbūDā'ūd, vol. 4, p. 134, Ḥadīth no. 4377; Ibn-i-AbīShaybah, Ḥadīth no. 28784.
[143]'Abd al-Razzāq bin Humām, Al-San'ānī, Al-Ḥumairī, Al-Muṣannaf (hereinafter 'Abd al-Razzāq), Beirut, 1413 AH, vol. 7, p. 322, Ḥadīth no. 13342; the full version of story is that Ma'iz first went to Abu Bakr r.a and 'Umar bin Al-Khattab one by one and asked them that what should he do? They both advised him to remain silent and beg forgiveness of that sin from Allah.
[144]Supra Note 35.
[145] Ibn-i-Qayyim, Al-Jauzīyah, Muhammad bin Abī Bakr, Tafsīr al-Qur'ān al-Karīm, Beirut, 1410 AH, Vol. 1, p. 178.
[146]Al-Jaṣṣāṣ, Aḥmad bin 'Alī, Abū Bakr al-Rāzī, Aḥkām al-Qur'ān, Beirut, 1994, vol. ٣, p. ٢٧٢.

there be his loss in disposing the truth,[147] because such person is supposed to have belief that if he said truth due to the "fear of Allāh, He prepares a way out"[148] for him and that "if someone puts his trust in Allāh, sufficient is (Allāh) for him" and "will surely accomplish his purpose."[149]Islam asks its followers to let themselves free of liabilities regarding the rights of others and if they owe someone, they should return to the owner what is due to him, even if the judge decreed in their favour but they know that the right actually belongs to someone else.[150]

Hence, the above mentioned verse of Sūrah Al-Nisā gives the idea that justice is not something to be demanded from others only, instead, it should also be extracted from one's own self. It means that one should say nothing against what is true and just, even when one has to declare something against himself, even if such an action is likely to bring personal loss upon him, because this loss is insignificant, tiny and transitory[151] as compared to the loss of the life hereafter. Whether all this mean that some authorities including police, magistrates, and judges can be allowed to compel a person to confess before them or it places merely a moral obligation? This question may be understood after some necessary discussions as follow.

Benefit of Doubt and Burden of Proof: *Sharī'ah* recognised that the benefit of doubt to be given to accused in cases of *ḥadd*. Blackstone ration of "ten guilty men" seems to have been reproduced in legal history of the world when it is seen in comparison with the instruction given to Muslims by Prophet Muhammad to go, as far as possible, to avoid the execution of *ḥadd* punishments. He the Prophet said, "Avert the legal penalties from the Muslims as much as

[147]Ibn-i-Kathīr, Abul-Fida, Ismā'īl bin 'Umar bin Kathīr, Tafsīr al-Qur'ān al-'Aẓīm, 1999, vol. II, p. 433.
[148] Qur'ān, ٦٥: 2.
[149]ibid, ٦٥: 3.
[150]It is reported that Umm-i-Salamah said: "The Messenger of Allāh said: I am only a human and you refer your disputes to me, and some of you may be more eloquent in arguing than others, so I pass judgment according to what I hear. If I rule in favor of someone at the expense of his brother's rights, he should not take anything from him, for I have only apportioned him a piece of the Fire." See Abū Dā'ūd, vol. 3, p. 301, Ḥadīth no. 3583.
[151]Uthmānī, Muhammad Shafī', Mufti, Ma'ārif al-Qur'ān, (Trans. Eng: Ḥasan 'Askarī& Muhammad Shamīm, Revised by J. Mufti Taqi Usmani), Karachi, vol. 2, p. 603.

possible, if he has a way out then leave him to his way, for if the *imām* makes a mistake in forgiving one it would be better than making a mistake in punishing him."[152] At another place it is mentioned that "avoid the execution of *ḥadd* if there be any doubt".[153] It is quite clear from analysing these sayings of the Holy Prophet that benefit of doubt must be given to the accused in criminal matters falling under the domain of *ḥadd* at least, as He specifically mentioned it in purview of *ḥadd* cases. These sayings are also invoking, successfully, the idea of presumption of innocence. One of the basic maxims of Islamic jurisprudence is that "the freedom from liability is a fundamental principle".[154] The maxim eloquently talks about the "presumption of innocence" that the neutral status of every human being is freedom from liability and he who accuses someone, must have to prove his accusation.[155]We have to investigate here *firstly,* whether the burden of proof rests, exclusively, on the prosecution or places some liability on the accused too? *Secondly* that has the *Islamic law* created any difference between civil and criminal cases as to place burden of proof?

The Islamic law on burden of proof is based on the saying of the Holy Prophet that "the proof is due from *mudda'ī* (the claimant) and the oath is due from *mudda'ā'alayh* (one against whom the claim has been made)"[156] who is "the party who denies".[157] Here *mudda'ī* is held liable to prove his case whereas *mudda'ā'alayh* is asked to take oath. It means that the party to dispute which is alleging something has to prove it and if he fails to prove the allegation then

[152] Al-Tirmidhī, Abū 'Īsā, Muhammad bin 'Īsā, Sunan Al-Tirmidhī(hereinafter Al-Tirmidhī), Beirut, 1998, vol. III, p. 85, Ḥadīth no. 1424; Ibn-i-AbīShaybah, vol. V, p. 512, Ḥadīth no. 28502.
[153]Al-Bayhiqī, vol. VIII, p. 54, Ḥadīth no. 15922.
[154] The Arabic text of the maxim is "Al-aṣlubarā't al-ḍimmah", see Al-Siyūṭī, Al-Ashbāhwa al-Naẓā'ir, p. 53; see alsoAl-Subkī, Al-Ashbāhwal-Naẓā'ir, p. 218; Ibn-i-Nujaim, Al-Ashbāhwal-Naẓā'ir, p. 50; and Majallah, Article 8.
[155]See Al-Sarkhasī, Al-Mabsūṭ, Beirut, 1993, vol. XVII, p. 28.
[156]Al-Tirmidhī, vol. III, p. 19, Ḥadīth nos. 1341-2.
[157]Al-Bayhiqī, vol. X, p. 327, Ḥadīth no. 21201.

opponent, *i.e.* the denier of allegation, is to take oath in his favour.[158]Imām Ghazālī says that this pattern is adopted by *Sharī'ah* on logical ground and cannot be rotated.[159]Let's find out what are these logical grounds?

The Terms *mudda'ī* and *mudda'ā'alayh* are comprehensive and both are used in *Sharī'ah* for the opposite parties in a legal case notwithstanding the description of the case being either civil or criminal. So the term *mudda'ī* may include a plaintiff (in a civil case), the prosecution (in a criminal case); and also applicant and petitioner whatever title the use. Likewise, a *mudda'ā'alayh* may also be used for a defendant of any case including an accused. Since it is clear that we don't find the difference between the terms *mudda'ā'alayh* in respect of its being defendant in either of the cases, we have to trace out whether the *mudda'ā'alay h*as used in the saying of the Holy Prophet giving the rule regarding burden of proof[160] is also to be applied on both civil and criminal cases without discrimination or it is different in both type of cases? Keeping in view prior discussions it can be understood that the rule is not attracted to the case of *ḥadd*, because the benefit of doubt was asked by the Holy Prophet[161]to be given to accused which requires to simply give advantage of unsuccessfulness of the *mudda'ī* to sufficiently prove his allegation. Hence, an accused in the *ḥudūd* cases cannot be compelled to take oath in order to get free from liability. Thus, it indicates that requiring the *mudda'ī* to take oath is not unavertable rule to the extent of *ḥudūd* cases, at least, on which this rule is not applicable. Imām Abū Ḥanīfah's opinion is that there are certain cases where rule of oath is not attracted.

These are the cases where subject-meter is something which cannot be attributed as wealth nor the wealth is claimed therein, *e.g.*;*nikāḥ* (marriage), *ṭalāq* (divorce), *raj'at* (

[158]Ibn al-Humām, Muhammad bin 'Abd al-Wahid, Fatḥ al-Qadīr, Beirut, vol. 8, p. 159; see alsoAl-Māwardī, Al-Ḥāwī Al-Kabīr, vol. 17, p. 69.
[159] Al-Ghazālī, AbūḤāmid, Muhammad bin Muhammad, Al-Mustaṣfā, Beirut, 1993, p. 162.
[160] Supra Notes 59 and 60.
[161]Supra Note 55 and 56.

repudiation of divorce), *'īlā'* (annulment),[162] *nasab* (paternity), *riqq* (slavery),*istīlād* (want of child), *qadhaf* (perjury), *etc*. However, according to ImāmShafi'ī, every right which can be claimed and suit thereof is maintainable, oath is mandatory on the denier in case the *muddaʿī* failed to prove; and it is equally applied on cases either involving wealth (gift, debt, etc.) or other than wealth like *qiṣāṣ*, *nikāh*, *ṭalāq*, *'itq*(freedom of slave), *nasab*, etc.[163] Al-Māwardī argued that demand of oath from defendant shall be determined watching the nature of right alleged to have been infringed. If claim involved infringement of pure right of human, oath shall be necessary, as in aforementioned cases. In case of the infringement of pure right of Allāh, oath shall not be necessary, like in case of *zinā*. If infringed right was a mix right of Allāh and human, like in theft liable to *ḥadd*, then oath would be called for the sake of recovering property but *ḥadd* could not be executed if defendant denies to take oath.[164]

Torturing the Accused (Ḍarb al-Muttahim: It is reported[165] that a person who confessed the guilt of theft was brought before Caliph 'Umar bin Al-Khaṭṭāb who, watching the sings of torture on the confessor's hands inquired the matter. In inquiry, the confessor retracted his confession and said, "By Allāh, I'm not a thief yet I'm compelled to confess." Caliph 'Umar set that person free and didn't amputate his hand. Al-Sarkhasī, a great Ḥanafī jurist, says that "if a person confessed to have committed theft in the consequence of punishment, torture, threat of detention, etc., his confession is invalid."[166] Al-Sarkhasī supported his view quoting the statement of Shurayḥ – a famous *qāḍī*in early Muslim state appointed by Caliph 'Umar as Chief *Qāḍī*– that he is reported to have made remarks on this issue and said, "Detention is abhorrence; and threat is

[162] It is annulment of a marriage after husband's sworn testimony to have refrained from marital intercourse for a period of at least four months. See Hans Wehr, A Dictionary of Modern Written Arabic, 3rd Ed, New York, 1976, p. 1101.
[163]Al-Māwardī, Al-Ḥāwī Al-Kabīr, vol. 17, p. 146.
[164]Ibid, p. 147.
[165]ʿAbd al-Razzāq, vol. 10, p. 193, Ḥadīth no. 18793.
[166]Al-Sarkhasī, Al-Mabsūṭ, vol. 9, p. 184.

abhorrence; and imprisonment is abhorrence; and torture is abhorrence."[167] This is because the confession is admissible only when it appears to be truthful being voluntary, but it will obviously be false if not voluntary as made in the result of inducement or threat. Al-Sarkhasī said, "Some of the later jurists of Ḥanafī school opined in favour of the admissibility of confession attained by using force because in our time thieves do not confess voluntarily." However, Ḥasan bin Ziyād was asked by a person from government if torturing the accused of theft were allowed under *Sharī'ah*, to extract confession? He allowed and said that torture must not be such to give cuts on body or exposing bone. Nevertheless he was not confident, so right after allowing the torture changed his opinion and followed the person and reached the door of the governor. He found that they just recovered the stolen property from accused on basis of confession extracted through torture. On this, Ḥasan blurted, 'I never witnessed such an amalgamation of justice and injustice."[168]

Qarāfī, a famous Mālikī jurist, allowed torture for accused if there be a strong accusation against him, but also held that if accused confessed while he be tortured then *qāḍī* shall inquire the matter and if found that the confession was merely the outcome of violence or accused retracted during inquiry than confession shall lose its admissibility. However, he further held that *qāḍī* may base the decree on such confession but attributed such a decree extremely abominable.[169] Al-Shāmī, quoting from Abū Bakr A'mash, said that if allegation was denied by *mudda'ā'alayh* then authorities were to find some presumption, like; possession of stolen

[167]'Abd al-Razzāq, vol. 10, p. 193, Ḥadīth no. 18791; Ibn-i-AbīShaybah, vol. 5, p. 493.
[168]Al-Sarkhasī, Al-Mabsūṭ, vol. 9, p. 184.
[169]Qarāfī, Abul-'Abbās, Ahmad bin Idrīs, Al-Dhakhirah, Beirut, 1994, vol. 10, p. 41.

property or joining company of thieves and persons of immoral characters, etc. If there be a strong presumption then the torture can be devised for the sake of extracting information.[170]

Keeping all the given opinions in view, one may conclude that even those jurists who allowed the torture for accused (*ḍarb al-muttahim*) admitted that no authority could be found in the primary sources of *Sharī'ah* on admissibility of a confession lead by torture and violence to accused. Some jurists allowed it under the head of *siyāsah* (political basis) and didn't consider it an ideal situation to extract information by using force. Furthermore, it is also apparent that the question of torture has only been discussed in the case of theft and allowed torture only for recovery of the stolen property. However, all jurists are clear on the point that the execution of *ḥadd* punishment allocated to commission of theft, *i.e.*amputation of hand from wrist, cannot be based on such confessions and subsequent recovery of property. Another important point pertinent to mention here is that the abominable and abhorrent act of violence has only been embraced for the sake of recovery of the rights of some other, *i.e.* stolen property. That's why Qarāfī allowed torture on the condition of existing strong and convincing accusation.

Position of right to remain silent in Pakistan

The term "right to remain silent" is totally alien to Pakistani laws, bars, benches, public and police. Right to protection against self-incrimination, however, was introduced in Constitution of Pakistan, 1973 for the first time.[171] Article 13 of the Constitution reads as below:–

[170]Al-Shāmī, Ibn-i-'Ābidīn, Muhammad Amin bin Umar, Radd al-Muḥtāralā al-Durr al-Mukhtār, Beirut, 1992, vol. 4, p. 88.

[171] Although there were chapters of rights in prior two repealed Constitutions – those of 1956 and 1962 – but this right was not embodied therein.

Protection against Double Punishment and Self-Incrimination. *"No person […] (b) shall, when accused of an offence, be compelled to be a witness against himself."*

It is intended in this part of the paper to review the statutory laws of Pakistan to investigate the position of protection against self-incrimination as accepted by constitution as a fundamental right of every citizen of Pakistan. Discussion will be made with reference to relevant provisions of laws including evidence, anti-terrorism and criminal procedure along with code of conduct of the police and rules applicable thereto.

Confession to Police Officer and in Police Custody: In British India, Section 25 of the Evidence Act, 1872 were introduced by the Crown which provided that"[n]o confession made to a Police Officer[172] shall be proved as against a person accused of any offence". Section 26 further explains the matter and provides that a confession made in police custody shall not be proved as against accused person, "unless it be made in the immediate presence of a Magistrate". The situation created by these Sections was not the same as it was in England. At that time, in England, a confession was not to become inadmissible by reason of the mere fact that it is made to a police officer.[173] The rule embodied in these Sections was enacted in view of the special circumstances of Indian Sub-continent, observing the notorious fact that confessions in this area were usually obtained by the police through deceit and torture.[174] The object of the Legislature in enacting these Sections was to put a stop to the extortion of confessions by the police malpractices,[175] because it is the widespread and rampant practice of police to use third-degree methods for extracting confessions from accused.[176] The Same provisions were borrowed in

[172] As to statements made to a police officer investigating a case, see Sec. 162 of the CrPC, 1898 (Act V of 1898).
[173]SeePhipson, Sidney L., The Law of Evidence, 7th Ed, London, 1930, p. 258.
[174]SeeQE v. BepinBehari Dev, 2 CWN 71, 74; Jogijiban Chosev.E, 2 IC 681; QE v. Babu Lal, 6 A 509, 523 (FB); but see 6 A 550, 551; State of Punjab v. Barkat Ram, AIR 1962 SC 276, 280: (1962) CriLJ 217.
[175]QE v. Babu Lal, (1884) 6 A 509, 523**(FB)**; approved in Noor Aga v. State of Punjab, (2008) 16 SCC 417: (2010) 3 SCC (Cri) 748; see also Raju Premji v. Customs, (2009) 16 SCC 496, at 503.
[176]Arup Bhuyan v. State of Assam, AIR 2011 SC 957: 2011 CriLJ 1455.

drafting Islamised version of law of Evidence which was promulgated under title "*Qānūn-e-Shahādat, 1984*" and replaced Evidence Act, 1872. Article 38 and 39 of Qānūn-e-Shahādatare the same provisions of Section 25 and 26 of the Act, 1872 but only renumbered asno repugnancy to injunctions of Islam was found in the these Sections.[177]Disclosure of self-incriminating facts before police have no legal value under Article 38 and 39 of Qānūn-e-Shahādat, 1984.[178]It is not necessary for application of Article 39 that the maker of the confession must have been formally arrested.[179] It is sufficient if custody of police was proved either legal or illegal.[180]

Supreme Court of Pakistan have been continuously holding that extra-judicial confession is always treated as a weak piece of evidence,[181]which can, easily, be procured whenever direct evidence is not available.[182] Therefore, while placing reliance on it, courts have to exercise utmost care and caution[183]and should be reluctant to act upon such confession.[184]But extra-judicial confession corroborated by oral evidence of unimpeachable character is not inadmissible but forms basis of conviction.[185] Three-fold test is required to make extra-judicial confession a basis of conviction; *firstly*, in fact it was made; *secondly*, it was voluntarily made; and *thirdly*, it was truly made.[186]FSC held in *Abid Mahmood case*,[187] "… it is also a normal practice here [in Pakistan] that when investigating officer of police would fail to properly investigate the case, he would resort to padding and concoction like extra-judicial confession and such confession by

[177]Wali Muhammad v. State, 2014 PCrLJ 206; reference has been made to a case 2005 SCMR 277(a) where Supreme Court of Pakistan held that Extra-judicial confession is a very week type of evidence and no conviction on it can be awarded without its strong corroboration available on the record.
[178]Wali Muhammad v. State, 2014 PCrLJ 206 (FSC); Saeed Ahmad v. State, 2011 SCMR 1686; see also Muhammad Imran v. State, 2011 MLD (Kar) 650; Sharif v. State, 2000 PCrLJ 562; Liaquat Ali v. State, 1999 PCrLJ 1469.
[179]Hakam v. E, 1940 L 129; ChodaAtchenah, 3 MHC 318; Maharani v. E, 1948 A 7.
[180]E v. MstJugia, AIR 1938 P 308.
[181]Muhammad Aslam v. Sabir Hussain, 2009 SCMR 985.
[182]Sarfraz Khan v. State, 1996 SCMR 188; see also Muhammad Aslam v. State, 1996 PCrLJ 287.
[183]Ibid.
[184]Rahzan v. State, PLD 1960 Lah 24; Seetan v. State, 1988 PCRLJ 939.
[185]Abdul Khaliq Patwari v. State, 1968 PCrLJ 869; Haribar Paik v. State, 1985 CrLJ 432 (Orissa).
[186]Sarfraz Khan v. State, 1996 SCMR 188.
[187]Abid Mahmood v. State, 2009 PCrLJ 894 (FSC).

now had become the sign of incompetent investigation." Judicial mind, before relying upon such weak type of evidence of extra-judicial confession which was capable of being effortlessly procured, must ask a few questions, like why accused would at all confess; what was the time-lag between the occurrence and the confession, whether accused had been hilly trapped during investigation before making confession; what was the nature and gravity of the offence involved; what was the relationship or friendship of the witnesses with the maker of confession; and what, above all, was the position or authority held by the witness.[188]When a man of sound mind and mature age would make a judicial confession in ordinary simple language, after he had been duly warned, and the court was satisfied that it was voluntary, true and trustworthy, it could be made the foundation for conviction.[189] Weight to be attached to a confession would depend on the facts and circumstances of each case.[190]

Sole retracted judicial confession, could be made a ground for conviction, if such judicial confession, was made, voluntarily; and was of confidence inspiring; and had not been obtained under coercion.[191]But courts, in Pakistan, have laid it down as a rule of prudence, that a retracted confession should not, by itself, be made the basis of conviction and that the court should insist upon some independent and strong evidence in corroboration of the confession,[192] because retracted confession is a tainted piece of evidence and one piece of tainted evidence would not corroborate another piece of tainted evidence.[193]

[188]Ibid.
[189]Suleman v. State, 2012 YLR 2395 (FSC).
[190]Ibid.
[191]Muhammad Ashraf v. State, 2016 YLR 1543 (FSC).
[192]Kher Singh v. State, 1989 PSC 533; Arabistan v. State, 1992 SCMR 754; Muhammad Ali v. State, 2002 PCrLJ (Kar) 1631; Muhammad Ismail v. State, 2011 MLD (Kar) 967.
[193]Muhammad Ali v. State, 2002 PCrLJ (Kar) 1631.

Inducement, Threat or Promise: A confession if voluntary and true can by itself form basis of accused's conviction [194] and voluntary confession means that it must not be caused by inducement, threat or promise.

Article 37 of the Qānūn-e-Shahādat, 1984gives rule to check the voluntariness of a confession which reads as below:

Confessions of caused by inducement, threat or promise, when irrelevant in criminal proceedings.— *A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*

Procedure of Recording Statement under Article 164 of the Code of Criminal Procedure, 1898: Only an authorised judicial officer can record a confession and "a confession made to a Police Officer must be ruled out of evidence".[195] Duty has been placed under Section 164 of the Code of Criminal Procedure (CrPC) on Magistrate to explain to the accused before recording his confession that "he is not bound to make a confession and that if he does so it may be used as evidence against him".[196] Magistrate is also duty bound to conduct questioning session before recording accused's confessionary statement to get belief that the statement is voluntary and there is no reason to render the statement involuntarily. Magistrate is

[194] State v. Jatindra Kumar Sutradhar, PLD 1968 Dacca 742.
[195] Sabur-ur-Rahman v. Government of Singh, PLD 1989 Kar 572; referred to Q v. HurriboleChunderGhose, AIR 1 Cal 207.
[196] Sec. 164 (3) of CrPC, 1898.

also under obligation to record exact statement carefully and "make a memorandum at the foot of such record".[197] Questions to be asked from deponent are that "for how long have you been with police; that has any pressure been brought to bear upon you to make confession; that have you been threatened to make confession; that has any inducement been given to you; that why are you making this confession and that have you been maltreated by police; etc."[198] However, the statements made by an accused person in the course of investigation are excluded by Section 162 of the CrPC.[199]

Self-Incrimination under Anti-Terrorism: An exception to the rule embodied in Article 37 to 39 of the Qānūn-e-Shahādat, 1984 and as interpreted by worthy courts of the country, has been given in the Anti-terrorism Act (ATA), 1997 by introducing[200] Section 21-H.[201]This Section provided that where, in any court, proceedings held under ATA, 1997, the produced evidence "raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation, without being compelled, before a police officer of a certain rank, may be admissible in evidence against him, if the Court so deems fit."[202]

This provision caused to give very wide powers to police regarding the investigation of a person caught as a suspect to involve into terrorism activities. Some Pakistani courts held that this provision is a violation of human rights and is repugnant to Articles 13(b) & 25 of the Constitution, 1973.[203]The provision was discussed by the Quetta High Court and held that though Section 21-H has made the confessional statement recorded before police officer of the

[197]Ibid.
[198] State v. Kalab Ali, 2010 GBLR 256 (Supreme Appellate Court, Gilgat).
[199] Muhammad Ali v. State, 2015 PCrLJ (Kar) 1448.
[200] Through the Anti-terrorism (Amendment) Ordinance, (XXXIX of) 2001.
[201] ATA, 1997, Sec. 21-H, "Conditional admissibility of confession".
[202] Ibid.
[203] Dhani Bakhsh v. State, 2006 PCRLJ (Quetta) 1671; State v. Shakeel Ahmad, 2015 MLD 1374 (Gilgat-Baltistan Chief Court).

said rank admissible, but the admissible evidence did not necessarily mean that it is credible as well.[204] Thus such a confession could not be used as exclusive piece of evidence, upon which conviction could be based, if said statement was not corroborated by a strong piece of evidence.[205]

Code of Conduct for Police: Besides prescribing attitude and responsibilities of police and general duties of police, Article 114 of Police Order, 2002 has laid down that Provincial Police Officer shall prescribe a code of conduct for police officers. Code of Conduct has been prescribed in Police Rules, 2002.Clause (v) of Rule 6.46 of the same states as under:

> *(v) No police officer may inflict, instigate or tolerate any act of torture or other cruel, in-human, or degrading treatment or punishment nor any police officer may invoke superior order, state of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, in-human, or degrading treatment or punishment.*

According to Rule 34.8 Every Regional Police Officer shall conduct Inspections of all districts under his charge[206] for evaluating the performance of the District Police Offices and shall send their reports to the Provincial Police Officer. Rule 34.9 required Regional Police Officers to inspect, along with others points, the "cases dealing with death or torture in police custody"[207] in preparing report of such inspections. By the virtue of Rule 30.5 **a**ny police officer who

[204] Dhani Bakhsh v. State, 2006 PCRLJ (Quetta) 1671. Quetta High Court explained that "a confessional statements recorded by Police Officer though may be above board and transparent but fact would remain to be explained as to what was unusual and extraordinary which compelled police officer to record statement himself instead of Judicial Magistrate. Accused when produced by one police officer before another Police officer he could neither feel free nor think that he was in safe hands. For accused all police officers, irrespective of their ranks, were chips of same block. Decision about admissibility of confessional statements under Section 21-H of Anti-Terrorism Act was left to discretion of Court and before relying upon such statements, Court was to satisfy itself about the credibility of such statements.

[205] State v. Shakeel Ahmad, 2015 MLD 1374 (Gilgat-Baltistan Chief Court).

[206] In accordance with a schedule notified by them in advance by end of January of the year.

[207] Rule 34.9 clause (XIII).

contravenes code of conduct may be dealt with under efficiency and discipline rules contained in Chapter VIII and may be awarded one or more punishments prescribed in Chapter VIII of these rules. The Police Order, 2002 under its Article 156 provides penalty for torture inflicted on accused by police officer stating as under:

Whoever, being a police officer […] (d) inflicts torture or violence to any person in his custody; shall, for every such offence, on conviction, be punished with imprisonment for a term, which may extend to five years and with fine.

Conclusions

The "presumption of innocence" is very basic idea which works like a *grund norm* and provides base to many rules and laws. Since neutral state of every human being is freedom from liabilities of others, it is obvious that one who alleges against the neutral state should be asked to prove it in a transparent, fair and public trial. Accused must be given full opportunity of legal representation and must not be compelled to give evidence against himself. He would, instead, remain silent as he is to set out of litigation automatically if accusation is not proved. Although, *Sharī'ah* placed burden on the *mudda'ī* party in all cases to prove his/her claim but the rule requiring oath to be taken by *mudda'ā'alayhi* is not attracted to all cases. Jurists differed as to what would be the basis to determine in which cases oath is necessary and in which it is not. Al-Māwardī's eloquently divided cases between those where oath is necessary and those where oath is not, keeping in view nature of the right involved. Thus, right to remain silent is not conversant with *Sharī'ah* to the extent of the demand of taking oath in every cases involving right of human being, according to *Shafi'ī* school; and only in cases involving wealth, according to Ḥanafī school. However, Ḥanafī school narrow down the orbit of reference to oath leaving only few cases.

Confession is considered very week type of evidence by *Sharī'ah* as well as common law based systems. Some Muslim jurist, especially those belonging to Mālikī and Ḥanafī schools, decreed in favour of torturing accused as has been discussed in second part of the paper. The discussion made on this issue shows that all they discussed was the issue of torture in the context of theft where right of the owners of stolen property has been infringed. Secondly, they were clear on the point that compulsion was an evil and could only be allowed where it looks fruitful in order to recover stolen property rather than to prove the guilt. That's why they also held that punishment of theft, *i.e.* the amputation of hand cannot be awarded on such a confession. Thirdly, they allowed it only when there was a strong apprehension of accused's involvement in theft. Fourthly, jurists were admitting that the real status of *Sharī'ah* is against torturing accused but they were compelled to allow this due to the reason that the number of theft cases were accelerating day by day and owners of stolen property were failing to establish the evidence according to the required criterion. The practice of the Holy Prophet, Caliph 'Umar and remarks of *qāḍī* Shurayḥ, as given in this paper, are good examples for understanding that *Sharī'ah* condemned the practice of obtaining confession of accused through force and threat. So, right of accuse to remain silent is protected in *Sharī'ah* by providing shield against self-incrimination.

The term "right to remain silent" in alien to Pakistani laws. The word Self-incrimination has been introduced by Article 13 (b) of the Constitution, 1973. It is quite unfortunate that no effective practical step could have been taken since than towards securing the protection of this right. Forget whatever is written in Police Order and Police Rules, the greatest pride of Pakistani police is their ability to have confessions extracted through infliction of torture which they count as their efficiency instead of an evil. Almost no advancement could have been made by the legislature for effective check on police against third degree violence, illegal detention, and

forced confession. An organisation of human rights "Madadgar Foundation" has collected 2071 cases of police torture involving torture to men, women and minors, reported throughout Pakistan between years 2000 to 2013.[208] This number of cases is, undoubtedly, just a little percentage of the real number as most of the cases could not have be reported by victims due to many reasons, like; fear of death, plotting by landlords and political icons with police and other investigating authorities, untraceability of detained persons due to use of private lockups and torture cells, etc. Courts frequently hold that extra-judicial confessions and those made before police are inadmissible evidence but there is no serious attempt to eradicate this evil on part of the government. Position of right to remain silent or protection against self-incrimination is very poor and miserable in the country and effective legislative and practical reforms are emerging need of the day. People of Pakistan are also unaware of their right to remain silent or right to protection against self-incrimination. People have to be educated to get them aware of their rights so that they can claim for protection thereof. Pakistan has signed[209] the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* but made reservation upon ratification[210] on three of its Articles namely; Articles 8(2), 20 and 30(1). The State should abide by this Convention and should effectively take steps towards application of those parts of the same that are not, anyway, against the injunctions of Islam.

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[208] http://www.madadgaar.org/data.html
[209] On 17 April 2008.
[210] 23 June 2010.

THE CONSTITUTIONAL RIGHTS OF THE PEOPLE OF THE FEDERALLY ADMINISTERED TRIBAL AREA (FATA): THEIR ENFORCEMENT & CONSTITUTIONAL REMEDIES AND THE ROLE OF FCR

Muhammad Rafeeq Shinwari [*]

Abstract

This work sheds lights on some important aspects of one of the chapters of the Pakistani Constitution comprising of "fundamental rights". It then, gives chronological and analytical study of the administration of justice in Pakistan in respect of the people of the Federally Administered Tribal Areas (FATA) of Pakistan. The work deals also with a significant issue that is the jurisdiction of the Apex Courts over the FATA. In this regard the work puts its entire stress upon constitutional rights of the people of the FATA alone. In doing so, the writer necessitates to give a brief introduction to the FATA, its distinctions in the legal system of Pakistan as contrast to the other parts of the country and whether those contrasts may or may not be justified in the present era of democracy and Human rights? The work, however, for providing solid propositions on such an important issue, discusses, though briefly, the international instruments on Human rights as well as the case-law from the superior courts of Pakistan in order to elaborate the true sense of the legal points and explore their reasonable and jurisprudential meanings, so that it may help in determining the status of the FATA rather equate it with that of the all other parts of the country as the underlying principles of the Constitutional law and Human rights law require so.

Key word: Constitutional rights, remedies, FATA, jurisdiction, Supreme Court of Pakistan

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Introduction

The Federally Administered Tribal Areas (hereinafter referred to as FATA) has been the part of Pakistan since its creation up till today. It has however, a different legal system as compare to the other parts of Pakistan. This is, perhaps, because of the difference in costumes and traditions followed by the people over there, and that of values conceived in these areas. This difference, on one hand, has definitely affected the legal system of that area, and on the other hand, it has utmost impacts on the social, economic and political lives of the people thereof as well.

Today a necessity is felt to work more on it from another aspect i-e the place of FATA and people thereof in the Constitution of 1973 with regard to Fundamental Rights. There are many works have so far been done regarding the FATA related issues, for instance its history, the chronology of the Pashtuns of this belt, analytical and critical study of its law i-e Frontier Crimes Regulation (FCR), comparative study of its traditions and laws with Islamic law, the rights of the people thereof in the international human rights paradigm etc.

In present work I will undertake to dig out the answers to few more questions, which have not been concentrated upon in so far studies as this humble scribe knows. Those are for example: what are the rights that have been conferred upon all the citizens of Pakistan and their remedies are assured if they violated everywhere in the Pakistan including FATA? What are the reasons for not giving the remedies for those constitutional rights if they violated in FATA? The Pakistani High Courts do not have the jurisdiction over the FATA but despite of this, Peshawar High Court has heard and given decision in some cases that arose in the FATA, what are the bases for hearing those cases? There are more than dozen of laws that have not been applied to the FATA, the reasons and secrets? There is a distinct and unique type of legal systems applied for the FATA, what were the reasons for that? What are the justifications that may be given for

its continuation even in the democratic and the era of the human rights; their analytical and critical scrutiny.

Topography and Geo-strategic of Federally Administered Tribal Areas (FATA) and its status in the legal system of Pakistan

The Tribal areas of Pakistan, according to the Article 246-Aof the Constitution of Pakistan, consists two types of areas i.e. Agencies and Frontier Regions. There are seven agencies: South Waziristan, North Waziristan, Bajaur, Khyber, Mohmand, kurram and Orakzai. Frontier Regions are six: Frontier region of Peshawar, Frontier region of Kohat, Frontier region of Bannu, Frontier region of Lakki Marwat, Frontier region of Tank and Frontier region of Dera Ismail Khan[211]. Agencies are divided in subdivisions and Tehsils.

The area of this belt is located along Pakistan's north-western and south-western Mountains. It stretches and gets lengthy from north to south instead of inflating or expending to all four sides. This belt constitutes an area of 27224 sq. km and is inhabited by around 3.17 million people belonging to different *Pukhtoon* tribes. The 1400 miles (2500 KM) long Durand Line, which was drawn in 1893 by the British colonial rulers of India, geographically divides the *Pukhtun* tribes in the region between Afghanistan and the FATA of Pakistan[212].

Chronology of the FATA

The belt of the Tribal areas, as has just been mentioned, is located between the Northwest Frontier of the Pakistan and Afghanistan. This belt also referred to as ‘land of unruly’, ‘land of free’, ‘land of the rebels’ and the ‘land of insolent’[213]. This particular region was ungovernable

[211] Frontier regions are also called “Protected-areas”, while Agencies are also called “Non-protected areas”. There is a slight deference between these two types as to the judicial process, visit for a detailed note on it: https://fata.gov.pk/Global.php?iId=29&fid=2&pId=25&mId=13 (accessed 29 September 2016).
[212] Sort to: http://www.understandingfata.org/about-u-fata.php (accessed 29 September 2016).
[213] See: Idrees Masood, Changing Patterns of Economy in the Tribal Areas Adjoining North West Frontier (Pakistan)’ unpublished PhD Thesis, Area Study Center (Russia , China, and Central Asia), University of Peshawar, 1992, p.5

and most hazardous for the British Empire; it was, thus, left outside the British administrative structures of 'settled India'[214]. In 1877, the Lord Lytton, British Viceroy…. devised a system whereby the central government would have direct control over administration and policy of the Frontier. The intention of the English rulers from the creation of this belt to control the people of these areas direct by themselves; because the people were of hard nature, worriers and not be governed and controlled conveniently[215]. Another purpose of creation of this belt was to create a buffer-zone area between the Afghanistan and British India. This was, although, after having a buffer-zone state of Afghanistan between British and Russia; because the British Gov. was scared of Afghanistan as that of Russia[216]. To achieve these purposes the system of political agencies was introduced in the tribal belt and a special status of semi-autonomous was granted to this area. The administrative control of an agency was entrusted to a Political Agent (PA). The political agent was required to liaise with the tribes (Elders in the form of 'Jirga')in the area of his jurisdiction[217].The system continued as such after the Pakistan was established in 1947 until the Article 246 was added to the Constitution of Pakistan and some changes were made which continues up till today.

It is to be mentioned here that these terms might have been used in history long ago for this belt, but they are quit new for recent and perhaps near past generations, particularly since Pakistan had been established. The present generations of the FATA, therefore, are neither familiar with what their progenitors' land was refereed to, nor are these terms, even rarely, used in today's political, legal or journalistic language.

[214] The British Gov. divided the region between 'Settled' and 'Tribal Areas'. The first were headed by Deputy Commissioners, while the second were controlled by Political Agents. See: Salman Bangash,"The Frontier Tribal Belt, Genesis and Purposes under the Raj', oxford University Press Pakistan, 1st Edition. 2016, p.35

[215] ibid

The author, at deferent places in his work, in a short but a comprehensive manner, elaborated that this was the intention of the British people behind the creation of the political Agencies, as at one place he has stated: that since the tribal Areas were too wide to be defended by the available armed forces, the British had to depend on political management of the tribes (p.215-216)'' referring to authoritative and, especially, to their correspondences to their rulers in England. Despite all of it, it was not the fundamental and premier intention of English rulers of the creation of this belt as it forthcoming.

[216] See: Salman Bangash,"The Frontier Tribal Belt, Genesis and Purposes under the Raj',p 215. 220.

[217] See: Salman Bangash, "The Frontier Tribal Belt, Genesis and Purposes under the Raj', p.216 onwards. And sort to: "Claude Rakisits: Pakistan's Tribal Area: A critical No-Man's land", available at: http://www.geopolitical-assessments.com/Pakistan_s_Tribal_Areas.pdf (accessed last time 29 September, 2016), also Bangash, Mumtaz A., "Administrative and Political Development of the Tribal Areas: A Focus on Khyber and Kurram", Ph.D. Dissertation, Area Study Centre (Central Asia), University of Peshawar, 1996.

The status of the FATA and FCR in the legal system of Pakistan

Constitutional status of the FATA

According to Article 1of the Constitution of Pakistan, the FATA is included in the territory of Pakistan. The masses of these areas, excessing four million, are represented in both National assembly[218] and Senate[219]. The FATA is under the direct control of the President, and on the behalf of the President, administered by the Governor of the Province, assisted by Political Agents (PAs)[220] in each Agency, assisted by a number of Assistant Political Agents (APA), through Frontier Crime Regulation (FCR) 1901[221].

The laws made by either house, National Assembly or the Senate, according to Article 247(3) of the Constitution are not applicable to the FATA unless the President directs and the laws made by the Provinces are also not applicable unless the governor on the approval of the President directs so. Existing laws may be extended to the FATA as many laws have so far been extended to the FATA[222]. The President has power to abolish the status of the FATA and convert it into "Settled Areas". Article 258 of the Constitution provides that the President may make necessary provisions for peace and good government of any part of Pakistan not forming part of a province.

[218] As Article 51 of the Constitution of Pakistan, 12 seats in National Assembly amongst all 342 seats have been allocated to the FATA.
[219] As Article 59 of the Constitution of Pakistan, 8 seats in the Senate amongst all 104 seats, have been allocated to the FATA.
[220] See: book and paper with regard to the Political System: Khan, S. (2012).Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia, Eurasia Border Review Part II, Hokkaido University, Japan, 2012.
[221] See for understanding the history of FCR and relevant important documents: Robert Nichols. "The Frontier Crimes Regulation; A History in Documents".Oxford University Press, Pakistan 2013.
[222] There are 158 FATA Legislative Acts, in the form of extension of the existing laws or the enacting new laws, available at: https://fata.gov.pk/Global.php?iId=439&fId=2&pId=355&mId=230 (accessed last time 5-10-2016) Whereas Acts applicable for the rest of Pakistan are few hundreds which are available at: http://pakistanlawyer.com/laws/ (accessed last time 5-10-2016). And also sort for a good discussion to: Ali, Ishfaq, "Laws extended to the Tribal Areas with Jirga Laws", New Fine Printers, Peshawar, 2003

The FATA now is divided into two administrative categories 'protected areas' which come directly under the control of central Federal government through political agents, they are vested with judicial powers as well, and 'non-protected areas' that are governed through the local tribes indirectly". At Federal level, the Ministry of State and Frontier Regions (SAFRON) at Islamabad, is given the responsibility to look after the development, management, and related matters of the FATA.

Dispensation of the Justice in the FATA through FCR

FCR is, on one hand, a procedural law, as it prescribes the procedure for the offences and civil disputes, and on the other hand, it is substantive law as well; because it defines certain crimes and prescribes punishments for them.

The System for the administration of the justice in FATA[223] is that when a dispute arises, the *Jirgah*[224] of the local elders come, and with the negotiations with both parties, settle the issue either in accordance with *Sharī'ah* or tribal costumes and traditions, or through arbitrators to whom the parties give "*Waak*" (unconditional authority) for the decision in their discretion.

Interestingly, the term of "*Jirga*" has not been used in FCR; rather it uses the term "council of elders" for it.[225] FCR defines it "a council of three or more persons convened according to the

[223] See for a precise but a comprehensive note on this: Khan, Mazhar Ali; "Violation of Social, Political and Economic Rights of the People of Federally Administered Tribal Areas (FATA) recognized by International Human Rights Law with special reference to Frontier Crimes Regulation, 1901" unpublished LL.M Thesis submitted to Faculty of Sharī'ah and Law, international Islamic university Islamabad, p. 23 (footnote 57).

[224] Many contemporary writers have appreciated the "Jirga" System as for it dispenses speedy, cheaper and transparent justice, and also it is trusted and accessible as compared to the state justice system. See: "Reforming the Jirga System; Sensitization on Fundamental Human Rights" Published: Community Appraisal & Motivation Program (CAMP) Islamabad p.16. See for a comprehensive discussion on the understanding and Role of "Jirga" in administration of the justice in FATA, Shinwari. Naveed Ahmad "Understanding Jirga: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas" published by CAMP Head Office Islamabad, Pakistan. and see also: Naveed Ahmad Shinwari and Neha Ali Gauhar "Understanding Justice Systems of Khyber Pakhtunkhwa, FATA and Baluchistan. The Pakhtun Perspective", especially its chapters 6, 7, 10 and 11. Published by CAMP Head Office Islamabad Pakistan. Bnagash, Mumtaz A, "A Speedy justice of Elders", Hassan, M. Yousafzai & Gohar, Ali, "Towards Understanding Pukhtoon Jirga: An indigenous way of peace building and more…" published by Just Peace International,(June 2005).

[225] See: S.2 (a) of FCR.

Pathān…usage as the Deputy Commissioner may directs. However, the 1973's Constitution of the Pakistan in article 247(6) has formally used the 'tribal Jirga' in the context of changing the status of FATA.

The decisions that are passed by the "*Jirgah*" are based upon the costumes, traditions and values which are passed down generation to generation in the form of unwritten laws of *"Pakhtūnwalī".*[226] The costumes and traditions of every community differ according to the differences in geography and climate.

Fundamental Rights under the Chapter-1, Part-2 of the Constitution of Pakistan

The definition, nature and scope of the fundamental rights

A right which is enjoyed by a human, regardless of being man or woman or any other deference, and without depending upon the law or believing in a specific religion or a culture and given by the nature is called "Natural Right". Such rights are given to each human just because of being a human and there is no need for having it to be a part of a specific legal system or a culture. If such rights further are guaranteed by a Constitution, they become"Fundamental Rights". A basic or foundational right, derived from natural law; a right deemed by the Supreme Court to receive the highest level of Constitutional protection against government interference.[227]

[226] Much more have written about this concept. For example see: Jonathan N Amato, B.S."Tribes, Pashtunwali and how they impact reconciliation and reintegration efforts in" A Thesis submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfillment of the requirements for the degree of Master of Arts in Security Studies. Daniel Brian Sheets, "Pashtunwali, Counter insurgency, and the Post-Taliban Democratic Government in Afghanistan" A research paper submitted in partial fulfillment of the requirements for the degree of Master of Arts in National Securities Studies. Muhammad Junaid "Living the Code of Honour: Pashtunwali and Entrepreneurial Identity of Afghans in Peshawar"

[227] Read more in this regard: at http://www.yourdictionary.com/fundamental-right#HOEEDFRSFQj1Y9Ro.99 (accessed last time 6-10-2016)

Supreme Court of Pakistan has explored the nature of the "Fundamental Rights", guaranteed under the Constitution, at many occasions that "Fundamental Rights" are those rights which the State enforces against itself and they are in essence restraints on the arbitrary exercise of power by the state.[228]

Fundamental rights, despite of having been guaranteed by the Constitution itself, are not absolute in their nature in the eyes of law[229]. It means that in some situations they may be suspended. For instance if the enforcement of a right runs contrary to the 'Objective Resolution' it is to be suspended. Supreme Court, at occasion, held that "Courts, while construing Fundamental Rights have to keep in view 'Objective Resolution' and placed widest possible construction as to advance the goals targeted/envisaged therein.[230] Moreover, it the enforcement of a Fundamental Right violates the norm of Islam it is not to be enforced either. This point shall be taken forthcoming in a bit detail.

The enforcement of the Fundamental Rights at Domestic & International level and the FCR

Since the Fundamental Rights, which are in fact given by the nature itself, have been guaranteed by the Constitution, it is appropriate to mention that what has been and is being done for their protection at both national and international level, whereas the Role of FCR must not be overlooked either.[231]

And the same has been held by the Supreme Court of Pakistan in Muhammad Nawaz Sharif v. President of Pakistan and others. PLD 1993 SC 473

[228]For example see: (Muhammad Nawaz Sharif v. President of Pakistan and othersPLD 1993 SC 473). Watan Party and others v.The Federation of Pakistanand others, PLD2012 SC 292.Golaknath v. State Of Punjab, AIR 1967 SC 1643.

[229]Muhammad Aslam Khan v. Federation of Pakistan PLD 2010 FSC (Federal Shari'at Court) 1.

[230]Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473

[231] Khan, Mazhar Ali, ""Violation of Social, Political and Economic Rights of the People of Federally Administered Tribal Areas (FATA) recognized by International Human Rights Law with special reference to Frontier Crimes Regulation, 1901", Chapter 4. See for ageneral study in this regard: Bangash, Salman: "The frontier

Article 55 of the United Nations Charter states that

> *'The United Nations shall promote…universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'*

Article 56 of the United Nations Charter states that

> *'[a]ll members pledge themselves to take point and separate action in cooperation with organization for the achievement of the purposes set forth in Article 55*[232].

Tunkin wrote that the content of the principle of respect for human rights in international law may be expressed in three propositions:

> (1*) '[a]ll states have a duty to respect the fundamental rights and freedoms of all persons within their territories; (2) states have a duty not to permit discrimination by reason of sex, religion or language, and (3) states have duty to promote universal respect for human rights and to co-operate with each other to achieve this objective.*[233]

Since, Pakistan, by at large, is Signatory to all those rights provided in Universal Declaration on Human Rights (UDHR) it was obliged to incorporate all those rights in its Constitution. In order to ensure the protection of the Fundamental Rights and their enforcement the Chapter 2 has been incorporated in the Constitution, and Article 184(3) of the Constitution empowered the Supreme

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Tribal Belt: Genesis and Purposes under the Raj" Chapter 5. Khan, Mazhar Ali: "Social, Political and Economic Implications of Frontier Crimes Regulation 1901, in FATA, Pakistan" Asian Journal of Social Science and Humanities. (V.13, (1) Feb 2014), p 250 onwards. Naveed Ahmad Shinwari and Neha Ali Gauhar: "Understanding Justice Systems of Khyber Pakhtunkhwa, FATA and Balochistan. The Pakhtun Perspective", chapter 7.

[232] Sort for understanding the meaning of the term "pledge" to Akehurst, "Modern introduction to International Law" 7th edition, p 212.

[233] This quotation has been taken from Malcolm N. Shaw "International Law" sixth Edition Published by Cambridge University Press India 2008 p.268

Court as well as the Article 199 empowered the High Courts to make an order for the enforcement of the Fundamental Rights guaranteed under Chapter 2.[234]

Supreme Court while giving much more importance to UDHR stated that;

> *Supreme Court while construing the Fundamental Rights may refer to the Articles of the Universal Declaration of Human Rights. If there is inconsistency between the twowith object to the place liberal construction as to extend maximum benefits to the people and to have uniformity with comity of nations*.[235]

It is from these statements very clear that the Fundamental rights are respected,protected, striven to be enforced and assured their remedies if violated.[236]

The fundamental rights, Injunctions of Islam and FCR

The nature of the Fundamental rights, incorporated in the Constitution, is that they are not absolute. Interestingly, these rights are protected in the Islam as well.[237] These rights are for

[234] The same has been reiterated by the Supreme Court and High Courts at many occasions; see for instance: Al-Jihad Trust v. Federation of Pakistan1999 SCMR 1379. Muhammad Nawaz Sharif v. President of Pakistan and othersPLD 1993 SC 473. Pakistan Muslim League (N) v. Federation of Pakistan and others PLD 2007 SC 642. Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and othersPLD 2000 SC 869. Malik Asad Ali and others v. Federation of Pakistan Through Secretary law and JusticePLD 1998 SC 161. Sue Moto Case no. 10 of 2007, PLD 2008 SC 673.Muhammad Kamran Mullah Khail and others v. Government of Baluchistan through Chief Secretary and others PLD 2012 bal. 57. Human Rights Commission of Pakistan and two others v. Government of Pakistan and others, PLD 2009 SC 507.

[235]Al-Jihad Trust v. Federation of Pakistan1999 SCMR 1379.

[236] This is however at most parts of the Pakistan. Is the situation same in the FATA? It will be taken soon. A question arises that where a state is party to an international treaty would the individuals of that state be obliged with regard to the provisions of that treaty? You may find a good discussion on this point in 'Paul Sieghart, "The International Law of Human Rights" published by Clarendon Press, Oxford. 1983, p. 39-44. The Pakistani Courts' practice in this regard however, is that for the provisions of an International treaty to be bound on the individuals, it is to be incorporated and transformed in the national law through Parliament. If that treaty or any provision of it is not incorporated in the domestic law it shall be not binding.

[237] For the general study on the Human rights in Islam see: Bassiouni, M. Cherif, "The Shari'ah and Islamic Criminal Justice in the time of War and Peace" Cambridge University Press USA, 2014. Chapter 2. Abdul Aziz Sachedina "Islam and the Challenge of the Human Rights" Oxford, UK: Oxford University Press, 2009. Mashood Baderin "International Human Rights and Islamic Law" Oxford, UK: Oxford University Press, 2005. Anver E Eman, Mark S Ellis and Benjamin Glahn)editers). "Islamic Law and International Human Rights Law, Searching

Islam not new and/or unique. Human beings had been conferred upon dignity, their lives had been protected and all kinds of discrimination against them were outlawed fourteen centuries ago.[238]

Since had the Islam been declared as a state-religion for Pakistan; the transformation of the human rights was to be conducted very cautiously. This has resulted in the determination of a General Principal that enforcement of any right, rather any provision of law, that runs contrary to the injunctions of Islam as laid down in Qur'an and Ḥadīth shall be nullified to the extent of repugnancy. Apparently, if the enforcement of any of the Fundamental Right is contradicting to norms of Islamit shall not be enforced, rather it would be suspended[239]. This is the testing for the rights guaranteed even by the Constitution on the Injunctions of Islam, now we may realize on the basis of that test of Islam, the status of the FCR. As the Constitution, FCR must protect the Fundamental Rights and the FCR itself must be tested on the norms of Islam.

The issue whether FCR is or not compatible with the Islamic injunctions? The answer, obviously, not as such easy; because the procedural components of it are not contradicting; instead this procedure, as being cheaper, speedy and conveniently accessible, is appreciable; as the procedure of "Alternative Dispute Resolution (ADR)" tended around the world. As far as its substantive elements are concerned, several sections have been faced scathing challenges in the

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for Grounds" " Oxford, UK: Oxford University Press, 2012. Abdullah Saeed (editor): "Islām and Human Rights, Key Issues in the Debates", An Elgar Research Collection, UK. 2012

[238]We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with definite preference. (Surat Al-Isra 17:70). O people, we have created you male and female and made you nations and tribes that you may know one another. Verily, the most noble of you to Allah is the most righteous of you. Verily, Allah is knowing and aware. (Surat Al-Hujurat 49:13). **"**O people, your Lord is one and your father Adam is one. There is no virtue of an Arab over a foreigner or a foreigner over an Arab and neither white skin over black skin or black skin over white skin, except by righteousness. Have I not delivered the message?" **(Musnad Ahmad 22978).** No one is better than anyone else except by religion or good deeds. It is sufficient evil for a man to be profane, vulgar, greedy, or cowardly**: (Shu'b al-Iman 4767)**

[239] The Supreme Court has stated "that Fundamental Rights as given in the Constitution, therefore, must not violate the norms of Islam as anything in the Fundamental Right which violates the Injunctions of Islam must be repugnant to such norms (Al-Jihad Trust v. Federation of Pakistan1993 SCMR 1718)

Federal *Sharī'at* Court (FSC) and many petitions have been filed that some sections of FCR[240] are against Islam. But the FCR still is operating with those sections[241].

Fundamental Rights and the case of the FATA in present era

The aim of this part is to realize that whether the fundamental rights are enjoyed in the FATA or not? And whether they are guaranteed and enforced in the FATA like all other parts of the Pakistan? If not, then the reasons and how they be enforced over there?

The enjoyment of Fundamental rights by the people of FATA

The Fundamental Rights are for all those who are in the territory of Pakistan, regardless of being its citizen or not. The FATA according to the Article 1 of the Constitution is included in Pakistan. Articles 184(3) and 199 empower the apex courts of Pakistan (Supreme Court and High Courts respectively) to make an order for the enforcement of the Fundamental Rights. It means that the Fundamental Rights are enforced through the Supreme Court and High Courts, but the Article 247(7) precludes the FATA from their jurisdiction which means that the Fundamental Rights are enjoyed[242] but not enforced in the FATA.

This is the Constitutional scenario of the issue; however the Court practice is that the Fundamental Rights are not enforced by the courts over there.

[240] Those sections are: 8, 11, 22, 23, 26, 30, 32, 33, 34, 36 and 40

[241] Read the story of such a petition at: http://www.dawn.com/news/409543/fsc-seeks-frontier-govtaes-stand-on-fcr (last time visited 6-10-2016)

[242] Supreme at an occasion states that 'People of Northern Areas are citizens of Pakistan, for all intents and purposes and like other citizens have the rights…said people are also to participate in the governance of their area and to have an independent judiciary to enforce, inter alia, the fundamental rights…(Al-Jihad Trust v. Federation of Pakistan1999 SCMR 1379). The high Court of Balochistan has explicitly stated that Persons living in PATA (FATA and PATA are same in the the Fundamental Rights not enforced therein. Author) are entitled to enjoy the Fundamental Rights in the same situation and manner which are being enjoyed through the Province as well as in the country by the general public…(Mistri Muhammad Ramazan v. Noor Muhammad and Two others PLD 1995 Quetta)

The Constitutional Remedies for and/or enforcement of the Fundamental rights and the case of the FATA[243]

As we have mentioned constitutional remedies are not provided in FATA; because these area are out of the Jurisdiction of the courts. The preclusion of the FATA from the jurisdiction of the Courts is interpreted that "Jurisdiction of the Supreme Court with regard to Tribal Areas is excluded only in matters exclusively concerned with Tribal Areas and the same is not excluded in matters in which any part of cause of action occurs at a place, falling outside Tribal Area and inside settled area[244], anyhow the Fundamental Rights are still not enforced by the Supreme Court and High Courts[245].

The FCR did not have a smooth passage. It frequently came under review by the courts for repugnancy to fundamental rights. Cases started coming tocourts soon after the promulgation of the 1956 Constitution which contained fundamental rights ofcitizens. In a series of judgments the superior courts declared various provisions of the law void, as being inconsistent with the fundamental rights.[246]

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[243] See for a general study on this topic, Pirzada, S.Sharifuddin: "Fundamental Rights and Constitutional Remedies in Pakistan", All Pakistan Legal Decisions, Nabha Road, Lahore 1966,

[244] Muhammad Aslam vs. Station House Officer and others 1997 MLD 152. The same point is found in many other cases. See for example: Malik Taj Muhammad and others v. Bibi Jano and 25 others 1992 SCMR 1431. Government of N.W.F.P v. Muhammad Irshad and othersPLD 1995 SC 281.

[245] The author would like to mention here that I asked Hamid Khan (senioradvocate of the Supreme of Pakistan) that if the high courts do not have jurisdiction over the FATA then on what basis the Peshawar High Court has heard the case of Drone attacks and gave decision in it? He said that Drone Attacks has remained no longer a regional issue; rather it became a national issue over which a high court may have jurisdiction. I asked him again that the "questions of facts" in the given case are regional then how it would stand a national issue? I got no answer from him. I guess the response to the drone attacks was a national responsibility and we quoted from case-law that if any part of the issue relates to settled area then apex courts would have power to hear the case.

[246] Such judgments were Dosso v. State (PLD 1957 Quetta 9), Toti Khan v, DM, Sibi (PLD 1957 Quetta 1), Abdul Akbar Khan v. DM, Peshawar (PLD 1957 Pesh 100), Abdul Baqi v. Super intendent , Central Prisons, Maclh (PLD 1957 Karachi 694), Khair Muhammad Khan v. Government of WP (PLD 1956 Lahore 668) and Malik Muhammad Usman v. State (PLD 1965Lahore 229). Justice A. R. Cornelius in the case of Sumunder v. State (PLD 1954 FC 228) referred to FCR proceedings as "obnoxious to all recognized modern principles governing the dispensation of Justice". He therefore concluded that in the circumstances, it was impossible to preserve public Confidence in the justness of the decision made under the FCR. See: "F C R. A bad law nobody can defend", Human Rights Commission of Pakistan Peshawar Chapter, published by Human Rights Commission of Pakistan, Lahore July, 2005, p. 59

Conclusion

So far we have realized the system, political though a bit, administrative and legal, of the FATA, from which we knew that FCR, through which this belt is administered, fails to be able to protect and enforce the Fundamental Rights of the people. The system, therefor,is to be changed; so as to be compatible with norms by, and standers upon which the Fundamental Rights are protected, guaranteed and enforced. At first stage the political and administrative powers to be separated; because Political Agent (PA) has the sole powers alone which is not reasonable in this democratic society and cannot be justified in the era of Human Rights. The new law (*Rewāj* law or customary law) must be as such that can play a significant role in the protection and enforcement of The Fundamental rights. The *Rewāj* law should not be as other ordinary amendments that have been introduced throughout the history.[247]The FATA should be included in the jurisdiction of the courts so as the Constitutional remedies are provided. The dispensation of the justice in the FATA by Jirga is to be reformed and should not be abolished; because it is speedy and cheaper in providing the justice, rather it needs to be compatible with principles of the constitution and international instruments of human rights law. Many other laws should be extended to FATA so as to be helpful in the enforcement of the fundamental rights. The FCR is neither justifiable nor cooperative with the Constitution in protecting the fundamental rights. It, therefore, be abolished.

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[247] This is new set of rules which has not yet been introduced therefore academic much more analyses has not come yet; rather it is debated on TV programs and written in newspapers. sort in this regard to: https://www.dawn.com/news/1286134/fata-secretariat-directed-to-document-customary-laws.(visited last time 6-10-2016) And http://www.dawn.com/news/1284517(visited last time 6-10-2016) and also see for a critic review of the "Rewāj Law": http://www.dawn.com/news/1286695

RIGHTS OF DIPLOMATS: A COMPARISON OF ISLĀMIC LAW AND PUBLIC INTERNATIONAL LAW; THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961, FROM ISLĀMIC PERSPECTIVE

Muhammad Moin u Deen*

Abstract

Religious laws dominated diplomatic relations long before the development and evolution of international law. Therefore, diplomatic and consular law is the outcome of civilizations and religions. Islām also recognized diplomatic rights in Arabia 1400 years ago. The Holy Prophet's (PBUH) dealings with representative and envoys from other nations and ethnicities show that Islām acknowledges the respect for representatives and ambassadors as a code of conduct. The Vienna convention on diplomatic relations 1961(VCDR) is an international treaty which provides framework for establishment and maintenance of diplomatic relations between independent states. This forms the basis of diplomatic immunities. Its articles are considered cornerstone of modern diplomatic relation. This paper aims to present a comparison between diplomatic rights in Islām and in VCDR 1961. It attempts to explore the origin and development of diplomatic immunities and privileges in Islām and as well as their sources. This work equally examines the compatibility of Islāmic diplomatic law and international diplomatic law. It concludes that the Qurān and the Sunnah, the two basic sources of Islāmic law and the consistent practice of Muslim heads of state, a secondary source, clearly establish the privileges and immunities of diplomats in Islāmic law and also in practice.

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Keywords: Rights of diplomats, diplomacy in Islām, Vienna convention, diplomatic immunities, diplomatic law

Introduction

The Vienna convention on diplomatic relations 1961 (VCDR) is an international legal treaty that codifies rules of international law with respect to diplomatic intercourse, privileges and immunities. It was adopted on 18 April 1961 by United Nations conference on diplomatic intercourse and immunities and came into force on 24 April 1961. It has been ratified by 190 states. This convention provides a complete framework for the establishment, maintenance and termination of diplomatic relation between independent sovereign states. It is one of the most important treaties in the field of diplomacy. VCDR consist a preamble and 53 articles along with two optional protocols. These articles are considered cornerstone in the modern international relations. This convention forms the legal basis for diplomatic immunity. Vienna convention is an instrument which covers almost all aspects of diplomatic relations among countries.

Briefly, the articles of the Vienna convention can be mapped into following several sections: Article 1 to 19 provides rules for the establishment of diplomatic missions, functions of diplomatic mission, the rights, appointment and submission of credentials heads of diplomatic missions; Article 20 to 28 provides immunity, privilege and exemption from various taxes for diplomatic missions; Article 29 to 36 sets of the immunities and privileges granted to diplomats and other staff; Article 37 to 47 regulates the immunity and privileges for family members of diplomatic agents and service staff who work on them; Article 48 to 53 regulates the signing, accession, ratification and entry into force of this Convention.

In this regard when we study Islāmic law, we find that the human dignity is one of Islāmic *Shariah* objectives. The holy *Qurān* states: *Surely we have granted dignity to the sons of Adam.*[248]This dignity applies to all mankind who are the descendants of *Adam* irrespective of any religion or race. Islām did not only expand the scope of diplomatic relation, but it also granted full personal inviolability to the diplomatic personnel and their families. Islām guarantees the protection of life and property to the emissaries, their families and their staff. Undoubtedly, the Holy Prophet (PBUH) is the first man in the history who initiated the process of global diplomacy in the true sense of the term. In Islām the diplomatic privileges and immunities derive their authority, first, from the holy *Qurān* which is the prime source of the Islāmic jurisprudence. The Prophetic traditions, known as the *Sunnah,* also provide diplomatic immunities as indicated in several statements of Prophet Muhammad (PBUH). Likewise, the practices of the heads of Muslim states also confirm the legitimacy of diplomatic privileges and immunities.

Despite this wide picture of Islāmic diplomatic law, there are still some questions needed to be answered: Does Islām give importance to diplomacy? Does Islām provide immunities and privileges to the diplomatic envoy? To what extent the immunities and privileges accorded by Islāmic diplomatic law are compatible with public international law? The basic objective of this paper is to find out the answers of these questions.

Comparison between Islāmic diplomatic law and public international law; VCDR 1961

Few important points of comparison between Islāmic diplomatic law and public international law; the Vienna convention on diplomatic relations 1961, are given below;

[248] Sūrah al-Isrā, 17:70

1- Assistance of Receiving State

Under VCDR

According to article 25, "*The receiving State shall accord full facilities for the performance of the functions of the mission.*"[249]

Under Islāmic law

Islāmic diplomatic law also provides this privilege to the diplomats. In this regard, *Al* Shaybānī (D. 189. H) Says, "*It is an obligation on Imam ul Muslimīn to cooperate with Musta'minin till the time they are in Muslim state and to provide justice if they are oppressed.*"[250]

2- Personal Inviolability

Under VCDR

VCDR provides personal inviolability to diplomats. According to Art.29 of VCDR, *"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."*[251]

Under Islāmic law

We can derive the validity of personal inviolability of diplomats from the story of Prophet *Sulayman* and *Bilqīsbint sharahil*, the queen of *Saba*. The holy *Qurān* has described this story in *sūrah Namal*[252]. In this story, we find the immunity and inviolability of emissary in the attitude of Prophet *Sulyman* towards envoys when the gifts sent by *Bilqīs* enraged him and he declined to accept those gifts which he considered a sort of bribery. Thus Prophet *Sulayman* restrained himself from visiting his anger on the emissaries, because

[249] Art. 25 Vienna convention on diplomatic relations 1961, Copy right, United Nations, 2005
[250] Al Sarkhasi (D. 483, H), Sharah al Siyar al Kabīr, (Al Shirka al Sharqiya lil ilanat, 1971), Vol. 1, p. 1853
[251] Art. 29, VCDR 1961
[252] Sūrah al Namal: 27:20-44

he knew the importance of their personal inviolability. He also considered the significance of 'diplomatic communication between Muslim and non-Muslim heads of State.

Bassiouni says that before the emergence of the Holy Prophet (PBUH), the inviolability of emissaries was ill recognized in Arabian Peninsula.[253] Personal inviolability demands that the diplomats are not to be killed, detained or maltreated. There are many instances in the life of the Holy Prophet (PBUH) where he strictly established this fundamental principle of inviolability. When *Musailmah kadhab* sent to the Holy Prophet (PBUH) two emissaries, named *Ibn Al-Nawwaaha* and *Ibn Aathaal*, to negotiate with him, he granted them this immunity regardless of their rude mannerism and said his historical words, "*By God, if it were not tradition that messengers could not be killed, I would have behead both of you*."[254]

Likewise in 631 AD, the Holy Prophet (PBUH) generously received *Wahshi* as the emissary of the people of *Ta'if* regardless the fact that he had killed his beloved uncle *Hamza* in the battle of *Uhd.* This generous reception of the Holy Prophet (PBUH) impressed *Wahshi* and led him to the acceptance of Islām.[255]

The principle that an envoy must not be detained was expressly illustrated in the matter of *Abū Rafi',* the Makkan ambassador who was sent to the Holy Prophet (PBUH) in *Madinah* after the battle of *Badr* in 624 AD. He became a Muslim and refused to return Makkah. The Prophet (PBUH) discouraged his refusal to go back to Makkah and said, "*I neither break a treaty nor detain envoys (you are an emissary), but return, and if you feel the same in your heart about Islām as you do just now, come back (as a Muslim).*"[256] There

[253] MC Bassiouni, 'Protection of Diplomats Under Islāmic Law' (1980), 74, No.3, AJIL, p.612
[254] Ibn Hishām, As-Seeratu-n-Nabawiyyah, (Darul Gadd al-Jadeed, Al-Monsūrah, Egypt), Vol. IV, p.192
[255] See Abū al-Fidā' al-Hafiiz Ibn Katheer, al-Bidāya wal-Nihāya, (al-Maktabat alMa'ārif, n.d., Beirut), Vol. 4, p. 17-19 See also Abū Ja'far Muhammad Ibn Jareer al-Tabari, Tarikh al-Tabari: Tarikh al-Umam wal-Muluk, (Mu'assasat 'Izz al-Deen lil-Tibā'a wal-Nashr, Beirūt, 1987), Vol. 1, p. 576
[256] See Abū dawod, Sunan Abi dawod, kitAbūl jihad, (al- Maktaba Al Asriya, saida, Beirūt), Vol.3, p. 82, hadith number. 2758

is another case of *'Āmir bin Al Tufail*, who was one of the three envoys sent by *Bni 'Āmir*. He wanted to kill the Holy Prophet (PBUH). But considering the inviolability of envoys, the Holy Prophet (PBUH) did take any action against him.[257]

The personal inviolability of an envoy was deemed so much important that its violation by way of detention, arrest or killing could result in a *casus belli*. In *Hudabiya*, when the rumors of the killing of *Uthman bin Affan* were spread, who was sent by the Holy Prophet (PBUH) to the *Quraish* of *Makkah* as an ambassador, it was deemed as *casus belli* and the Muslims fully prepared for war and they detained the envoy of Makkan who was sent to the Holy Prophet (PBUH).[258] This incident is a vivid proof of the sanctity of diplomatic envoy in Islām. Therefore *Abdulla bin Masūd* (R.A), (D. 32, H) says, "*There had been a Sunnah that the messengers are not killed.*"[259]

Limitation on Personal Inviolability

There are following limitations in this regard in Islāmic law;

1- Observing the incident of *Hudaibya,Imam Tabari* says, "*Only under extraordinary circumstances diplomatic envoys may be detained and imprisoned and that would be in the form of specific reprisals in kind*."[260]
2- Another limitation on diplomatic personal inviolability is that when according to military intelligence report an envoy is acting as a spy and he is inimical to the interest of Muslim army, he may be detained for investigation.[261]

[257] Salahudin al Munjad, Al Nazm al Diblomasia fil islām, (Dar al kitab al Jadid, Beirut, 1982), p. 85
[258] M Hamidullāh, Muslim Conduct of State, (Sh. Muhammad Ashraf Publishers, Lahore-Pakistan 1961), p.148
[259] Ahmad bin Hanmbal, Musnad Al Imām Amad, (Dar ul Hadith Cairo, 1995), Vol. 4 p. 22, hadith number: 3761
[260] Cited in MC Bassiouni, 'Protection of Diplomats Under Islāmic Law' p. 612
[261] A Rāshid, Islām et droit des gens, Recueil des Cours, (Librairie de Recueil Sirey, Paris, 1973), Vol. II, p. 498

3- If a diplomatic envoy is suspicious of the acts injurious to state such as buying weapons for *Dar ul harb*, he also may be detained.[262]

3- Respect for Diplomats

Under VCDR

Article 29 establishes that the receiving state will treat diplomats with due respect.[263]

Under Islāmic law

Diplomacy in the era of the Holy Prophet (PBUH) represents ideal level in the diplomatic history of mankind in general and in the history of Islām and the Muslims in particular. There is no doubt that the period of the Messenger of Allah (PBUH) is the greatest period in human diplomatic history. It is unimaginable that mankind will see any other period that will more perfect or better than the period of the Holy Prophet (PBUH).

The *Sunnah* of the Holy Prophet (PBUH) has expressly established the principle of respect and honor granted to envoys under Islāmic *Siyar*. The Holy Prophet (PBUH) sent various emissaries to various places for religious or political reasons. He received many delegations and embassies warmly in his holy mosque at a place designated as *Ustuwanat ul-Wufūd* (the pillar of delegations)[264]. We can understand the high esteem of his respect and honor granted to foreign envoys from a *hadith* in which it is reported that on his death bed he instructed his companions to grant gifts to envoys as he himself used to award during his lifetime[265]. Moreover, the emissaries are considered as guests in Islāmic state and the Holy Prophet (PBUH) generally cherished the

[262] See I Shihata, 'Islāmic Law and the World Community', (1962) 4 Harv. Int'l Club J., p. 109. See also Sarakhsi, Sharh Al-Siyar Al-Kabīr, Vo. 1, p. 66-67
[263] Art. 29, VCDR 1961
[264] Hilmi M. Zawati, Is Jihād A Just War? War, Peace and Human Rights Under Islāmic and Public International Law, (The Edwin Mellen Press, Wales 2001), p.77
[265] M Hamidullah, Muslim Conduct of State, p.146

honoring of guests. He was reported as saying, "*Every person who believes in Allah and the Day of Judgment should be hospitable with his or her guests."*[266]

When we go back to period of first four caliphs we find their many instruction, advices and orders for the immunities and privileges of envoys. I give only one example which was the clear instruction of first caliph Abū Bakr (632-634 AD) to Yazīd bin abī Sufyan that if emissary of the adversary come to you, deal them with hospitality.[267]

4- Protection

Under VCDR

According to article 29 of VCDR, "*The receiving state shall take all appropriate steps to prevent any attack on his person, freedom or dignity."*[268]

Under Islāmic Law

Islām establishes the concept of *Aman* (safe conduct) for the protection of envoy's life and property. The envoy is a beneficiary of *Aman.* It is the obligation of the state to protect *Musta'min* till his return to his territory. Allah Almighty says, *"If any person from polytheists demands your protection, grant him protection so that he may listen to the words of Allah. Then reach him to his safe place*."[269]

Imam *Fakhar u deen Al Razi* (D. 606, H) says, *"If any person from their side enters Islāmic state as a messenger, he will have protection.*"[270] This has been an established rule

[266] Abūbakr Jabir Al-Jazā'iri, Minhāj ul-Muslim, (Maktabat ul-'ilum wal-Hakam, Madinah, 1995), p. 112
[267] Arjoun, Sādiq Ibrahim, Khalid Ibn al-Walid, (Al-Dar Alsaudiah, 1981), p. 244
[268] Art. 29, VCDR 1961
[269] Sūrh al Taubah, 9:6
[270]Fakhar u Deen al Rāzi, Mafatih ul Ghaib, (Dar ul Kutub ul Ilmia. Beirūt, 2000), Vol. 15 .p. 183

throughout the caliphate that emissaries may enter in Islāmic state and they will have protection and diplomatic privileges from the state.[271]

About the protection of *Musta'min*'s family and property, *Sarakhsi* (D. 483, H) says, *"His protection includes the protection of his family and his property."*[272]

5- Immunity from court's Jurisdiction

Immunity under VCDR 1961

Article 31(1) of VCDR says; *A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions*.[273]

Immunity under Islāmic law

It is better to discuss this immunity under the basic classification of punishments in Islām; Qisas, Hudood and Tazirat.

[271] See I Shihata, 'Islāmic Law and the World Community', (1962) 4 Harv. Int'l Club J., p. 109. See also Sarakhsi, Sharh Al-Siyar Al-Kabīr, Vol. 1, p. 66-67
[272] Al Sarakhasi, Sharah al Siyar al Kabīr, Vol. 1, p. 453
[273] Art. 31(1) VCDR 1961

Qisas

There is consensus of all Islāmic jurists that *Qisas* will be applicable to diplomats. No one Islāmic jurist has given immunity to the diplomats in *Qisas*.[274] So there is no difference of opinions regarding *Qisas*.[275] They say that the following verse of Holy *Qurān* does not exempt any one even emissary from its scope; *and We prescribed for them in it that life is for life, and eye for eye, and nose for nose….*[276]

Hudood

Imam Abū Hanifa (D. 150, H) divided hudood into two kinds i.e. *Haqoqulla* (rights of Allah) and *Haqoqul ibad* (rights of people). He is of the opinion that the punishments which are related to the rights of Allah, those are not applicable to *Musta'min* and the other punishments which are related to the rights of people those may be imposed upon *Musta'min*.[277] Imam Muhammad al Shaybānī also has this opinion.[278] In this regard, Abū Hanifa was asked about a *Musta'min* who commits *Zina* (unlawful sexual intercourse) or *Sariqa* (theft) he answered that hudood laws will not be imposed upon him.[279] Imam Shafi'ihas also the same opinion.[280]

According to Imam *Malik, Had u Zina*[281] and Had *Shurb ul Khamar* (drinking of liquor)[282] can be awarded to the *Musta'min*. Abū Yousuf[283] (D. 182, H) from Hanafī School of law and Al Awzai'i[284] (D. 157, H) from Shafi'i School of law have the opinion that *Had u Zina*

[274] Abū Zuhra, Al Ilaqat al Duwaliya fil islām, (Dar ul Fikr al Arabiya, Cairo, 1995), P.77
[275] Ibn e Ābidīn, Raddul Mukhtar ala al Durul Mukhtar, (Dar Ihya al Turas al Arabi, Bairūt, 2000), Vol. 3,p. 249, Muhammad bin Arafah, Hāshiya Al Dasoqi ala Al Sharah al kabīr, (Dar Ihya ul Kutub al Arabia, Bairūt), Vol. 4, p. 237
[276] Sūrah al Maida, 5:45
[277] Al Sarakhasi, Sharah al Siyar al Kabīr, Vol. 1, p. 306
[278] Ibid
[279] Abū Yusuf, Al-Radd 'ala Siyar al-Awza'I, (Dar ul Kutub Al Ilmiya, Bairūt), p. 94
[280] Muhammad bin Idrīs Al Shafi'i, Al Umm, (Dar ul Marifah Bairūt, 1990), Vol. 8, p.378
[281] Abū Abdullāh Muhammad bin Muhammad Al TrAbūlusi (D.954.H), Muwahib ul Jalil le Sharah al Mukhtasar al Khalil, (Dar Ālim ul Kutub, 2003), Vol. 8, p. 387
[282] Ibid, p. 433
[283] Al Sarakhasi, Sharah al Siyar al Kabīr, Vol. 1, p. 306
[284] Abū Yusuf, Al-Radd 'ala Siyar al- Awzai'i, p.94

is applicable to *Musta'min*. According to *Hanabla, if a Musta'min commits Zina with a Muslim woman, he will be sentenced to death and if he commits it with non Muslim woman, Had will not be awarded to him and likewise other Hudood also cannot be awarded to him*.[285]

Tazirat

There is some space in Islāmic law regarding *Tazirat*. Under Islāmic diplomatic law, envoys have exemption from the jurisdiction of its courts in *Tazirat*. They are not answerable to the courts of their host for the offences they have committed in their ambassadorial capacity. In the above mentioned incident of *Musailmah kadhāb*, the two emissaries of *Musailmah* were exempted from their sentence by the Holy Prophet (PBUH) in spite of their direct contempt of Holy Prophet (PBUH). The Holy Prophet (PBUH) asked them, *"Do you say what he has said?"* they answered, *"We say what he has said*."[286] In this case, the Holy Prophet (PBUH) maintained the principle of immunity and personal inviolability of diplomatic envoys.

Under the Islāmic *Siyar* it is very clear that if a non-Muslim commits an offence and he claims to be an envoy, he will have diplomatic immunity automatically when he confirms his status by producing a genuine letter from his ruler.[287]

Abū Zuhra says, *"It is right to enter Tazirat under the immunities of diplomats."*[288] *Dr. Hamidullah says that even if the emissary or any person of his company is a criminal of the receiving state, he must be treated as envoy not as a criminal*."[289]

The two secondary sources of Islāmic law; *Urf* (custom) and *Masalih al Mursalah* (welfare of the people) also support this opinion of modern jurists in granting immunity to

[285] Mansor bin Younus al Bahoti, Kashāf ul Qana an Matanil Iqnā, (Dar ul Fikr, Beirūt, 1402.H), Vol. 5, p. 524
[286] Ibn Hisham, As-Seeratu-n-Nabawiyyah, P.192
[287] MA Gazi (Tr.), Kitab Al-Siyar Al-Kabīr The Shorter Book on Muslim International Law, (Adam Publishers & Distributors, New Delhi, 2004), p. 63, M Khaddūri (Tr.), The Islāmic Law of Nations Shaybānī's Siyar, (The Johns Hopkins Press, Maryland, 1966), p. 170
[288] Abū Zuhra, Al Ilaqat al Duwaliya fil islām, P.77, Abū Zuhra, Al Jarimah wal Aqobah fil fiqhil islāmi, (Dar ul Fikr al Arabiya, Cairo), P.296
[289] M Hamidullāh, Muslim Conduct of State, p. 291

diplomats in Tazirat because it is impossible for Islāmic states to remain and survive without diplomatic relations with other countries and for establishing diplomatic relations Islāmic states have to accord immunity to diplomats where there is a space in Islāmic law for doing so.

6- Exemption from taxation[290]

Under VCDR

Article 34(1) of VCDR describes that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal.[291]

Under Islāmic law

Islām also exempts the diplomats from taxation. Abū Yousuf says, "*There is no 'Āshūr (one tenth tax) on the commodities of messengers."*[292] The principle is that if the Muslim envoys have been accorded exemption from taxation in foreign state, the envoys of that foreign state will also enjoy the same exemption in Muslim state by the way of reciprocity.[293] Upon the base of reciprocity, Shaybānī mentioned many situations in which he says that we will treat *Musta'min* regarding the exemption from dues and taxes as the sending state treats our *Musta'min*.[294] There is a famous principle (qaidah) of Islām in this regard; *"The dealing between us and them is based upon reciprocity (Mujazat)."*[295] This is a treaty based matter in Islām. Abū Zuhra also wrote like this in his famous book.[296]

[290] The discussion about the taxes that the diplomats have to pay under VCDR is ignored because it is not under the scope the article. Similarly their duties and obligations are not discussed here.
[291] Art. (34(1)), VCDR 1961
[292] Abū Yusuf, Kitab al-Kharaj, (Dar Al-Ma'a refah, Beirūt-Lebanon), p. 205
[293] HM Zawati, Is Jihad A Just War? War, Peace and Human Rights Under Islāmic and Public International Law ,p. 80
[294] Al Sarakhasi, Sharah al Siyar al Kabīr, Vol. 1, p. 2139
[295] Ibid
[296] Abū Zuhra, Al Ilaqat al Duwaliya fil islām , P.77

Commercial Purpose

It is important to mention that to qualify for tax exemption, the item must not be brought in Islāmic territory for commercial purpose. According to Abū Yousuf, *"If anything is brought in Islāmic state, one tenth tax will be paid after the sale of the thing*."[297]

7- Commercial Activities

Under VCDR

VCDR does not allow diplomats to practice professional and commercial activities. Article 42 states: "A diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity." [298]

Under Islāmic Law

Islāmic law does not prohibits envoys from commercial activities. This is an additional privilege granted by Islām to the diplomats. But tax will be imposed on commercial things as Abū Yousuf said in kitab Al Khiraj.[299]

8- Other Privileges

I have mentioned some diplomatic privileges under this one heading because they derive their validity in Islām from same principles.

Under VCDR

VCDR provides following privileges to the diplomats; Inviolability of the premises of mission (Art.22 (1)); Inviolability of archives and documents of mission (Art.24); Freedom of

[297] Abū Yusuf, Kitab al-Kharaj, p. 106
[298] Art. 42, VCDR 1961
[299] Abū Yusuf, Kitab al-Kharaj, p. 205

movement and travel subject to prohibited zones (Art.26); Protection of communication, inviolability of correspondence, inviolability of diplomatic bags (Art.27); Inviolability of private residence of diplomats (Art.30(1)).

Under Islāmic Law

Islām also guarantees all these diplomatic privileges. These privileges are based upon a fundamental principle of *Shariah*; *"Nothing is prohibited in Islām unless it is explicitly prohibited in Nasūs (Qurān and Sunnah)*.[300] It was narrated that the Holy Prophet (PBUH) said, "*Halal is that which Allah has made it Halal in His book and Haram is that which Allah has made it Haram in his book, and the things about which He remained silent, those are allowed for us*.[301] These privileges may be covered by this hadith. The secondary source of Islāmic law, *Masalih Al Mursalah,* also validates all these privileges.

Muslim diplomats

In early Islāmic era, there was only one Muslim state and therefore it was impossible that a Muslim envoy would have come in Muslim state. If a Muslim came in Muslim state, he had the status of a Muslim. He was not considered as a *Musta'min* so there was no concept of Muslim diplomat in earlier days. But in modern age, Muslim diplomats are also living in Muslim states. So, the Muslim diplomats also enjoy same privileges, exemptions and immunities in Tazirat in Muslim states.

[300] See Y al-Qaradawi, The Lawful and the Prohibited in Islām (Al-Halal Wal-Haram Fil Islām), (Al-Falah Foundation, Cairo, 2001), p. 6

[301] Muhammad bin Iisa al Tirmazi, Sunan al Tirmazi, hadith number. 1726, (Dar ihya al turas al arabi, Bairūt), vol. 4, p. 220

Conclusion

In the light of all above discussion, it can be concluded that Islāmic diplomatic law is much compatible with international diplomatic law. Islām has contributed in the development of international diplomatic law. Islām has accorded privileges and immunities to the messengers fourteen centuries even before the emergence of Vienna convention on diplomatic relations. In his life time, the Holy Prophet (PBUH) received more than hundred emissaries and delegations but there is not even one incident when he has maltreated or dishonored any messenger. Islām gives much significance to diplomatic relations because all the Prophets (PBUT) are considered as the messengers of Allah to mankind.

The compatibility of Islāmic diplomatic law, regarding the rights of diplomats, with the Vienna convention on diplomatic relations 1961 can be seen in following table.

No.	Diplomatic rights	VCDR	Islāmic law	Compatibility
1	Assistance of Receiving State	√	√	compatible
2	Personal Inviolability	√	√	Compatible with some limitations
3	Respect	√	√	compatible
4	Protection	√	√	compatible
5	Immunity from court's Jurisdiction	√	Not absolute	incompatible
6	Exemption from Taxes	√	√	compatible
7	Commercial Activities	×	√	incompatible
8	Other Privileges	√	√	compatible

***

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