

The Jurisprudence of the Codified Islamic Law: Determining the Nature of the Legal System in Pakistan

Zahid Rehman v The State
PLD 2015 SC 77

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The Supreme Court judgment in *Zahid Rehman v the State*¹ has raised the ‘persistent question’² about the nature of the legal system in Pakistan, that is, is it based on common law, Islamic law, or a hybrid of both systems? This question, however, still remains unanswered. Though the judges tried to weigh various reasons and took different lines of reasoning, the core of the question dissipated in the struggle to find an answer – perhaps due to the contentious nature of the question.

Let the facts of this case be conceptually seen before entering into the analysis of the judgment. The case of sentencing of one Zahid Rehman (who was convicted of *Qatl-e-Amad* punishable as *Ta ‘zir*) came up before the Supreme Court in 2012. The Court passed a short order and noted that two of its earlier judgments on the issue were in conflict. In *Naseer Ahmed v the State*,³ the court held that a convict of *Qatl-e-Amad* punishable as *Ta ‘zir* could be punished under the statutorily provided exceptional clauses⁴ of *Qatl-e-Amad* punishable as *Qisas*. While in *Faqir Ullah v Khalil-uz-Zaman*,⁵ a contrary view was taken. Following the ratio of *Naseer Ahmed*

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² H.L.A Hart in his *The Concept of Law* styled the first chapter as ‘Persistent Questions’. See H.L.A Hart, *The Concept of Law* (3rd ed., Oxford University Press 2012, first published 1961) 1-13.

³ PLD 2000 SC 813. See also the allied judgments in cases of *Dil Bagh Hussain v the State* 2001 SCMR 232; *Muhammad Abdullah Khan v the State* 2001 SCMR 1775; *Amanat Ali v Nazim Ali* 2003 SCMR 608; *Muhammad Ilyas v the State* 2008 SCMR 396; and *Khalid Mehmood v the State* 2011 SCMR 1110.

⁴ Sections 306 and 307 of the Pakistan Penal Code constitute the statutory exception to the liability and enforceability of a *Qatl-e-Amad* liable to *Qisas*, and the consequent punishment is provided in Section 308 of the Pakistan Penal Code.

⁵ 1999 SCMR 2203 and allied judgments in cases of *Muhammad Afzal alias Seema v the State* 1999 SCMR 2652; *Umar Hayat v Jahangir* 2002 SCMR 629; *Muhammad Akram v the State* 2003 SCMR 855; *Ghulam Murtaza v the State* 2004 SCMR 4; *Nasir Mehmood v the State* 2006 SCMR 204; *Abdul Jabbar v the State* 2007 SCMR 1496; *Iftikhar ul Hassan v Israr Bashir* PLD 2007 SC 111; and *Tauqeer Ahmed Khan v Zaheer Ahmed* 2009 SCMR 420.

meant punishing under the *Qisas* regime (which under the Islamic criminal jurisprudence is a divinely determined regime and is not open to legislation by state); conversely, the ratio of *Faqir-Ullah* meant punishing under non-*Qisas* regime, and by implication, punishing under the state's legislative sentencing policy. On a wider jurisprudential plane, the ratio of the two judgments touched upon the very soul of the Islamic law where one of the chief considerations is to preserve the divine law in its most pristine form.

The Court observed that in view of the diverging opinions in these judgments, a larger Bench of judges was required to examine the issue and pass an authoritative judgment. Accordingly, a larger Bench, comprising five judges, was constituted. The Bench heard the case in 2014, and passed a detailed judgment with a split decision of three to two in *Zahid Rehman v the State*.⁶ Justice Asif Saeed Khosa authored the main opinion. Dost Muhammad Khan and Qazi Faez Isa JJ concurred and added their separate notes. Ejaz Afzal Khan and Ijaz Ahmed Chaudhry JJ disagreed and Ejaz Afzal Khan J authored the dissenting opinion. The judgment upheld the view in the case of *Faqir Ullah v Khalil-uz-Zaman*.⁷

With this factual background, it is now appropriate to examine the reasoning in the judgment. A common point in all the opinions rendered in this case is that the judges interpreted the statutory codified Islamic criminal law without referring to any established rule of interpretation, either from English law or Islamic law.⁸ This is a bit surprising as the whole issue in this judgment revolved round the interpretation of various conflicting sections of the Pakistan Penal Code ('PPC'). Therefore, for the sake of certainty, it would have been better had the judges explicitly referred to some rule of interpretation. This would have also added to the precedent value of the case, thereby establishing its significance for future reference. The need for following a particular rule of interpretation cannot be overemphasised. S. M. Zafar, Senior Advocate Supreme Court, very elaborately captured the essence of following the rules of interpretation by a judge in our system. He noted:

... I found judges oscillating between activism and self-restraint. The area between these two is filled by various rules of interpretation... Thus the judge's discretion operates freely to the extent of his choice of

⁶ PLD 2015 SC 77.

⁷ 1999 SCMR 2203.

⁸ The only exceptions are paragraphs 1 to 10 of the opinion of Justice Dost Muhammad Khan, which slightly touch upon the subject of interpretation. Justice Dost has briefly alluded to a 'maxim' '*A Causus Omissus*' (sic). Justice Ejaz, however, does not refer to any rule of interpretation.

principles or to the extent of the priority that he may assign to one or the other of such principles. It is a free choice but within a determined number of choices.⁹

This shows that judges are not entirely free when arriving at a decision. Though they may appear to be free, they are bound to follow certain formal and informal rules. They operate within a limited paradigm of choices, sometimes due to societal restraints, and at others due to established customary practices. The opinions of the judges reproduced the statutory provisions applicable to the case, but the interpretation of these provisions has not been disciplined under a particular scheme of interpretation. This has left little space for a systematic principle based interpretation to emerge that would have added precedent value to the judgment.

Secondly, the role of the Supreme Court in adjudicating Islamic law has not been fully examined. Three views emerge out of the judgment on this point. The first view was expressed by Justice Khosa who towards the end of his opinion, referred to Article 203-G of the Constitution of Pakistan,¹⁰ read with Section 338-F of the PPC,¹¹ which provides a bar upon the jurisdiction of the Supreme Court and High Courts in matters related to Islamic law. He observed:

... [I]t must never be lost sight of that by virtue of the provisions of Article 203 G of the Constitution of the Islamic Republic of Pakistan, 1973 this Court or even a High Court, has no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of this Court.¹²

Justice Khosa apparently assigned the adjudication of Islamic law to the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. Justice Dost Muhammad Khan's concurring note, however, was not in agreement with Justice Khosa on this point. He contended that the statute (i.e. PPC) does not give section 338-F 'any overriding or superimposing effect' over sections 299 to 310,

⁹ S.M. Zafar, *Understanding Statutes Canons of Construction*, (PLD Publishers 2002) ix.

¹⁰ Article 203-G of the Constitution of Pakistan 1973 provides a bar on the jurisdiction of the Supreme Court and the High Courts on matters falling in the jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court of Pakistan.

¹¹ Section 338-F of the PPC provides that the interpretation of the *Qisas* and *Diyat* law shall be guided by the Injunctions of Islam as laid down in the Qur'an and Sunnah.

¹² Paragraph 30 of the opinion of Justice Khosa.

implying thereby that the interpretation of sections 299 to 310 could not be controlled by the Injunctions of Islam and therefore the matter fell within the jurisdiction of the Supreme Court. The third view was expressed in the dissenting opinion of Justice Ejaz Afzal Khan who brought up the question of legal basis of the punishment of *ta'zir* and noted that it was not provided by either the Qur'an or the Sunnah,¹³ implying thereby, that the Supreme Court could adjudicate this issue.

It is interesting to note how the judges weighed various alternatives and reasons before arriving at a conclusion. This shows not only that the judges exerted themselves to arrive at a conclusion, but also the inherent contentious nature of the matter at hand. Judging the nature of a legal system is never an easy task, as a host of factors that determine its nature are at play. In particular, in a country like Pakistan, where two legal systems run simultaneously, the complexities further increase.

However, the ultimate question, regarding the adjudication of Islamic law by the Supreme Court, remained unanswered. In this case, the judges have interpreted the codified statutory Islamic law without necessarily examining Islamic law on the point in the light of the Qur'an and Sunnah. It may be noted that one of the primary reasons for preferring *Faqir Ullah* case over *Naseer Ahmed* case in the main judgment was the numerical strength of judges in the former case (i.e. five member bench of the Supreme Court had decided *Faqir Ullah* case). Without undermining the importance of this rule, one may ask could the numerical strength of judges be made the basis of adjudicating a rule of Islamic law? Further, should Islamic law be interpreted based on its original sources, i.e. the Qur'an and Sunnah, or through the codified statutory legislation? The codification of a law in statutory form for legislation is surely a human endeavour; should the veil of codification be lifted in interpreting codified Islamic law? All these questions, regarding the nature of the legal system of Pakistan, have persisted. The questions need to be resolved for the sake of consistency, certainty and for settling the issue at policy level.

The third aspect that warrants consideration in this case is about the working of the criminal justice system in Pakistan. Justice Khosa took pains in documenting how the diverging views of the Supreme Court persisted since 1994 when the case of *Khalil-uz-Zaman v Supreme Appellate Court, Lahore*¹⁴ was decided and it 'sowed the seeds of all the monumental confusion'. In this case, a two-member bench of the Supreme Court had held that the statutory exceptions provided in sections 306 and

¹³ Paragraph 2 of the opinion of Justice Ejaz.

¹⁴ PLD 1994 SC 885.

308 of the PPC are applicable to the case of *Qatl-e-Amad* punishable as *Ta'zir*. The judgment in the *Khalil-uz-Zaman* case was reviewed and reversed in the *Faqir Ullah* case, which was decided by a five-member bench of the Supreme Court in 1999. Justice Khosa noted that in a string of cases¹⁵ after the decision in the *Faqir Ullah* case, the Supreme Court did not 'advert to' it. He, however, did not examine the impact of the omission of not considering the *Faqir Ullah* case in subsequent judgments. Should the bar or the bench be held liable for this omission? Or, how could in future such omissions be avoided? What should be the impact of any such omission on those who are undergoing the sentences in the cases in which the precedent of the Supreme Court was not followed? These aspects have not been discussed in the case. From a practitioner's point of view, the certainty of a sentencing regime is very important and has serious implications for the society. The significance of these aspects is further amplified by the fact that most cases in which the *Faqir Ullah* case is not followed relate to honour killings. Noting this point, Justice Isa, while discussing the inapplicability of exceptions provided under sections 306 and 308 of the PPC, from a sociological perspective, concluded that allowing sentencing under these provisions may entitle a murderer who is also a legal heir (*wali*) to pay compensation (*diyat*), hence it may amount 'to grant of licence of killing innocent persons by their *walies*.'¹⁶ The point was not fully elaborated especially in view of the concern of human rights that need to be protected under law whether based on Islamic norms or otherwise.

It may not be out of place to record appreciation for Justice Khosa who authored an elaborate and authoritative judgment on the issue; his fellow judges also contributed in their own way. The analysis of the judgment evinced that it underlined the perennial questions related to Islamic law in a modern state. For example, the problem of preserving the divine law in codified form in a statute has once again been highlighted in the case. Likewise, the interaction of the modern legal system with classical Islamic law has come to the fore as the question of interpretation of Islamic law by either Sharia judges or non-Sharia judges was at the heart of the instant case. Where is the locus of the source of Islamic law in case of a conflict between a validly passed statute by a parliament? Is it in the statute or the *Qur'an* and the *Sunnah*? Should a judge not interpret the *Qur'an* and the *Sunnah* instead of the statute in case he wants to discover a rule of Islamic law? How is interpretation

¹⁵ *Muhammad Iqbal v the State* 1999 SCMR 403; *Sarfranz alias Sappi v the State* 2000 SCMR 1758; *Naseer Ahmed v the State* PLD 2000 SC 8; *Dil Bagh Hussain v the State* 2001 SCMR 232; *Muhammad Abdullah Khan v the State* 2001 SCMR 1775; *Amanat Ali v Nazim Ali* 2003 SCMR 608; and *Muhammad Ilyas v the State* 2008 SCMR 396.

¹⁶ Paragraph 4 of the opinion by Justice Isa quoting from *Muhammad Akram v the State* 2003 SCMR 855.

by a Sharia judge different from the interpretation by a non-Sharia judge? These questions have not been answered in the judgment. The need for developing adjective legal jurisprudence alongside the substantive Islamic law has been clearly identified in this case.

In a nutshell, the question regarding the nature of the legal system in Pakistan still remains unanswered. Though the judges tried to resolve this question, but its complex nature hindered their investigation. This has once again established that we need to adopt a clear approach regarding the extent to which we want to integrate *Shari'a* into our legal system. Otherwise, due to overlapping domains of the two existing legal systems, and at times opposing methodologies, the complexities will further increase. The pressures and demands of a modern state cannot be ignored in coming up with a new approach, as an ideal and modern Islamic state needs to be capable of resolving the modern conflicts. The sooner we realise this, the shorter it will take to resolve many of our persistent legal problems.