

# The Doctrine of Sovereign Immunity from the Perspective of *Shari'Ah*

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## Abstract

Keeping in view the doctrine of Justice in the perspective of Shariah, Islamic law refuses the doctrine of sovereign immunity. The ruler, king or president is considered equal to the public like a common man in the eye of law. The remarkable rule of elimination of the sovereign immunity is applied and first practiced by the Holy Prophet Muhammad (peace be upon him) upon himself as a ruler. The pious caliphs continued practicing the same during their eras due to which the Shariah refused to tolerate this doctrine. All four school of Interpretations of Islamic law are of the opinion that if the Khalifa violates the law of the land, he has to go through the procedure of the court. The Khalifa will be treated in the court as a common man. There are no special privileges for him and if found guilty be sentenced accordingly.

**Keywords:** Sovereign Immunity, Presidential Immunity, king can do no wrong, Islamic law, Rex non Potest Peccare

## Introduction:

At the advent of Islam the law of sovereign immunity was in full swing around the globe. The Kings of the two mighty empires of that time, Rome and Iran, were above any kind of law. There was no law which could restrict their discretion. When the Holy Prophet (peace be upon him) succeeded to establish a state in Madinah, he applied there the Islamic laws. Among which was the most dazzling law of removal of the immunity of the ruler of the state. Islam even termed the ruler not as sovereign but vicegerent of Allah. The Holy Prophet (peace be upon him) explicitly rejected this concept by both his express and implied conduct. He said

لا طاعة في معصية الله انما الطاعة في المعروف<sup>1</sup>

“No obedience in the disobedience of Allah, indeed obedience is only in good.”

The Holy Prophet (peace be upon him) acted upon his sayings and presented himself to the people before his death to take vengeance from him if he (peace be upon him) ever harmed any one or infringed anyone's rights. A person from the companions came ahead and demanded to take his vengeance as once Holy Prophet (peace be upon him) flapped him with his stick. The Holy Prophet (peace be upon him) did not demand the immunity as he was the head of the state at that time and removed the cloth from his back and presented to be beaten but the companion only kissed the back of Holy Prophet (peace be upon him) and didn't take his revenge.

The all four pious caliphs after the death of the Holy Prophet (peace be upon him) heartened the public to ask there rulers about any act of them if that seems illegal. The caliphs used to announced this continually in there sermons. The detailed study of the conduct of the pious caliphs will be done in this article. The jurists of all four schools

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<sup>1</sup>Al-Qushairi. *Sahih Muslim*. Kitab-ul-Amarah, (Riyadh: Dar us Salaam, 2005).

of thoughts are of the opinion that the ruler is subject to law. In this article the doctrine of sovereign immunity in Islamic law will be discussed. Some of the research questions of this research are as under.

#### Research questions:

1. To whom the sovereignty belongs in an Islamic state?
2. Is the ruler immune from the law in Islamic state?

#### Literature Review:

The doctrine of ruler's immunity is against Shariah. Islamic law is not in favour of it. This concept is considered to be the venom for the judicial body of the state. Throughout the history the Muslim jurists have written upon this issue. Both the classical and modern literature of Islamic law (Fiqh) is loaded with the writings against this doctrine. Few of books are reviewed and are briefly discussed below.

Muhammad bin Habib al-mawardi states in his well-known book *Al-Ahkam al-Sultania* that if Imam fulfils the rights of people, two rights against the public arises in his favour.

1. His obedience.
2. His help in governance.

وإذا قام الإمام بما ذكرناه من حقوق الأمة، فقد أدى حق الله تعالى فيما لهم وعليهم، ووجب له عليهم حقان:

الطاعة والنصرة ما لم يتغير حاله. والذي يتغير به حاله فيخرج به عن الإمامة شيئان:

أحدهما: جرح في عدالته. والثاني: نقص في بدنه، فأما الجرح في عدالته وهو الفسق.<sup>2</sup>

“If the Imam (ruler) fulfils the rights of public means that he has fulfilled the right of Allah. After this he possesses two rights upon public, his obedience and support, till he successfully does the same. If his position changes, which changes in two cases, he is no more the Imam (ruler), those two points are, if he becomes disobedient to Allah and if he receives an defect in his body.”

This means the only extra rights from common people that a ruler enjoys are to obey him and to help him in the smooth governance of state and that are also attached with the condition that the ruler fulfil the rights of his public. Except these two rights the ruler has no other extra privileges like immunity from certain laws etc.

Imam Abu Ya'ala Hanbali elaborates this issue in his book *Al-ahkam Al-sultania* as

بذل الطاعة له ظاهرا او باطنا في كل ما يأمر به أو ينهى عنه الا ان تكون معصية.<sup>3</sup>

“His (ruler's, Khalifa's) Obedience, in his presence and absence, to do or to refrain from doing, except what is sinful.”

So in the opinion of Imam Abu-Yaala hanbali the ruler has too many rights but he is not free to do whatever he wishes and the public is also not liable to obey him in the un-Islamic or sinful orders. This shows that there are some restrictions upon the khalifa and he is not above the law.

Imam Abu Zahra has mentioned a very important point that inside an Islamic state the punishment of a crime may vary from one province to another if allowed by the

<sup>2</sup>Abu al-Hasan Ali Ibn Muhammad Ibn Habib al-Mawardi. *Ahkam Al-Sultania*. (Bairut: Dar-ul-Kutub Al-Ilmia, 1989), 24.

<sup>3</sup>Abi Ya'ala Muhammad bin Hussain Al-Farra'a Al-hanbali. *Ahkam Al-Sultania*. (Cairo: Dar-ul-Kutub Al-Ilmia, 2000), 12.

constitution. For example it is possible that in one province punishment for not payment of zakat is 1 year and in the other province it is 8 month imprisonment. But punishment with respect to human cannot be changed, that the punishment differs for one class of people from the other class. It varies only with the intensity of crime. This shows that everyone in Islamic state in front of law is same even if he is governor or president and no one possess special privileges or immunities.<sup>4</sup>

Abdul Wahab Khallaf is of the opinion that Islam has made the ruler answerable to the public and made him to listen to the advice of his public. Islam has made the advice to the ruler and to restrain him from doing wrong, for the public obligatory. He means that the base of Islamic governmental system is *Shura* and not the sweet will of any individual.<sup>5</sup> The doctrine of equality of Islam enacts that every individual is same in front of law. The ruler of the state and a common individual are same and subject to law. There are no special laws for anyone.

Dr. Wahba Zuhaili describes this issue by saying that the Islamic law whether it's political or in some other capacity is based upon Justice. A common citizen is equal to the governor or ruler in the eye of Islamic law.<sup>6</sup> The Quranic versus as well as Sunnah clearly declares that there are no special laws for specific class or individual.

Dr. Hamidullah enlightens this case and says that in Islamic political system the people are made bound to obey the ruler but the ruler is also made bound to maintain justice in the society and not to do injustice.<sup>7</sup> The prophets in Islam used to be considered *Masoom* (*they cannot do mistake*) but this did not mean that they are *masoom* in every act but only in the delivering of message of Allah the almighty. Other than that they and the caliphs were subject to the legal system of Islam and if they did any illegal act they would be considered responsible for their acts. That's why that the doctrine of "King can do no wrong" does not exist in Islamic legal system. Every one whether he is the prophet or the caliph were considered subject to the law. This means that the doctrine of sovereign immunity is discouraged and not accepted by Islam.

Abdul Qadir Aodah, the famous Egyptian scholar says that Allah almighty has declared the man as his viceroy in this world. But this vicegerancy of mankind limited by the boundaries specified by the real sovereign The Allah.<sup>8</sup> Now this vicegerancy is of two types, for every human and that is general and secondly specific vicegerancy which is for the ruler of Islamic state. Allah gives his vicegerancy to the one who is capable of it. The duty of vicegerant is to obey and implement His orders.<sup>9</sup> Islam has given the right to every individual to keep check on the ruler and object on his illegal acts. The injunctions of Quran and Sunnah in this regard are very clear. The practice of all four pious caliphs in this regard shows the right way that the ruler is not immune, not above the law and is subject to the law of land. The doctrine of sovereign immunity is took birth in un-Islamic world, is in force since long till today and our legal and political system neither accepts nor can be run with laws which are against its nature. The very basic principle of Islamic law is the equality. It treats every human equally and does not grant any special rights

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<sup>4</sup> Abu Zahra. *Al-Jareema*. (Cairo: Dar ul-fikr al-arabi, 1998), 315.

<sup>5</sup> Abdul Wahab Khallaf. *Al-Siyasa Al-Sharia*. (Cairo: Matba al-salfia, 1928), 28.

<sup>6</sup> Dr. Wahba Zuhaili. *Al-Fiqh Al-islami wa Adilltuhu*. (Damascus: Dar-ul-Fikr, 1985), vol 6, 718.

<sup>7</sup> Dr. Hamidullah. *Rasool-ullah s.a.w Ki Hukmarani o Janashini*. Lahore, 85.

<sup>8</sup> Abdul Qadir Aoda. *Al-Islam wa Aozaona Al-Siyasiya*. (Bairut: Dar-ul-kutub A-arabi, 1980), 13.

<sup>9</sup> Abdul Qadir Aoda. *Al-Islam wa Aozaona Al-Siyasiya*. (Bairut: Dar-ul-kutub A-arabi, 1980), 176.

and immunities to anyone.<sup>10</sup> These kinds of un-natural laws have destroyed our society, our thoughts and our life because these laws are unfit for our system.

Mulana Syed Abu al-'ala Mududi writes that Islamic state is totally different from *western democratic* and *Christian theocratic state* because in Islamic state sovereignty lies only with Allah. Neither the public nor the religious leaders are sovereign here.<sup>11</sup> The Muslims are vicegerents of that sovereign and it's their duty to implement the laws prescribes by that sovereign. They cannot enact new laws neither they can immune someone from those laws by their choice. Mulana Mududi denies the immunities of ruler and says Allah almighty has granted His vicegenerancy to the whole ummah and no one has the right and power to disable any Muslim from this position. Now the person made the ruler (*Khalifa*) is just the representative of Muslims, he is answerable to Allah and to the general *Khulafa (the public)*. He is not above of the criticism, even a common man can objet upon his public and private acts. He is like a common man in the eyes of law, he can be sued in the court and no special proceedings will be done for him. He will have to appear in the court and will not be immune from any law.<sup>12</sup>

#### Research Method:

In this article the qualitative research method was followed. Several books were collected, read and consulted regarding th issue. This article starts with the status of sovereign immunity in Islamic law generally. A lot of books both from classical literature of Fiqh as well as from modern literature were consulted. The Urdu sources for the topic concerned were also included.

#### Critical Analysis:

Government is the most important organ of the state. It is regarded as one of the three main pillars of the state by political scientists. It is the fountain of justice. The better use of the government machinery is the key of prosperity in the society. That is why Islam has also given much importance to the government. Islam made it a pious institution by turning it into vicegerency (*khilafat*) of almighty Allah. It is a sacred institution and the person holding it and running it is generally called as vicegerent (*Khalifa*). A very important doctrine related to the government and ruler is the doctrine of '*Rex non potest peccare*' which means 'the king can do no wrong'. It is a well-known concept of English jurisprudence and is generally known as 'Doctrine of Sovereign Immunity.' The view of Islamic law regarding this doctrine is discussed here.

#### Quranic viewpoint of Sovereignty:

From the very first day Islam declared that the sovereignty and supremacy belongs to Allah only and the humans are same in the eye of law, as since in Makkah before the establishment of an Islamic state, it was taught to Muslims<sup>13</sup> that

إِنَّ الْحُكْمَ إِلَّا لِلَّهِ.<sup>14</sup>

“The decision rests with Allah only.”

And:

<sup>10</sup> Abdul Qadir Aoda. *Al-Islam wa Aozana Al-Qanunia*. (Bairut: Dar-ul-kutub A-arabi, 1980), 106.

<sup>11</sup> Abul A'ala Mududi. *Islami Riyasat*. (Lahore: Islamic Publications, 2008), 524.

<sup>12</sup> Abul A'ala Mududi. *Islami Riyasat*. (Lahore: Islamic Publications, 2008), 526.

<sup>13</sup> Dr. Ali Juraisha. *Al-mashroiya Al-Islamia al-ulya*. (Mansoor: Dar al-Wafa), 30.

<sup>14</sup> *Al-Qur'ān, Yousaf:40*

وَمَا اخْتَلَفْتُمْ فِيهِ مِنْ شَيْءٍ فَحُكْمُهُ إِلَى اللَّهِ.<sup>15</sup>

“And in whatsoever ye differ, the verdict therein belongeth to Allah.”

And sovereignty doesn't only mean that Allah is the creator and that He feeds creature, as many of non-Muslims also believe that He is the creator, but rather this means that only Allah deserves to give and make laws, only He can order and legislate.<sup>16</sup> So to accept him as God means to accept him as lawgivers and legislator and whatever He says that must be obeyed.

أَلَا لَهُ الْخَلْقُ وَالْأَمْرُ.<sup>17</sup>

“His verily is all creation and commandment.”

So when He was accepted as the sovereign and lawgiver then all His laws must be acted upon and if He has made each and every one equal to law then no one is above the law or immune from law.

The above discussion shows that the only and actual sovereign is the Allah. Human beings are his vicegerents. The job of vice is to fulfill the duties assigned by the real sovereign. The duty of vicegerent is nothing but to obey the commands of his master. This fact was accepted and incorporated in the constitution of Pakistan in the preamble as *Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;*<sup>18</sup>

The public in general are his vicegerents and this general vicegerency is bestowed in a single man to easily fulfill the desires and orders of the real sovereign. That person is called the *Khalifa* (vicegerent). The khalifa serves as the ruler of the state. The Islamic law gives the sovereign a high status in society as his obedience is made compulsory<sup>19</sup> upon the public.

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ.<sup>20</sup>

“O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority,”

#### **Sunnah on Sovereign Immunity:**

When the Holy prophet (peace be upon him) migrated to *Yasrab*, he signed a treaty with the Jews and non-believers of *Yasrab* known as *Treaty of Madina*. In that treaty the Holy Prophet (peace be upon him) was declared as the Head of the city state of *Madinah*<sup>21</sup> and that was agreed upon in the article 28 as

وانكم مما اختلفتم فيه من شيء فان مرده الى الله و الى محمد.<sup>22</sup>

“When any one among you differs about anything, the dispute shall be referred to almighty Allah and to Muhammad (S.A.W).”

<sup>15</sup> *Al-Qur'ān, Al-Shura*:10

<sup>16</sup> Dr. Ali Juraisha. *Al-mashroiya Al-Islamia al-ulya*. (Mansoor: Dar al-Wafa), 31.

<sup>17</sup> *Al-Qur'ān, Al-A'araf*:54

<sup>18</sup> *Constitution of Pakistan, 1973*. Islamabad. 2015. Preamble.

<sup>19</sup> Ibrahim Abdur Rahim. *Al-Siyasa al-Sharia*. (Cairo: Dar al-Nasr), 443.

<sup>20</sup> *Al-Qur'ān, Al-Nisa*:59

<sup>21</sup> Ibrahim Abdur Rahim. *Al-Siyasa al-Sharia*. (Cairo: Dar al-Nasr), 334.

<sup>22</sup> Dr. Tahir-ul-Qadri. *Meesaq-i-Madina*. (Lahore: Minhaj-ul-Quran publications), 143.

And after that till death the Holy prophet (peace be upon him) remained the supreme leader of the Islamic state in Medina. In that era the Holy prophet (peace be upon him) showed us the rights, privileges, prerogatives, duties, responsibilities and jobs of ruler of an Islamic state. The Holy Prophet (peace be upon him) in both capacities, as a ruler of the state and as a messenger of Allah, by sayings and by his conduct, taught his pupil to consider everyone same in front of law and that there are no immunities for the ruling class.

The Holy Prophet (peace be upon him) has given the Muslims and world a universal and eternal law by making everyone equal to law, despite his religious and public or social status by saying;

الناس سواسية كاسنان المشط لا فضل لعربي على عجمي الا بالتقوى.<sup>23</sup>

“Mankind is equal like the teeth of comb, there is no preference for an Arab over a non-Arab but only by virtue of Taqwa.”

Holy Prophet (peace be upon him) made the obedience of sovereign obligatory but subject to the condition that until he obeys the teaching of Islam<sup>24</sup> and principles of Sharia

لا طاعة في معصية الله انما الطاعة في المعروف.<sup>25</sup>

“No obedience in the disobedience of Allah, indeed obedience is only in good.”

This shows that the ruler possesses these right just for the purpose of government and governance and doesn't have any special rights like immunity from judicial process and punishment etc. and these right are further or associated with the condition that if he indulges in illegal activities you are not bound to obey him, as said in Hadith.

عن عبدالله ابن عمر قال الرسول (ص): على المرء المسلم السمع والطاعة فيما أحب وكره الا ان يؤمر

بمعصية فلا سمع ولا طاعة.<sup>26</sup>

“Abdullah ibn Umar (r,a) narrates that Holy Prophet (S.A.W) said that it's the duty of every Muslim to listen and obey (his ruler) whether he likes it or not but there is no obedience in un-Islamic orders.”

These injunctions show that every order in Islam or Islamic law by the government will be considered right and will be obeyed only and only if that is according to Sharia and principals laid down by the Holy Quran and Sunnah because the sovereign authority lies only with the Allah almighty in Islamic state and if someone denies that he will not be listened and obeyed and his acts will be considered un-Islamic irrespective of his authorities and powers.

عن علي ابن ابي طالب قال: بعث النبي (ص) سرية و أمر عليهم رجلا من انصار وأمرهم ان يطيعوه فهو

قال لهم في الغضب ان يدخلوا في النار فرفضوا و حكى ذلك للنبي (ص) فقال لهم النبي (ص): "لو دخلوها ما خرجوا

منها ابدا انما الطاعة في المعروف."<sup>27</sup>

<sup>23</sup> Abu al-Hassan Ali Ibn Muhammad Al-Aseer. *Al-Kamil fi al-tareekh*. (Bairut: Dar Bairut), vol 2, 154.

<sup>24</sup> Ibrahim Abdur Rahim. *Al-Siyasa al-Sharia*. (Cairo: Dar al-Nasr), 443.

<sup>25</sup> Al-Qushairi. *Sahih Muslim*. Kitab-ul-Amarah. (Riyadh: Dar us Salaam, 2005).

<sup>26</sup> Al-Bukhari. *Sahih bukhari*. Hadith: 7137

<sup>27</sup> Al-Bukhari. *Sahih bukhari*. Hadith: 7145

“Ali (R.A) narrates that Prophet (S.A.W) sent some people on a battle and made one of them there commander and ordered them to obey him. He in anger during their journey ordered them to enter the fire they were sitting with. The sahaba denied and told this to Prophet (S.A.W) on return. The Prophet (S.A.W) replied: if they had entered that fire would not come out of it forever. Indeed obedience is only in Islamic legal orders.”

So likewise in this case the leader has the rights and privileges but not above the law because the doctrine of Islamic justice deny this and it has made every one equal to law.

The Holy Prophet (peace be upon him) was the ruler of the state but not the sovereign. He by himself presented him in front of people to take their rights if anyone has.<sup>28</sup> Following is the story of Qisas from Holy Prophet (S.A.W)

أَمَرَ رَسُولُ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، بِبِلَالٍ أَنْ يُنَادِيَ بِالصَّلَاةِ جَامِعَةً ، فَاجْتَمَعَ الْمُهَاجِرُونَ وَالْأَنْصَارُ إِلَى مَسْجِدِ رَسُولِ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، فَصَلَّى بِالنَّاسِ ، ثُمَّ صَعِدَ الْمِنْبَرَ ، فَحَمِدَ اللَّهَ وَأَثَى عَلَيْهِ ، ثُمَّ خَطَبَ خُطْبَةً فَقَالَ لَهُمْ : " مَعَاشِرَ الْمُسْلِمِينَ ، أَنَا أَنْشَدُكُمْ بِاللَّهِ وَبِحَجَّتِي عَلَيْكُمْ ، مَنْ كَانَتْ لَهُ قِبَلِي مَظْلَمَةٌ فَلْيُفْتِصِّمْ فَلْيُفْتِصِّمْ مَعِيَ ، فَلَمْ يَفْعَلْ أَحَدٌ ، فَتَنَاشَدَهُمُ الثَّانِيَةَ فَلَمْ يَفْعَلْ أَحَدٌ ، فَتَنَاشَدَهُمُ الثَّالِثَةَ : " مَعَاشِرَ الْمُسْلِمِينَ ، مَنْ كَانَتْ لَهُ قِبَلِي مَظْلَمَةٌ فَلْيُفْتِصِّمْ مَعِيَ قَبْلَ الْقِصَاصِ فِي الْقِيَامَةِ فَقَامَ مِنْ بَيْنِ الْمُسْلِمِينَ شَيْخٌ كَبِيرٌ ، يُقَالُ لَهُ : عُكَّاشَةُ ، فَتَخَطَّى الْمُسْلِمِينَ ، حَتَّى وَقَفَتْ بَيْنَ يَدَيْ النَّبِيِّ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، فَقَالَ : فِدَاكَ أَبِي وَأُمِّي ، كُنْتُ مَعَكَ فِي عَزَاةٍ ، فَلَمَّا فَتَحَ اللَّهُ ، تَعَالَى ، عَلَيْنَا وَنَصَرَ نَبِيَّهُ ، وَكُنَّا فِي الْإِنْصِرَافِ حَادِثٌ نَاقِيَةٌ نَاقَتِكَ ، فَتَزَلَّتْ عَنِ النَّاقَةِ وَذَنُوتُ مِنْكَ لِأَقْبَلِ فِحْدَكَ فَرَفَعْتُ الْفُضِيْبَ فَضَرَبْتُ خَاصِرَتِي فَلَا أَذْرِي أَكَانَ عَمْدًا مِنْكَ أَمْ أَرَدْتُ ضَرْبَ النَّاقَةِ ؟ فَقَالَ رَسُولُ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : " أُعِيدُكَ بِجَلَالِ اللَّهِ ، أَنْ يَتَعَمَّدَكَ رَسُولُ اللَّهِ بِالضَّرْبِ ، يَا بِلَالُ ، انْطَلِقْ إِلَى مَنْزِلِ فَاطِمَةَ ، وَاتَّبِعِي بِالْفُضِيْبِ الْمَمْسُوقِ " ، فَدَخَلَ بِلَالُ الْمَسْجِدَ وَدَفَعَ الْفُضِيْبَ إِلَى رَسُولِ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، فَدَفَعَ رَسُولُ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، الْفُضِيْبَ إِلَى عُكَّاشَةَ ، ، فَقَالَ النَّبِيُّ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : " اضْرِبْ إِنْ كُنْتُ ضَارِبًا " فَقَالَ : يَا رَسُولَ اللَّهِ ، ضَرَبْتَنِي وَأَنَا حَاسِرٌ عَنْ بَطْنِي ، فَكَشَفَتْ عَنْ بَطْنِي وَصَاحَ فَلَمَّا نَظَرَ عُكَّاشَةُ إِلَى بَيَاضِ بَطْنِ رَسُولِ اللَّهِ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، فَجَبَلَتْ بَطْنَهُ وَهُوَ يَقُولُ : فِدَاكَ أَبِي وَأُمِّي ، وَمَنْ تَطِيبَ نَفْسُهُ أَنْ يَفْتِصِّصَ مِنْكَ ؟ فَقَالَ لَهُ النَّبِيُّ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : " إِمَّا أَنْ تُضْرِبَ وَإِمَّا أَنْ تَعْفُو " فَقَالَ : عَفَوْتُ عَنْكَ رَجَاءً أَنْ يَعْفُوَ اللَّهُ عَنِّي فِي الْقِيَامَةِ ، فَقَالَ النَّبِيُّ ، صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : " مَنْ سَرَّهُ أَنْ يَنْظُرَ إِلَى رَفِيقِي فِي الْجَنَّةِ فَلْيَنْظُرْ إِلَى هَذَا الشَّيْخِ " <sup>29</sup>

“The Holy Prophet (S.A.W) ordered Bilal (R.A) to say Azaan. Muslims came to mosque in result. Holy Prophet (S.A.W) offered prayers, and delivered a speech in which praised Allah and then said; O Muslims anyone of you who has any right or Qisas against me should come now and take it. But no one came. .... Asked for second and then for third time. An old man from Muslims stood up and claimed Qisas of once Holy Prophet (S.A.W) Beat him in a war with his stick. The Holy Prophet (S.A.W) Ordered Bilal (R.A) to bring that stick from home and he brought and that stick was handed over to that old man whose name was Okashaa (R.A). Okashaa (R.A) said that he was beaten while his shirt was not on his body so Holy Prophet (S.A.W) raised his shirt and Okashaa (R.A) went forward and just kissed the abdomen of Holy Prophet (S.A.W) and said that I don't

<sup>28</sup> Dr. Muhammad Al-Bahi. *Al-Din wa Al-Daola* . (Cairo: Maktaba Wahba). 311.

<sup>29</sup> Imam Tibrani. *Al-Mujam al-Kabeer*. (Baghdad: Ahya al-Turaas Al-Islami), 58, 59, 60, 61, 62, 63, 64.

take revenge. Holy Prophet (S.A.W) asked him to take revenge or forgive him. Okashaa (R.A) forgave Holy Prophet (S.A.W) on the condition of having with him in paradise and Holy Prophet (S.A.W) Said if someone wants to look at my fellow in paradise should look at this old man.”

This incident is a clear poster of the status of the ruler of an Islamic state. The president or the ruler is not above the law even if he is the prophet. If the ruler violates the law he is subject to the judicial proceedings and if found guilty, be punished. The Holy Prophet (peace be upon him) defined the government as a sacred trust and not an office, and cautioned Muslims to avoid it because the ruler will be asked strictly in life after death.

#### **Evidence from Companions of Holy Prophet (S.A.W):**

The Holy Prophet (peace be upon him) educated his companions in a way that after his death they continued the practice of Holy Prophet (peace be upon him). The pious caliphs believed that the ruler/sovereign is not immune from the operation of law of land. They used to encourage their public to not remain silent upon illegal acts of their rulers.<sup>30</sup>

#### **Abu Bakr (R.A):**

Abu-Bakr in his first speech after being elected as khalifa said:

أطيعوني ما اطعت الله فإذا عصيت فلا طاعة لي عليكم. وما أنا إلا كاحدكم فإذا رأيتموني قد استقمتم فاتبعوني وإن زغت فقوموني. وأعلموا إن لي شيطاناً يعتريني أحياناً.<sup>31</sup>

“Obey me until I obey Allah and whenever I disobey Him, you are not bound to obey me then and remember that I am just like you if you see I am on right path so obey me and if I do wrong, take me to the right path and remember that there is a sytan with me as well who misguides sometimes.”

#### **Umar Farooq (R.A):**

When Umar (R.A) was made *Khalifa*, he in his speech said:

من رأى منكم في اعوجاجاً فليقومه. فقال له اعرابي: يا عمر لو رأينا فيك اعوجاجاً لقومناه بسيوفنا.<sup>32</sup>

“Anyone among you whenever see me leaving the right path should straighten me. So a person replied : O Umar if we see you leaving the right path we will straighten you by our swords.”

This was the practice developed by Islamic rulers where they didn't considered themselves as high class and immune from laws but considered themselves as common people and moreover the servants of nation. The ruler had no special immunities.<sup>33</sup> He may be a plaintiff or defendant in a case in any court and he has to face the consequence of his acts.

Hazrat Umar (R.A) also knew the importance of this law and time by time he used to write to his judges and governors in different states of the empire to practice justice and consider everyone equal to law. Following are few of examples of Hazrat Umar (R.A)

<sup>30</sup> Ibrahim Abdur Rahim. *Al-Siyasa al-Sharia*. (Cairo: Dar al-Nasr), 519.

<sup>31</sup> Gohar Rehman. *Islami Siyasat*. (Mardan : Maktaba Tafheem-ul-Quran), 353.

<sup>32</sup> Ibrahim Abdur Rahim. *Al-Siyasa al-Sharia*. (Cairo: Dar al-Nasr), 519.

<sup>33</sup> Muhammad Al-Mubarak. *Nizam-ul-Islam. Al-hukm, al-daolah*. (Cairo: Dar al-Fikr), 38.

And at another stage said that

رَأَيْتَ رَسُولَ اللَّهِ (ص) يَقِيدُ مِنْ نَفْسِهِ.<sup>34</sup>

“I saw the Holy Prophet (S.A.W) giving Qisas from himself.”

Once wrote to his governor Abu Musa al-asha'ari:

أَمَّا أَنْتَ أَمْرٌ مِنْهُمْ وَقَدْ جَعَلَكَ اللَّهُ أَنْقَلَهُمْ حَمَلًا.<sup>35</sup>

“Indeed you are just like a common man among them and Allah has made your duties much more than anyone.”

The story of Amr-bin-ala'as and his son is very well known in Islamic history. Once the son of Amr bin al-a'as (Governor of Egypt) slapped a person for nothing. The aggrieved person approached the Caliph Hazrat Umar (R.A) and narrated the incident to him. Hazrat Umar (R.A) called both the governor and his son to capital and gave the opportunity to that man to take his revenge.<sup>36</sup> And then said the historic words in the history of justice, which are worth writing with gold;

مَذَّ كَمْتَعْتُمْ النَّاسَ وَقَدْ وَلَدْتُمْ أُمَّهَاتِهِمْ أَحْرَارًا.<sup>37</sup>

“Since when you have enslaved the people and their mothers have given birth to them as free people.”

The caliphs used not to consider themselves above common people but even if someone abuses them they used to leave him and no caliph killed anyone which happened later in the era of Abbasids etc because they considered themselves as the common people and their duty to implement Shariah.<sup>38</sup>

Once few sheets were distributed among Muslims. Everyone got one each. Umar (R.A) also got one. He made a suit from that sheet for himself. Salma Farsi (R.A) objected that your suit is made of two sheets and only one sheet was given to everyone. How you got two sheets. The caliph did not become angry and sought immunity but presented his defense that the second sheet was that of my son and I have not got it illegally.<sup>39</sup>

Once few clothes were brought to Umar (R.A). He divided that among people. One of that was much beautiful and of high quality. He feared to whom it should be given because the others will object. So later on he gave it to a young boy. After sometime Saad bin abi Waqas (R.A) came to Umar (R.A) and objected that why you gave that beautiful clothe to that boy and not to me. Umar (R.A) replied that I feared to give it to any one just because of the reason that the rest of people will object about it. At last I gave it to that young boy because of his good deeds. Saad bin abi Waqas (R.A) said that I have sworn that I will beat you upon your head. Umar (R.A) bowed his head and Saad bin abi Waqas (R.A) beat him upon his head and he was at that time ruler of half of the world.<sup>40</sup>

<sup>34</sup> Yaqoob Bin Ibrahim Abu-Yusuf. *Kitab-ul-Kharaj*. (Karachi: Idara-tul-Qauran wl Uloom Al-Islamia), 116.

<sup>35</sup> Muhammad Al-Mubarak. *Nizam-ul-Islam. Al-hukm, al-daolah*. (Cairo: Dar al-Fikr), 38.

<sup>36</sup> Shah Mueenuddin Ahmad Nadwi. *Khulafa-i-Rashideen*. (Lahore: Idara Islamiyat), 131.

<sup>37</sup> Gohar Rehman. *Islami Siyasat*. (Mardan : Maktaba Tafheem-ul-Quran), 437.

<sup>38</sup> Abu Zahra. *Al-Jareema*. (Cairo: Dar ul-fikr al-arabi) 1998), 151.

<sup>39</sup> Gohar Rehman. *Islami Siyasat*. (Mardan : Maktaba Tafheem-ul-Quran), 437.

<sup>40</sup> Gohar Rehman. *Islami Siyasat*. (Mardan : Maktaba Tafheem-ul-Quran), 437.

Once a dispute aroused between Hazrat Umar (R.A) and Ubai bin Ka'ab (R.A). Both of them made Zaid (R.A) as their judge. Hazrat Umar (R.A) was the Caliph in that era. Both parties appeared in his court. Zaid (R.A) wished to give respect to Hazrat Umar (R.A) because he was caliph but Hazrat Umar (R.A) refused and sit equally next to Ka'ab (R.A). Ka'ab (R.A) presented his plea, Hazrat Umar (R.A) denied that. Now according to rules judge have to take oath from Hazrat Umar (R.A) but the judge didn't like to take oath from the incumbent caliph. Hazrat Umar (R.A) by himself took oath and said that Zaid (R.A) cannot be a judge until he treats a common man and Umar equally.<sup>41</sup>

#### **Usman (R.A):**

Same was the character of Hazrat Usman (R.A). He was abused but he did not say anything to anyone. People used to object them openly but he did not try to answer them by force rather defended himself in every case.<sup>42</sup>

Hazrat Usman (R.A) also gave very importance to justice during his government and practiced it even on himself. Once he lightly punished his slave on his ears, after sometime felt sorry and straight away came to his slave, presented his ears to the slave and asked him to take his revenge.<sup>43</sup>

#### **Hazrat Ali (R.A):**

Once Hazrat Ali (R.A) and a non-muslim appeared in the court of Qazi Shuraih, the judge stood up in respect of the caliph. Ali (R.A) said to him, "This is your first injustice"<sup>44</sup> when the case was heard, Ali (R.A) was lacking evidence due to which the judge announced his decree in favour of the jew against the ruler of his time.

All these examples show very clearly that they consider themselves as common people and not above the law or superior from other humans. The governors of states were also considered as common people that's why Hazrat Umar (R.A) used to impeach his governors when he sense any illegal or un-Islamic act from them.<sup>45</sup>

The above discussion establishes the fact of unacceptability of the doctrine of sovereign immunity in Shariah. The Muslim jurists throughout the history are agreed upon this fact and they have written this issue in their books, some of which are mentioned in the literature review. All main four school of thoughts of Muslim jurists are of the same opinion that ruler is not above the law. They believe that the maxim 'king can do no wrong' has no place in the skeleton of Islamic law.

<sup>41</sup> Abul A'ala Mududi. *Khilafat o Mulokiat*. (Lahore: Idara Tarjuman-ul-Quran, 2005), 96.

<sup>42</sup> Abul A'ala Mududi. *Khilafat o Mulokiat*. (Lahore: Idara Tarjuman-ul-Quran, 2005), 191.

<sup>43</sup> Sarwar Solat. *Millat-i-Islamia ki Mukhtasar tareekh*. (Lahore: Islamic Publications, 2006), 105.

<sup>44</sup> Ibn khalkan. *Wafaat-ul-A'ayan*. (Bairut: Dar Sadir), 96.

<sup>45</sup> Abu Zahra. *Al-Jareema*. (Cairo: Dar ul-fikr al-arabi, 1998), 290.