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Interpreting Fundamental Rights in Islam

Zia Ullah Ranjah

Ph.D Scholar, Faculty of Law,
International Islamic University, Islamabad

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Abstract

No constitution is expected to be without the provision of fundamental rights such as the right to life, liberty, and dignity of man as the protection of fundamental rights is a must for the meaningful living of humans. These fundamental or basic rights are endowed on humans by birth, therefore, they have been provided to the people in varied forms and degree under all legal systems, culture, and civilizations. However, some western scholars seem to deny this historical evidence. They argue that the concept of fundamental rights does not exist in Islam. They claim that fundamental rights or human rights have emerged in western societies only. To them, in Islam, there are only duties to God and independent human rights are not available to the Muslims. This argument is based on the assumption that there is no space for the notion of fundamental rights in Islam as the Quran and the Sunnah emphasizes the performance of religious duties or obligations. The present paper examines the validity of this argument in view of the opinion of a few Muslim scholars. Further, it explores the meaning and the application of fundamental rights in the context of the constitutional practice and judicial interpretation in an Islamic state i.e. the Islamic Republic of Pakistan. It posits that the superior courts in Pakistan have creatively employed Islamic law and jurisprudence to expand and strengthen the meaning, concept and the provisions of fundamental rights within its constitutional dispensation.

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Introduction:

The concept of fundamental rights has attained unparalleled currency and salience in the constitutions of various countries in the recent past. This present surge of this idea is attributed to American constitutional jurisprudence along with other western countries. Though there is no denial of the fact that what is termed as fundamental rights in the constitutions of different countries has its origin in western-oriented constitutional jurisprudence, but this fact alone is not sufficient to establish that such notion was entirely absent from other religious discourses particularly Islam. This paper aims to demonstrate that Islam espouses a notion of fundamental rights in Pakistan, which is constitutionally declared as an Islamic republic, has employed it ingeniously to ensure and protect the rights of its citizens. With this object in mind, this article first explores the idea of fundamental rights and locates their basis in the constitution of Pakistan. Then, it discovers the genesis and concept of fundamental rights in both Islamic and Western civilizations. It assesses how Pakistan's judiciary has construed basic rights relying on the notion of justice in Islam. It concludes that fundamental rights not only exist in Pakistan's constitution and Islam but have been increasingly safeguarded, clarified, and expanded by the superior courts of Pakistan.

The paper is divided into three sections in addition to an introduction and the conclusion at the end. The first part discusses the constitutional jurisprudence of fundamental rights as it has been evolved in Pakistan. The second section describes the origin and foundation of fundamental rights in Islam for dispelling the erroneous notion of the absence of fundamental rights in Islam. The last part is the lengthiest one and is dedicated to the analysis of how fundamental rights have been construed and expanded in their functional ambit by the superior judiciary of Pakistan.

Constitutional Jurisprudence of Fundamental Rights in Pakistan

Pakistan's constitution labelled fundamental rights comprises an open declaration regarding the basic rights of the people. These constitutional rights are basic as not only they are written in the constitution but also protected by an effective constitutional mechanism from the transgression of the executive and the legislature. These rights are eternal and supreme and cannot be dismayed by the wish of the legislature or the executive.¹ No branch of the government can violate the fundamental rights, and they can only be suspended or abridged by the mode lay down by the constitution; it can be done either by amending the

constitution or by the declaration of emergency.²

Constitutionally protected basic rights function as a double-edged sword; they abolish the law which contradicts with these rights and also, they run to make invalid any act of state which curtails the fundamental rights. If a law violates these fundamental rights, it would be null and void to the extent of its violation.³

One of the main motives to include fundamental rights in the constitution is that religious minorities are living alongside the religious majority professing Islam. It was obligatory to provide some basic protections in the constitution so that the rule of the majority party may not prevail. There is no better protection against the rule of the majority than the incorporation of basic rights in the constitution, specifically in a country where democratic norms are not fully established.⁴

The fundamental rights mean those rights which have been provided under Pakistan's constitution.⁵ Fundamental rights are intrinsic to all persons, irrespective of sex, race, nationality, culture, language, religion etc. These are rights instead of honor which can be averted at somebody's wish; they are rights as one is permitted to be, to do or to have. They are global and they are the heritage of every individual of the society; nobody has to acquire the basic rights. These rights protect the people from individuals who might hurt them and they let the people live in a society with freedom, dignity, justice, equality and peace.⁶ Fundamental rights are necessary for the full progression of society.⁷

Fundamental rights are immutable and inseparable: one cannot be deprived of a right as somebody held that it is insignificant. Moreover, one cannot lose these rights lest he dies. The basic rights fixed least possible criterion for in what manner government or private institutions must treat the individuals; they also allow the persons to claim and protect their rights as well as rights of the general public.⁸

The fundamental rights provided under the constitutions of modern democracies originate from the divine text and traditional scriptures such as the Quran and the Bible.⁹

These rights are contemplated as basic as they are central and fundamental to the being of humans. Human beings have these rights merely on account of being a human. The humans are naturally eligible for the provision and security of these fundamental rights; without the provision and protection of the same, the existence of human society cannot be imagined. For instance, in the absence of adequate security of human life, there will be unending fight and bloodshed amongst humans that may ultimately destroy the human population.¹⁰

The fundamental human rights are based on a philosophy that there are divine principles such as the right to life which cannot be dishonored by the government. These divine principles, values or rights occasionally named as natural law or universal law which is merged in the constitutions as the fundamental law of the land. The notion at the back of stipulating basic rights in the constitution is to safeguard basic human rights from the oppression of the government.¹¹

Pakistan's constitution also furnishes an inclusive way to safeguard basic human rights. On breach of any of such rights, an aggrieved person can approach a High Court to redress his grievance.¹² High Courts would exercise its extraordinary jurisdiction where a person makes a complaint regarding the violation of his/her basic right by a government official.¹³ High Courts can order all types of writs and declare any action of the government to be unlawful by exercising its constitutional jurisdiction. The constitutional courts are guardian and custodian of the fundamental rights and possess the responsibility to safeguard the basic rights of the people against any incursion by the State.¹⁴ However, a High Court may refuse to exercise its extraordinary jurisdiction when the law affords an alternative, adequate, and efficacious remedy. The extraordinary situations which might warrant using constitutional power are those when the impugned act is clearly shorn of jurisdiction, malafide, Coram-non-judice or void.¹⁵

Likewise, the SC has a mandate to protect fundamental rights under suo motu jurisdiction¹⁶ if it thinks that the question before it involves the fundamental rights of public importance.¹⁷ Thus, the SC has ample powers to safeguard the basic rights of the people.¹⁸

Fundamental Rights and Islam:

Before Islam, there was severe defilement of rights of the people by influential ethnic groups and individuals of the Arabs. It might be maintained that all messengers of God strived for the basic rights of the individuals.¹⁹ The Prophet Muḥammad (PBUH) also struggled for the realization these fundamental rights.²⁰ Muḥammad (PBUH) came when the Arabian society was violating human rights such as female infanticide and the dignity of persons.²¹ Ja'far Ṭayyār, a companion of Muḥammad (PBUH) while speaking to the King of Abyssinia, said that we were accustomed to killing the girls before the appearance of Mḥammad (PBUH) and fight with one another and do all crimes.²² It is worth-mentioning that Muḥammad (PBUH) stressed on protection of fundamental rights in his final sermon.²³ Islam preaches for the parity among human beings, which is a central fundamental right.²⁴ In Islam, the

self-esteem of humanity is considered sanctified;²⁵ and the religious freedom is acknowledged;²⁶ the right to life, property, privacy, and free speech are protected. Therefore, it is evident that fundamental rights are provided and safeguarded in Islam.

Some Jurists like Donnelly contends that the fundamental rights have a western origin and such rights are unknown to other civilizations and societies. He contends that in Islam, nobody has any fundamental rights, but individuals and rulers have only duties. He argues that the right to justice in Islam is a responsibility of monarchs and the right to freedom is an obligation to do justice with the slaves; financial rights are a responsibility to support the poor. He further clinches that the basics of these sanctions are not human rights but divine commands which approach 'rights' not as human rights but in the context of 'what is right'. He reluctantly acknowledges that the welfare of humanity is the main objective of Islam; instead, he maintains that the appreciation and protection of fundamental rights in Islam is not equal to the status and protection of such rights in western civilization.²⁷

Muslim scholars like Baderin admire the contribution of western jurists for the recognition and protection of fundamental rights globally; however, he contends that the appreciation, recognition and protection of fundamental rights are not exclusive to the western society. They are also found in other cultures and civilizations like Islam.²⁸ Furthermore, Baderin claims that al-Mawardi debated the rights of human beings and said that rulers have to protect the basic right of the people under the concept of *Hisbah* (public order). He contends that the terminology 'human rights' may have a particular meaning in the west. However, the concept it infers is (almost) same all over the world and different societies may have different terminologies of it. Baderin maintains that basic rights must be perceived as a growing process that got its existing form passing through diverse phases of human society and it will remain evolving in future.²⁹

According to Baderin, the evolution of basic rights took place centuries before when human beings started an organized life. Human beings began searching basic rights long before the modern states started framing the international criterion of fundamental rights by transnational discussions.³⁰ As per Baderin, through this advancement, the word *Huqūq Al-Insān* (individuals rights) has substituted the term *Huquq al-Ādimiyīn* (rights of a person) to signify the basic rights in current reports. He ascertains human rights in the principle of *maṣlahah* (benefit). His faith on *maṣlahah* (benefit) as a classificatory code demands further deliberation for the growth and realization of human rights.³¹

According to Baderin, there are two groups of scholars: evolutionists and traditionalists. Traditionalists are regressive and they do not want to review their views as per varying circumstances. On the other hand, the evolutionists while recognizing the past relate the legal doctrines profoundly with contemporary facts.³² The protection of fundamental rights is the main purpose of any democratic government. Thus, the evolutionary approach may be adopted to promote human rights in Pakistan. On the other hand, the regressive approach of traditionalists appears outdated and rigid in the modern democratic framework of Islamic states.

Leonard Binder contends that one generation can override any judgement of another generation.³³ It may be argued that the message of Islam is not fixed and static and it can be interpreted considering the needs of modern times and on the basis of knowledge and experiences gained by humans through the process of evolution. As the message of Islam is undying and for the whole world and not specific to Muslims, so this message of Islam may be interpreted and re-interpreted in the light of science and philosophy of modern times.

According to Baderin the connotation of *maṣlahah* (benefit) is welfare, well-being or benefit of the human being.³⁴ The concept of *maṣlahah* (benefit) could be employed by an Islamic state to construe rights progressively.³⁵ Baderin further gives cataloguing of the fundamental rights. There are basic rights such as the protection of life, intellect, religion, and property. Then, there are those rights which advance the general quality of human beings. Arguably, the fundamental rights of the first and the third level relate and can accommodate the basic human rights in the modern context of Islamic states.³⁶

Thus, the third level of fundamental rights can be construed creatively to accommodate more basic rights in this list such as socio-economic rights. The idea of *ḥuqūq al-‘ibād* (rights of the people) in Islam may be liberally interpreted to promote and protect fundamental rights as per the requisites of modern times. A head of state in Islam is responsible for the well-being of the people. With this background, it may be stated that fundamental rights exist in Islam and the same can be promoted and protected in modern Islamic democracies by employing the concept of *maṣlahah* (benefit).

It may be contended that standards of basic human rights are elaborated in Islam as the Quran emphasized on the provision of basic rights. The democratic rights like equality among the people and the process of consultation in affairs of an Islamic state, that was the cause of

civil rights movement and the outcome of the French revolution and also the movement of freedom in America, in fact, have roots in Islam. The basic rights were present in Islamic states before the renaissance in Europe. It is maybe conceded, however, that basic human rights are the shared inheritance of all cultures and it is the collective legacy of mankind. However, full agreement and concordance between the western and non-western concept of human rights are not desirable to keep this phenomenon as ever-evolving and flourishing. Different cultures and civilizations have different connotations of the idea of basic rights. They may be different in meaning and application due to different contexts.

Even in the west, the idea of basic rights is not limited to a particular time frame or civilization. The basic rights began developing since the birth of the first human being and it continues. For the collective welfare of mankind, all culture and states may agree on a broader definition and a scheme for implementing basic human rights. This objective may be achieved through constant dialogue and intellectual engagement amongst nation-states under the UN system.

Judicial Interpretation of Fundamental Rights in Pakistan:

Interpretation plays a critical role in understanding and applicability of the law. There are two main theories of interpretation: Literal, purposive and progressive.³⁷ To protect the basic rights in Pakistan the judiciary used the purposive and progressive theory of interpretation maybe by assuming the role of *Mujtahid* (a person who is duly competent to engage in legal reasoning in the appraisal of Islamic law). In Pakistan, the formal system of *Ijtihād* (Legal reasoning and hermeneutics through which a jurist derives law from the Qur'ān and Sunnah)³⁸ does not exist. Fatwa of *Mujtahid* is not binding on the people as per the constitution.³⁹ However, the parliament and the judiciary have the power to make and interpret the law. Therefore, it may be argued that the parliament and the judiciary have adopted the role of *Mujtahid* in present days. It is a basic duty of our courts to interpret the constitution, so by performing its duty, courts have interpreted the constitution creatively to protect basic rights.

The analysis of case law shows that our courts have appreciated socio-economic justice as enunciated in Islam.⁴⁰ *Syyed Sajjād 'Ali Shāh J.* suggested that while construing the provisions of basic right the courts should construe them liberally, dynamically to give full benefit to the individuals.⁴¹ *Nasīm Hassan Shāh J.* emphasized that human rights provision must be interpreted while seeing the varying circumstance in a

society.⁴² Thus the courts of Pakistan preferred a liberal and dynamic approach to protect and promote the basic rights in Pakistan over a regressive and fixed approach of interpretation of fundamental rights.⁴³ It is the outcome of this approach of the SC that it has over the years played an exemplary role in protecting women rights.⁴⁴

A constitution cannot be limited to its past. Thus, the judiciary interprets the constitution in evolving context to protect fundamental rights. Pakistan's constitution represents the political will of the people, which is incorporated in the preamble of the constitution. This will and aspiration contain socio-economic justice as enunciated in Islam. The constitutional courts of Pakistan have, therefore, given widest space to the will of the people by liberally interpreting the basic rights.⁴⁵

The courts ordained broader construction of rights to meet the varying needs of our society and the objective of an Islamic state.⁴⁶ This approach of the courts can be seen in both substantive and procedural law. For instance, the courts relaxed the filing requirements and strict necessities of evidence in basic human right cases. Second, the courts protected rights of the people on the basis of newspaper reports and letters. Through its directions⁴⁷, the courts have broadened the meaning and scope of fundamental rights.⁴⁸

The courts have legal duty to protect basic rights⁴⁹ of the people, and the courts have protected and promoted⁵⁰ the same to a large extent recognizing the constitution as an organic instrument and basic rights as unlimited legal rights.⁵¹ The judiciary has exercised such a liberal approach in cases like safeguards against the arrest and detention⁵², the right to defend in case of arrest and detention⁵³, the freedom of business and profession⁵⁴, the prohibition of forced labour⁵⁵, the dignity of mankind⁵⁶, the right to consult a counsel⁵⁷, freedom of forming business unions,⁵⁸ right to individual liberty⁵⁹, political freedoms⁶⁰, freedom of business and profession⁶¹, the right to property⁶², and the right to equality of citizens⁶³, inheritance⁶⁴, offshore company⁶⁵, judicial independence⁶⁶, the elimination of exploitation⁶⁷, the principles of policy⁶⁸, and Islamic rights.⁶⁹ In these cases, the judiciary construed basic rights in a progressive manner⁷⁰ and extended the connotation and meaning of basic rights⁷¹ to benefit the individuals.⁷²

For instance, in *Muhammad Akbar Azad v. Federation of*

Pakistan,⁷³ the court observed that the state has a duty to create an atmosphere where the Muslim community can regulate their lives as per the teachings of Islam.⁷⁴ After the incorporation of Article 2-A, the Quran and Sunnah have gained the status of the supreme law; thus, the courts should adopt and enforce the existing laws as per Quran and Sunnah.⁷⁵ Every law made by legislature ought to be confirmed with the Quran and Sunnah and the basic rights incorporated under the constitution are not expected to contravene the injunctions of Islam.⁷⁶

In *'Abdul Khanān v. Government of Khyber Pakhtunkhwa*,⁷⁷ the court held that the out of turn promotion is unlawful and against the injunctions of Islam as it offends the constitutional rights of equality before law and the equal protection of the law.⁷⁸ The court emphasized that out of turn promotions are in contradiction of both the constitution and teachings of Islam. It creates annoyance and depression among government officers and ends the essence of civic service. The concept of award and reward to promote positive competition about public service is good; however, it must not be done by out of turn promotion.

Also, in *Bāz Muḥammad Kākar's case*⁷⁹ the court observed that the constitution must be interpreted liberally to protect basic rights and particularly while interpreting the Article 184(3), the object and purpose of incorporating this article—that is protection of fundamental rights which are of public importance ought to be considered. The interpretation of the constitution must not be confined to formal rules of interpretation. In this regard, courts should contemplate on the objectives resolution, fundamental rights provisions, and the principles of policy. Moreover, the court observed that access and provision of justice is an internationally recognised fundamental right; a civilized and egalitarian society can only be created by providing this right to its citizens.⁸⁰

In *Ch. Muhammad Siddique v. Government of Pakistan*,⁸¹ the court stated in our country, frivolous customs practiced on the weddings and the communal problems stemming thereof have increased the sorrows of depressed and backward classes of the society. Dowries are boldly claimed now, thus the poor's have been crushed on the name of such wasteful spending. The court observed that Islam does not appreciate such frivolous matrimonial ceremonies.⁸² The Muslims have sacrificed create a state in which they could practice Islam; and under the constitution, the

state is duty-bound to eradicate such bad customs evils and create an atmosphere where teachings of Islam can be fully observed.⁸³

The court, in *Asfand Yār walī v. Federation of Pakistan*,⁸⁴ emphasized on the objectives resolution to establish that Allah is sovereign of the entire universe. In Pakistan, Allah has delegated His authority to the people which is to be exercised through their representatives within the limits prescribed by Allah as a sacred trust.⁸⁵ The court stressed that the an Islamic state is responsible that the Muslims live according to the teachings of Islam.⁸⁶ The court noted that protection of basic rights particularly the rights of underdeveloped classes and minorities and judicial independence is duty of the state.⁸⁷

The court in another landmark case titled *Sh. Liāquat Hussain v. Federation of Pakistan*⁸⁸ held that imparting justice to the citizens is a basic right protected in the constitution. Right to get justice as enunciated in Islam connotes that all citizens must have equal opportunity and right to approach the courts to redress their grievance. All people have the right to approach an independent and competent court and fair trial as per law. The independence of the judiciary is necessary for the provision of fundamental rights, without judicial independence the protection of fundamental rights is uncertain.⁸⁹ The court further noted that extremism and criminal acts refute the basics of democracy as well as social justice as set forth by Islam. The legislature can make the law to curb terrorism and restore law and order situation. However such law cannot contravene the constitutional provisions such as fundamental rights.⁹⁰

In *Benazir Bhutto's*⁹¹ case the court observed that the dignity of man and the privacy of home are constitutionally protected fundamental rights and Islam has immensely emphasized in this regard.⁹² If an individual encroaches the privacy of any person, it hurts the dignity and privacy of man and in particular, it places the individual to the grave risk of being threatened. When the telephonic conversation of an individual is being recorded it violates constitutionally protected basic rights i.e. the freedom of expression and speech. It is supposed that when an individual speaks through the phone just the speaker and his addressee hear the discussion as one cannot discuss his secrets in front of other persons; this protects freedom of expression, speech and privacy of any person. Thus,

the recording of the phone violates liberties provided under the constitution.⁹³

In another famous case titled *Miān Muḥammad Nawāz Sharif v. President of Pakistan*,⁹⁴ the court held that the citizens have intended to make a system where the government shall use its power by the elected representatives; where they can practice and experiment democracy, equality, and freedom as articulated in Islam. The preamble of the constitution dictates that "the State shall exercise its powers and authority through the chosen representatives of the people".⁹⁵ The constitution recommend that "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" and state is commanded to "exercise its powers and authority through the chosen representatives of the people".⁹⁶ A chosen representative who defects his declared conviction, mandate, party, constituency, abolishes his typical characteristic and cannot exercise the authority of the state.⁹⁷

In *Shehlā Zīā's* case,⁹⁸ the meaning of 'life' was expanded by the court through an activist approach.⁹⁹ The SC observed that although the constitution does not define the word 'life', yet it cannot be given restrictive meaning to equate human life with animal life. While liberally interpreting the meaning of life, the court observed that a human should be able to live a dignified life with all facilities and pleasures of life being born in a free society. The court, for the first time, departed from the traditional definition and jurisprudence of fundamental rights in Pakistan. Under the traditional conception of fundamental rights, the right to life could only be construed as a 'restraint on the powers of an individual or a government not to kill a citizen unlawfully such as extrajudicial killing. However, in *Shehlā Zīā's* case, the court stretched fundamental rights jurisprudence.

The courts granted the right to accommodation to a civil servant while stretching the right to life.¹⁰⁰ The right to life was extended even to drinking clean water.¹⁰¹ The court held that damage caused to property by the flood is a matter of fundamental right.¹⁰² Likewise, contract employees were confirmed as permanent employees considering the right to livelihood as a matter of fundamental right.¹⁰³ Access to justice was also treated as an issue of the right to life.¹⁰⁴ Such an interpretation of

fundamental rights arguably disturbs the balance of power between different state organs.¹⁰⁵ Arguably, it amounts to encroach upon the policy-making domain of other branches of the government, as, the courts have intervened in the government's domain of regulating environmental pollution.¹⁰⁶

On the contrary, it can be argued that when the executive fail to protect the people's rights, then the courts becomes the last resort to address the grievance of the people. Therefore, Pakistan's judiciary has followed a liberal, progressive, creative, and dynamic approach in interpreting fundamental rights to meet the objective of Islam—that is the welfare of the people. In this regard, our courts are inspired by the notions of socio-economic justice in Islam.¹⁰⁷

Conclusion:

The provision of fundamental rights is integral for human life. Therefore, the protection of fundamental rights is envisaged in all constitutions. The fundamental rights owe its origin to religious text such as the Quran and the Bible. Thus, they were available to humans in one form or the other in all ages, cultures, and legal systems. Contrary to this historical fact, some western scholars argue that fundamental rights or human rights do not exist in Islam. Their argument assumes that as Islam obliges the performance of religious duties, the fundamental rights are not granted as such to the citizens of an Islamic state. However, a brief survey of thoughts of Muslim scholars and the constitutional interpretation and practice of Islamic states like Pakistan refutes the western approach on human rights. It is established that fundamental rights exist in Islam and Pakistan's constitution. The Islamic principle of *maṣlaḥah* (benefit) can be utilized for the creation, elucidation and protection of fundamental human rights. Islam intends to advance well-being of the humans that requires the protection of fundamental rights. The argument that fundamental human rights originate in the western society only negates the historical evolution of these rights in different cultures and legal systems. In fact, the notion of human rights emerged, promoted, and protected in Islamic civilization even before the resurgence of these rights in so-called modern western societies. Further, the progressive interpretation of fundamental rights by Pakistan's judiciary rebuts the argument of western scholars. In doing so, the judiciary has employed the notion of socio-economic justice of Islam

provided in the preamble of our constitution to expand and protect fundamental rights in Pakistan.

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