



Repugnancy to Islamic Injunctions: Analysis & Legitimacy of National Accountability Ordinance 1999

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Abstract: This article encompasses an analysis of provisions of NAB 1999 on the touchstone of their conformity with the injunctions of the Quran and Sunnah. The argument advanced in this respect is based on Article 203(d) of the Constitution of the Islamic Republic of Pakistan, under which FSC is vested with the power of examining and deciding questions of law tainted to be contrary to the injunctions of the Quran and Sunnah. Arguments made in this paper challenge Section 9(a)(iv) and Section 14(c) and (d) which are not in consonance with the injunctions of Islam, as appeared in the Quran and Sunnah. Pakistan's Islamic identity necessitates such questions pertaining to un-Islamic provisions in the laws of Pakistan always yielded debates and different opinions of scholars. Analysis of the NAB ordinance and its provisions discussed in the paper, which does not conform to the injunctions of Islam would inform and invoke legislators to reform legislation in Pakistan.

Introduction

The National Accountability Bureau was formed in the era of General Pervaiz Musharraf as a result of the NAB ordinance. The Ordinance empowered this agency with absolute powers of arrest, investigation and prosecution. Arbitrary powers and absolutism in other legal procedures were criticized by academics and law makers from time to time. This paper looks into the validity of provisions of the Ordinance which are contrary to the injunctions of Islam. The impugned provisions can be summarized in the way that: A trial which will be conducted under these above mentioned impugned provisions of the Ordinance, the person who is accused of accumulating assets and other resources and cannot convince or give an account of those and the same properties do not match with his known sources, the court in such case would be of opinion to hold the said person guilty of the offence of illegally obtaining such properties. Here also the presumption of

innocence shall not be attracted, rendering the conviction invalid merely because it was based on conjecture.

This is the point which shifts the burden of proof on the defendants which is against Islamic injunctions and also against any norms and principles of the legal system. In order to question the validity of provisions of NAB Ordinance which have been claimed in this article to be repugnant to Islamic Injunctions are mainly two. First, the point of shifting the burden of proof which originally and principally should lie on the shoulders of the party alleging it but these impugned provisions shift this burden otherwise and require the defendant to establish his innocence and account for his assets and properties alleged to be obtained by illegal means. This is against all norms of proving an accusation. Secondly, a basic principle on which a judicial system functions is of giving sanctity and deference to the principle of presumption of innocence unless proven otherwise. On this point, both

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Muslim and Western jurists are unanimous on the view that a person accused of wrong should be treated as per the principle of; 'innocent until facts prove otherwise' This principle is also accepted and recognized by the fundamental rights granted by the UN's declaration on human rights.

Literature Review

Objections on Impugned Provisions of NAB Ordinance

It is important to mention here the articles of the constitution of Pakistan wherein it has been provided that there is no room for the enactment of laws which are contradictory to Islamic injunctions. In this respect, Objective resolution has been made a substantive part of the Constitution through Article 2-A of the Constitution, wherein it has been laid down that "The sovereignty over the entire universe belongs to Allah alone and the authority to be exercised by the people of Pakistan within limits prescribed by Him is a sacred trust. Under article 2 of the constitution, Islam shall be the State religion.

It is categorically provided under article 227 of the constitution of the Islamic Republic of Pakistan that Pakistani laws which are not in conformity with the Islamic injunctions are required to be made in consonance with the principles laid down in the holy Quran and Sunnah. For this purpose, the government of Pakistan has created two institutions which have been entrusted with the power of examining and deciding upon cases where the existing laws of Pakistan are challengeable on the grounds of being contrary to Islamic injunctions. The first institution which is entrusted with the task of examining the validity of laws in Pakistan on the touchstone of Islamic injunctions is the Council of Islamic ideology, whose observation and recommendation are merely persuasive and educative and not mandatory to be followed and complied with. The second institution formed for this purpose is the Federal Shariat Court which has a significant role to play in the Islamization of Pakistani laws because observations to be made by this court are mandatory and must be complied with where it finds that the law of the land challenged by a citizen or found at its own motion is contrary to the injunctions of Islam.

The Status of Presumption in Islamic Law in the Light of Quranic verses, Traditions and Principles of Islamic Law

Islamic jurists have given the degree and threshold required for proving a case in five different types ranging from level of doubt to an acceptance of certainty. The first one is certainty or يقين. It is a complete and definite knowledge about the existence or nonexistence of anything. It is an established principle of the Islamic law that certainty cannot be dispelled with doubt. The second in number is Dominant conjecture or ظن غالب. The existence or nonexistence of anything with some degree of preference to the other side. The example of ظن غالب is that if a virgin girl becomes pregnant, there is a dominant presumption that she has committed Zina.

Mere presumption ظن is the one where no preference is given to either side but it hangs in the balance. The other categories below ظن is "Doubt" Shak and wahm, a wrong idea or notion created in the mind of a person about anything. The jurists have allowed relying on the first three categories with certain conditions. Likewise سوء الظن negative presumption has been condemned while حسن ظن has been appreciated, as appeared in the tradition that: "ظنوا المؤمن خيرا" always think positively and attach better expectations with fellow Muslims. The word "ظن" appeared in the holy Quran in the sense of baseless thinking, incomplete information mostly directed towards the criticism and objections raised by unbelievers about Islam and Muslims. The Muslims have been enjoined to avoid relying on and applying conjecture mostly because it ultimately leads towards a sin. Few verses of the holy Quran are reproduced in the following lines: Allah almighty says that:

يَا أَيُّهَا الَّذِينَ آمَنُوا اجْتَنِبُوا كَثِيرًا مِّنَ الظَّنِّ إِنَّ بَعْضَ الظَّنِّ

ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin" (Al-Hujraat:12). It also appears in another place that: وَمَا يَتَّبِعُ أَكْثَرُهُمْ إِلَّا ظَنًّا إِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا

"But most of them follow nothing but fancy: truly fancy can be of no avail against truth (Yonos:36)

"وَمَا لَهُمْ بِهِ مِنْ عِلْمٍ إِنْ يَتَّبِعُونَ إِلَّا الظَّنَّ وَإِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا"

But they have no knowledge therein but they follow nothing but conjecture and conjecture avails nothing against the truth

وَمَا خَلَقْنَا السَّمَاءَ وَالْأَرْضَ وَمَا بَيْنَهُمَا بَاطِلًا ذَلِكَ ظَنَّ الَّذِينَ كَفَرُوا قَوْمًا لِيُذَمَّرُوا (53:28)

"لِلَّذِينَ كَفَرُوا مِنَ النَّارِ"

Not without purpose did We create heaven and earth. That were the thought of unbelievers but woe to the unbelievers because of the fire of hell (38:27).

In Shariah, the presumption of innocence has preference over the presumption of guilt because the principle of Shariah is that: *الاصل برائة الزم* (Freedom from liability is the fundamental principle of Shariah.) originally, the human being is created free from all kinds of liabilities. It attains certainty while guiltiness is doubtful. A person is presumed to be free from all kinds of liabilities towards others unless liability against him is established through other evidences. The principle of original freedom from liability has its roots in the tradition of the Holy Prophet which places the burden of proof on the plaintiff.

البيته على المدعى واليمين على من انكره

"Originally the burden of proof is on the claimant or plaintiff and the defendant has to take oath. In another tradition, it is appeared that:

حَدَّثَنِي أَبُو الطَّاهِرِ أَحْمَدُ بْنُ عَمْرٍو بْنِ سَرِّحٍ أَخْبَرَنَا أَبُو وَهْبٍ عَنْ أَبِي جَرِيرٍ
عَنْ أَبِي أَبِي مُلَيْكَةَ عَنْ ابْنِ عَبَّاسٍ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَوْ يُعْطَى النَّاسُ
بِدَعْوَاهُمْ لَأَكْرَهِي نَاسًا وَمَعَائِرَ رِجَالٍ وَأُمُوهًا هُمْ وَلَكِنَّ الْيَمِينَ عَلَى الْمُدْعَى عَلَيْهِ

صحيح مسلم: جلد دوم: حديث ميمر 1976

Ibn Abbas reported from the holy Prophet as saying: If the people were given according to their claims, they would claim the lives of persons and their properties but oath must be taken from the defendant. "According to this Hadith, it is incumbent on the plaintiff to make out his case crystal clear by giving a full description of the claim, adducing all possible and lawful evidence and putting forth forceful and convincing arguments. The defendant will take the oath. Reversing the onus of proof in utter violation of this tradition and principles of Shariah is a condemnable act and violation of article 227 of the Constitution of the Islamic Republic of Pakistan.

A review of Quranic Verses and Hadith and traditions from Islamic history shows that the impugned provisions of the NAB ordinance are contrary to the norms of Islamic Injunctions and also to any canon of the legal system.

Principle of Islam on Presumption made with Error

In Islam, another important principle is that:

'Conjecturing which is made with error is invalid'.

لا عبرت بظن البين خطأ

In Islamic principle, the concept of presumption is allowed in certain cases as a procedural step towards dispensation of justice, however, where the same presumption is rebutted in the judicial process with a certain fact and testimony, such presumption becomes invalid and is laid to rest to be relied on. This is equally applied to the criterion given in *ijtihad*. For example, if a *mujtahid* makes mistakes in *ijtihad* which is established otherwise by certain evidence in subsequent facts, such *ijtihad* becomes invalid and it has to be based on new evidences. Similarly, this principle is given in Islam for judges to make recourse in cases where they decide cases on wrong perceptions and judgments.

About the impugned law, the viewpoint of the superior courts of Pakistan is cited as:

1. Supreme court of Pakistan has clearly established in its decisions that although the impugned law (NAB ordinance) places the burden of proof on defendants, yet this is primarily the responsibility of the prosecution to establish an initial case against defendants and the accused will be presumed innocent until proven otherwise (PLD, 2008 SC, page 166)(SCMR 2009,790).
2. Presumption against accused. The Supreme court has also established that where distinction regarding civil and criminal liability is not made in the process of prosecution, it amounts to favoring prosecution and is unjust to the interests of defendants (PLD 2001 SC 607),(SCMR 2008,1118).
3. In another judgment, the supreme court declared that the accused would be treated

guilty only in circumstances where the prosecution succeeds in establishing initial charges against the accused. Nonetheless, the burden of proof would lie on the prosecution as an initial step to proceed in the judicial process. (PLD 2004, Quetta, 136)

4. The above mentioned verdicts of superior courts in Pakistan also observe the arbitrariness in the procedural mechanism provided in the NAB ordinance.

Analysis of English Law Pertaining to Presumption of Innocence and Presumption Guilt

To form an opinion or supposition about (something) on the basis of incomplete information is unjust. It is rather better to follow a quote that "Ten guilty persons should escape than one innocent should suffer," or "a person ought not to be condemned on suspicion; for it is preferable that the crime of a guilty man should go unpunished than an innocent man be condemned."

In the United Kingdom, it was declared by king Alfred that "In cases of doubt, one should rather save than condemn". Moreover, it was stated by Chief Justice John Fortes Cue that "indeed I would rather wish ten evil doers to escape death through pity than one man to be unjustly condemned."

If the above quotes are examined in the light of Islamic injunctions, there seems to be complete agreement between the two judicial systems. Further, in support of this, the perusal of the following lines is necessary.

Allah is very kind to His creature; this is not the intention of Him to award capital punishment to His creature. This is very relevant in Hadd punishments where He has set a very difficult criterion of proof for awarding such punishments in order to allow accused persons to escape such stringent punishments. In Islam, the concept of eternal punishment is given which means if a person escapes punishment in this world, he/she will not be able to escape on the day of judgment. It is also the policy of Islam to protect the privacy of individuals and such crimes should be overlooked, particularly making such erring scandals inappropriate and not advisable in Islam. For example, this is provided in Hadith that:

حَدَّثَنَا عَبْدُ اللَّهِ بْنُ الْحَرَّاجِ حَدَّثَنَا وَكَرِيمٌ عَنْ إِبْرَاهِيمَ بْنِ الْقَاسِمِ عَنْ سَعِيدِ بْنِ أَبِي سَعِيدٍ عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِذْ نَفَخَ الْخُذُودَ وَمَا جَدُّكُمْ لَهُمْ مَدْفَعًا -

In this Hadith, it was provided that where there is a way or iota of justification to ward off Hadd, set it aside. (IbnMajah, 2007, page, 186)

Moreover, in the following Hadith, it is also laid down that.

حَدَّثَنَا عَبْدُ الرَّحْمَنِ بْنُ الْأَسْوَدِ أَبُو عَمْرٍو الْبَصْرِيُّ حَدَّثَنَا مُحَمَّدُ بْنُ بَرِيعةٍ حَدَّثَنَا يَزِيدُ بْنُ زِيَادٍ الرَّاسِبِيُّ عَنْ الزُّهْرِيِّ عَنْ عُرْوَةَ عَنْ عَائِشَةَ قَالَتْ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِذْ نَفَخُوا الْخُذُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ تَخْرُجَ فَخُلُوا سَبِيلَهُ فَإِنَّ الْإِمَامَ أَنْ يَخْطِئَ فِي الْعُقُوبَةِ خَيْرٌ مِنْ أَنْ يَخْطِئَ فِي الْعُقُوبَةِ -

In this above mentioned Hadith, this principle is also laid down that where there is an iota of chance or substance to ward off Hadd, it should be allowed to escape such punishment. This principle further explains that a person who is in authority to dispense justice should be better to err in delivering justice than making a mistake in awarding a sentence to an innocent person (Mubarakfori, 1979, page 688).

Following the above mentioned principle laid down in the Hadith, where there is little chance of doubt, it should go in favor of the accused as in Islam. Doubt invalidates the punishment of Hadd. Similarly, the principle laid down for a judge in Islam to decide cases is that better if he erroneously acquits a person than punishing someone mistakenly.

This principle is evident in the following Hadith; 'that for an imam, it is better to make a mistake in absolving someone than punishing someone erroneously' This shows how is it inappropriate in Islam to punish an innocent person wrongfully. Furthermore, the sanctity of an innocent person to be punished wrongly is also established when doubt in a testimony makes punishment invalid in Islam. This principle is applicable to other kinds of cases in Islam such as Hudud, Qisas and Tazir punishments (Awdah 'Abd al Qadir, nd, section, 183).

Since human lives are the most precious creature on earth, any harm to the lives of humans is judged with the strict criterion of justification and parameters. The right to life is granted to humans by the Holy Quran. Therefore, the criterion for proving a crime is required to be

beyond a reasonable doubt in order to ensure an innocent person might not suffer at the hands of fallibility.

Conclusion

In the light of the above discussion, it is established that the principle which relates to a claim of innocence until proven guilty is a cardinal principle of Shariah law. The impugned provisions of the NAB ordinance on this principle deviate from the injunctions of Islam and also against the norms of western judicial procedures of the dispensation of justice. It has also been discussed in this paper that placing the burden of proof on the shoulders of a defendant, which initially lies on the prosecution, is contrary to the Hadith which states that,

البينة على المدعي واليمين على من أنكر

شرح مسلم للنوي

In the above analysis and circumstances, it has been discussed and established that clauses (IV) of

Sub-Section (a) to Section 9 and (c) and (D) of Section 14 of the National Accountability Ordinance, 1999 are repugnant to the injunctions of Islam. The national accountability bureau was formed to check corrupt practices in the country but at the same time, the relevant law and its procedure are required to be according to the international standards of a fair trial. It is equally required to be in consonance with injunctions of Islam. It is required by the objective resolution which was made part of constitution through article 2-A wherein it is laid down that sovereignty belongs to Allah and people will exercise authority under the auspices of Allah's trust given to mankind. Thus, this paper concludes that the impugned provisions of NAB ordinance discussed here above are required to be amended in accordance with the requirement of article 227 of the constitution of Pakistan, wherein it is required as a direction of the constitutional obligation to make all laws in the state of Pakistan in consonance with the injunctions of Islam.

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