Philosophy of Legal Theories

Jurisprudential Constitutionalism

Prof. Dr. Md. Maimul Ahsan Khan

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Philosophy of Legal Theories: Jurisprudential Constitutionalism
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Preface

Legal philosophy refers to Jurisprudence of all kinds. As a thought system or pattern legal philosophy is a branch of the philosophical world that directs us to be concerned with the utility of various principles, postulates, norms, precedents, and courts' decisions. Legal philosophy is related to the evaluative theories of law that might be of any kind such as the analytical or normative jurisprudence. Any critical theory of law is of great importance, if we are serious about the health of any legal or judicial system. The traditional idea that we don't need legal theories in our practical life is a self-defeating attitude. Jurisprudence has immense theoretical and practical use, if we are really serious about the role of law, rule of law, democratic reforms and egalitarian ways of establishing human rights and justice.

All human societies can be divided into some kinds of democratic and hierarchical system of governance. John Rawls in his *The Law of Peoples* writes "that well-ordered hierarchical societies are not expansionist and that their legal order in guided by a common good conception of justice ensuring that it honors human rights... for example, that human beings are moral persons and have equal worth or that they have certain particular moral and intellectual powers that entitle them to these rights... Human rights understood in the light of that condition can'not be rejected as peculiar to our Western tradition... War is no longer an admissible means of state policy. It is only justified in self-

defense and a state's internal sovereignty is now limited. One role of human rights is precisely to specify limits to the sovereignty."

These legal ideas are overloaded in view of making jurisprudential studies more practical and down to earth. At the initial stage, any civilization may produce many success stories. In the past, many centuries were needed to build a human socity capable of creating vibrant human and financial resources. At present maybe we need far less a creative time to claim our success as state-builders with immense potential.

It is rather hard not to agree with Samuel Moyn, who has argued in his book titled *The last Utopia: Human Rights in History (2010)*:

"Westerners left the dream of revolution behind – both for themselves and for the third world they had once ruled – and adopted other tactics, envisioning an international law of human rights as the steward of utopian norms... Having been almost never used in English prior to 1940s... human rights emerged historically as the last utopia... until "human right" displaced revolutionary nationalism.... In this atmosphere, an internationalism reveling around individual rights surged, and it did so because it was defined as a pure alternative in an age of ideological betrayal and political collapse... Human rights were born as the last utopia – but one day another may appear."

Like legal and moral issues, human rights issues are now a matter of deep and great substance. However, because of trade and business issues, in terms of adjective legal matters, in many cases, we have been suffering either from double standard or emptiness of our national and international hopes and aspirations.

To understand the significance of the double standard, it is necessary to appreciate the special enforcement logic for the protection of vested interests and poor performance record of

international human rights law. Much of the international law is largely self-enforcing because nations receive mutually beneficial gains from compliance. A good example is the law of diplomatic immunity. Whether by treaty or customary law, the immunity of diplomatic personnel has been viewed as a necessary prerequisite to carry out diplomatic missions and for the maintenance of good formal relationships between nations. Observance of the principle of reciprocity is very relevant issue here.

At present many state authorities fail to comply with international human rights law. No nation publicly declares a prerogative to commit human rights abuses against its citizens of other nations at this stage of globalization. This phenomenon reflects the human rights community's success in making human rights a matter of international concern as well as more effective communication tools among the nations.

"In the end, the USSR abstained from the vote on the Universal Declaration itself, but presented itself at home for more than a decade as faithful to the precepts of the documents. Its public justification for the abstention was the Westernization involved in itemization, which also led some Muslim states to dissent during the drafting and abstain in the voting, with special attention to the right of religious observance made increasingly central by Western states."

The above statement of Samuel Moyn (2010) reflects the reality of the beginning of the Cold War era that confused many Muslim Nations, which fall victims of great power rivalries. The second edition of the book has taken the importance to this scenario that ultimately shaped many things in the Muslim world.

The study of jurisprudence lends reasoning power, not only to such broad questions as the validity of law and the relationship between law and morals but also to such particular questions, like the distinction between principles and rules of law and the legal weight given to each, and it is precisely because of this

generality of scope and application that jurisprudence may be placed *primus inter pares* among the core law subjects. To escape from its thickness we excluded the chapters from 21 to 25 from the first edition.

The second edition is meant for law students and any student for that matter who wishes to have a look to comparative perspective of legal and political theories and doctrines. Needless to mention that, the major theme of the book has good currency in the market as we have witnessed in the first edition as well. The first edition of the book was sold within three month of its appearance in the market. With the help of the critical readers, we wish to improve it further in our future edition. However, readers should not expect us to take steps of any empirical testing of hypotheses related to all kinds of legal Theories and doctrines. The following two citations can'not be tested, despite the fact they are of universal character.

"All things being equal, nation-states can be expected to prefer institutional designs that impose the least constraint on their sovereign legal authority." (Cary Coglianese)

"Presumably these differences will be found in the fact that international law, unlike morality, is a creation of states and that Western states, with their long and continuing history of imperialism and of then tragically misjudged interventions, have historically played a disproportionately influential role in fashioning and implementing international law." (John Tasioulas)

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Introduction to Legal Philosophy

Every ideology or political system needs to be supported by some philosophical thoughts, particularly by some legal theoreies. Those legal theories in their turn make a legal philosophy. Karl Marks was a philosopher, but we could call him an “economical Philosopher”. It did not happen because every analyst tend to believe that he was an economist first, and then many ‘things’ next. As poets, Tagore and Nazrul were essentially philosophers, but we simply like to call them poets and composer of global repute.

Many authors and critics seriously argue that legal philosophy is rather a misnomer to be called Jurisprudence. In some opinion, modern legal theories are even clearly divorced from all other social sicencies, essentially from natural sciences. That is why many jurists with secular bias think that even the world religions also cannot produce any legal philosophy of their own. For them, legal ideas produce normative rules to be enforced by coercive methods.

There are too many moral and legal doctrines in Islamic jurisprudence. Both the defenders and critics believe that Islam maintains too many uncompromising attitudes toward modern legal theories, which on their part would remain unbending to acknowledge that the Qur’an and the legal principles derived from the sources of Islamic law should be accepted and treated as a comprehensive pertinent subject of modern legal discourse.

For a vast majority of modern judges and lawyers, it is just a fantasy to discover a whole range of legal theories in the religious

injunctions based on the Qur'anic principles. For others, Islamic ideals are either out-dated and thus should be abandoned for good. Religious law refers to ethical and moral codes taught by religious traditions. Examples include Christian canon law, Islamic sharia, Jewish halakha, and Hindu law.

However, at-present serious legal minds in the West as well as in the Muslim world have been pondering about what really happened with the legal theories available in the hands of lawmakers and judges. What is really justice? How far we can bind the judges, lawyers and government servants by the Normative Acts? Who would ultimately ensure justice for poor and vioceless masses around the world?

Diverse legal systems we have around the world that have increasingly becoming cruel, unjust, and thus "unholy" not worth of following for any genuine public good and individual rights that we may need so urgently at some points of our personal or collective life.

Islam in theory and practice does not condone any kind of colonial or racial rule whatever justification it might have in a particular period of human history. Islamic legal theories based on some universal principles of freedom, human dignity, tolerance, equality and equitable justice that are pre-requite for any legal system to be developed for the sake of general masses.

Natural order surrounds us all the time claims that we have in orderly manner in social, political and economic life as well. Our Prophet Mohammed (SAAS) was fully aware about the legal norms he had to introduce in the State of Medina. As a legislator he was constantly guided by the revelation. He was not in need of any tailored legal theory to be followed. He was bringing new social, cultural, and economic norms to be introduced initially in Arabia and then to be spread out all over the world. His theory of justice was based of reformative and corrective administration of civil and criminal justice.

The prophet of Islam, from the very beginning of his journey, as an arbitrator wanted to put an end to the tribal feuds in Medina. For that purpose, he decided not to behave or work as a dictator or military ruler. He did not follow the suits of any tribal leader either. He was a legislator and judge at the same time as there was no place for separation of powers at the time. Becoming the Head of the City State of Medina he graciously shared his legislative and judicial powers with others, including the tribal chiefs of all ethnic and religious groups in Medina.

Using the Qur'anic injunctions to establish justice through arbitrations, he intended to put an unyielding restrictive method of fighting the system of bribe-taking and bribe-giving in producing evidence at his court of law, and ordered everybody to give full scrutiny and measure in all kinds of financial transactions.

In the line of Qur'anic injunctions, the Prophet of Islam ordered to make the contracts in black and white. It was a great surprise for Arabs, who used to do things orally based on promises. However, it was already a time that needed a better and comprehensive method of safeguarding people's rights at the time of entering any contract between Muslims and non-Muslim alike. Here we see the foundation of a legal theory. This is one of tereasons why many analysts believe that Islam as a whole is a legalist religion based on too many specific Moral Rules. In reality, Islam is a Naturalist and moralist religion rather than a legalist in positivist understanding of the content of the subject-matter concerned.

The Prophet of Islam could give commands to be followed without allowing any question to be raised whatsoever. The simple logic that any norm or rule based on revelation should be followed because of its strength attached to its source. However, without consultation with his companions he never gave any

command, or even advice and suggestion to anybody, who wished to have Prophet's opinion to be reckon with.

Here is the consultative method we find in him at the time of decision-making process. These methodological techniques and ethical foundation for the execution of reveled texts practically gave birth different legal theories later on developed by the renowned jurists and researchers. For example, calling witnesses at the court of law was mandatory under Islamic law. But that was a legal and judicial process unknown to the then Arabia. It is a new technique or a norm to be followed by all judges?

The issue was the evidence collection that included living human beings as well. Here an honest witness at the court of law keeps his or her higher grounds just by virtue of being witness, whose ethnic or tribal identity did not have any significance in the eyes of Islamic laws. In this regard as well, we get the legal norms that are contributing to the process of establishment or creation of a legal theory.

As an administrator, the Prophet of Islam ordered to work for the empowerment of women and children without any discrimination based on gender or age. However, legal rules are yet to emerge through revelation for which he had always been waiting eagerly. He did not change his course of development or did not create any artificial barrier in the way of legal theory to be formulated, nurtured, and developed. The Qur'anic principles and injunctions went hand in hand with the ethical attitude and standard demonstrated by the Prophet Muhammad himself.

The Prophet of Islam was very particular to legal matters and their underlying ethical values. The justification for every Qur'anic norm was given in full length and in details. As a result, Muslims and non-Muslim citizens of Medina City were quite aware of the legal requirements for doing some specific works or

conducting activities under a mutual trust that worked for the benefits of the people at large.

In this ideological backdrop, we find that various types of legal discourses have begun with full swing at the very early stage of Muslim civilization. We may call them as renewed legal reform-initiatives or even Islamic resurgent movements in many cities and countries existed at that time. However, these peaceful revival movements of reinvigorating universal messages of Islam were either misconstrued and/or misunderstood. Many misconceived ideas of Islam have been spreading all over the world and thus the core ideas of "Islamic reforms" for creating a better and decent humane society were by and large forgotten.

Islam is always for a genuine progress and prosperity. But that vital facet of Islamism has overshadowed by militant behavior of some fringe groups in many Muslim countries. Moreover, the issues related to economic equality and quick distribution of wealth between all segments of society are not in the priority list of Muslim governments and political parties aspiring for State powers.

Apart from deeper ethical foundations and spiritual aspects of Islamic laws, in terms of legal perspectives many Qur'anic thoughts, ideals, and ideas directly deal with the material aspects of life.

In this backdrop, Islamic and non-Islamic legal theories share some fundamental common grounds that imply for many substantial ramifications in view of alleviating poverty and redressing the curse of unemployment. The desired alleviation process for the eradication of poverty and lawlessness is the common cause for entire human race, especially for the empowerment of women, children, sick, underprivileged men and women around the globe.

You cannot make fool all people around you all the time. Today's legal act might be a tomorrow's illegal act. Today's constitutional amendment might be illegal one tomorrow. The entire legal regime and system might collapse tomorrow. But you will be standing firm with your jurisprudential conscience to bring a new climate of legality and morality for the entire society or state. With such a huge burden a first year law student is always confused why he needs to study a subject that makes 'little' sense every time in the class room and outside.

Jurisprudence treats you as if you knew a lot about historical, social, political and cultural development of many diverse legal theories without which it cannot start its journey in the endless ocean of material, intellectual, and ethical sources of law. And it is true that you know jurisprudence like your mother knows you. May be this is the reason why jurisprudence is regarded as mother-science of law.

However, without knowing the philosophical, psychological, social, cultural and economic phenomena of human societies controlled, influenced and regulated by many obective and subjective factors, human being may fall into the limits of its own intellectual limitations.

The book has tried to juxtapose many ideas about legal theories of all kinds. However, Islamic legal theories in some cases received a special attention to examine the validity of this or that norms claiming to be perpetual for all generations to come. In all its paraphernalia relevance to the issues of women's empowerment and respect for older generation and special care for children that cannot be traded off with our own immediate monetary gains. There is no harm in doing business or making profits, but we can'not simply destroy the family values and our habitat that are under constant attack by a very tiny and powerful tycoons, who are now deliberately creating confusion about all

kinds of healthy legal and moral theories that we all need of so desperately.

Author tries to draw the readers' attention to the reasons behind the misconceptions about Islamic legal theories and doctrines on the one hand. On the other hand, author invites people with any good or moral sense to examine the Western legal theories, which are out there with all of their dichotomies and paradoxes from which we cannot escape either as we share this earth as our home.

This author tries his level best to demonstrate that legal positions prescribed by the primary and secondary sources of Islam are quite distinct and room for manipulation with the basic Islamic legal doctrines is not that huge. The ugly or dangerous onslaughts on Islamic and oriental legal theories are often remained unaddressed and deserve to be examined critically, but surely objectively.

Lawyers get a bad reputation of being unrepentant liars. Jurisprudence wishes to make a lawyer firm and confident in professional duty and honesty. Other subjects may teach you how to become a good or bad manipulator of law and legal issues, but jurisprudence teaches you know to become a reputed and successful lawyer without being a liar or an utter manipulator of laws or facts. That is the first and last lesson in jurisprudential studies, if you are really serious about it. Don't try to find any shortcut way to success in any legal profession. You will then die an intellectual death overnight.

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The book has no special fascination for any particular group of audience, students or teachers. However, author has intended to make the book a balanced contribution to legal discourse between Islamists and modernists of all kinds. Author believes that the book supposed to be helpful for any student, teacher, lawyer, social and human rights activists with a mind of inquisitiveness. It does not matter what are the diverse backgrounds and affiliations a concerned reader and researcher carry with him or her, only pre-requite is to be open minded to any new legal idea or means.

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