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A SHARĪ AH REVIEW OF THE DECREES OF WALĪ SWAT RELATED TO "MORTGAGE" AS MENTIONED IN THE BOOK OF "RIWAJ NAMĀ SWAT"

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ABSTRACT

The rule of Mian Gul Abdul Wadood Bacha Sahib in Swat began in 1917. After Mian Gul Abdul Wadood Bacha Sahib got the government, he adopted *Jirga* System¹. According to this system, the *Jirga* was responsible for making laws for the area that would have been included in the state of Swat either by choice or force. The laws made by *Jirga* members for their area were written down and signatures or thumb marks of *Jirga* members were recorded on them. These were called the "manuals" (*Dastoor-ul- Amal*). In future, all the decisions related to any matter or crime was carried out through these manuals. Hence, it was the *Jirga* that used to formulate laws for their areas. However, prevailing local customs and traditions would also be taken into consideration for making any law. Therefore, these laws were not uniform throughout the state, rather regional color prevailed.

When Bacha Sahib's hold on the government was strengthened, he started issuing orders on his own and instructed the respective *Jirgas* to make them part of their own manual. When Bacha Sahib transferred the government to his son Mian Gul Abdul Haq Jahanzeb Wali Swat, like his father, he also issued written orders that were kept on record, in order to be practiced accordingly.

The state of Swat was integrated into Pakistan as a district in 1969. The government of that time directed the *Jirgas* to settle disputes according to the local customs. So for the guidance

of *Jirgas*, Ghulam Habib Khan compiled these laws in the book form, which was published with the name of "*Riwaj Namā Swat*". This article examines the *Shariah* status of decrees related to "Mortgage" in "*Riwaj Namā Swat*", which are eleven decrees in total, starting from Decree No. 238 to Decree No. 248.

DECREES RELATED TO MORTGAGE AS MENTIONED IN THE BOOK

Decree No. 238: Mortgage and Possession

1. In a case of mortgage, possession of a land for a period of twenty years will not be considered as ownership. In order to prevent such claims, the matter will be directed towards *Jirga* and they will decide whether the disputed land is in his possession as mortgage or he is the real owner.
2. If a person has claim of mortgage on a property while the other one is claiming that the property has been sold out to him then the matter will be assessed in the light of *Shariah*, only in that case that none of them has possessed the property for up to twenty years. If any of them has possessed the property for up to twenty years then the other person's claim of mortgage will be declined. Because the law of mortgage is very clear. According to which the term of mortgage will be fixed only for two years. If you need to extend the term you will have to renew the mortgage document (*Tamassuk*).²

A Sharġ Review of the Decree

In this decree, two orders have been given regarding mortgage.

The first rule is according to *Shariah*, in which the possession of a land for a period of twenty years will not be considered as ownership. As *Shariah* says:

"الحق لا يسقط بتقادم الزمان"³

"The right does not lapse with the passage of time"

According to second rule, if a person is using a property as owner for up to twenty years and another person made a claim on that property to be given as mortgage then the mortgagor will have to bring evidence and show the mortgage documents otherwise his claim will be declined. This decree of *Wali Swat* is also according to *Shariah*. As *Shariah* states:

"البينة على المدعي"⁴

"Applicant will have to produce evidence"

Decree No. 239: Tax on a mortgaged land

In the area of Khudu Khel, the tax was on mortgagor and seller of a property. However, we received different complains regarding this matter. According to them, we sell or give on mortgage our property due to poverty. It is the buyer and mortgagee that make benefit of this property. Thus, we have nothing to pay.

Their complain has been taken into consideration by high up. Today we have received new order through telephone. From today, whoever is getting benefit from a property will pay the tax. Most probably it will be the buyer and mortgagee to pay the tax.

(From Register of Tehsil Khudukhel 01-12-1940)⁵

A Sharġ Review of the Decree

In this decree, it is decided that who will pay tax on a property. In a case of selling a property, it will be the buyer who will pay tax as he is going to get benefit of that land from onward. Similarly, *Shariah* states:

“Loss is in concordance with the profit” "الغرم بالغنم"⁶

In the case of mortgaged land, the tax payer is mortgagee as he is getting benefit of this land. This rule is against of *Shariah*, as Islam does not allow mortgagee to get benefit from mortgaged land. The real beneficiary will be mortgagor.

"لَا يَغْلُقُ الرَّهْنُ، هُوَ لِمَنْ رَهْنَهُ، لَهُ غُنْمُهُ وَعَلَيْهِ غُرْمُهُ"⁷

“A Pledge does not become lost to its owner when he does not redeem it in time. Any increase in its value goes to him and any lost must be borne by him”

So, allowing mortgagee to get benefit from a pledge and imposing tax on him accordingly seems a clear violation of *Shariah* rule.

Decree No. 240: When will be the due money pay back?

We, the members of Aba Khel Jirga set the following rules regarding the payment of mortgage etc., and will be practiced accordingly in the future.

1. If a person has mortgaged his land for a sum of one thousand rupees to another person. The mortgagor has to pay the due money till the end of the month of *Baisakh*. If he was unable to pay back until the next month. The mortgagee has the right to refuse and keep the mortgaged land. No one is going to blame him for this act. However, if he wants to take the money back on his own will, he can do so.
2. If one person has mortgaged his land for a sum of one thousand rupees to another person. Later on, the mortgagee thought that he should not keep the land and requested for his money back. Then he has to request officially before the start of the month of *Baisakh*. If he made his request after the month of *Baisakh* then his request will be denied. However, if mortgagor has no object on returning the money back then his request will be accepted.

The above law is approved by all *Jirga* members and it will be practiced accordingly in future and no one is allowed to practice otherwise.

(By Register Decisions Tehsil Brikot Page No. 121, Dated: 26-05-1953⁸)

A SharĪ Review of the Decree

In this decree, the dispute regarding the return of mortgaged land and the due money has been settled down. However, the dispute arose because of not practicing *shariah* properly. According to the custom, it is the mortgagee who used to get benefit from mortgaged land. However Islam forbids it in all its forms whether he is getting benefit with the permission of mortgagor. If it is so then it constitutes *riba* (usury), and *riba* is *haram* (forbidden). According to Allama Ibn Abidin Shami:

"لا يحل له ان ينتفع بشيئ منه بوجه من الوجوه وان اذن له الراهن، لانه اذن له في الربا"⁹

"Getting benefit from pledge is strictly forbidden for mortgagee, although the mortgagor has given the permission, because it the permission of *riba*"

If it is forbidden with permission then there is no chance of allowing it without his permission.

Decree No. 241: From Registered Decisions of Deputy Minister, Central Office, Page No. 09

First Party: Maulvi Muhammad Ismail and Mir Muhammad, Resident of Lelonai

Second Party: Gul Alam, Resident of Lilonai

I, Binat Mian, son of Mir Hatim Mian, resident of Lelonai acknowledge this agreement that Maulvi Muhammad Ismail and Mir Muhammad owe me a sum of two thousand rupees. I will pay them back without having an excuse in coming *Baisakh* 1959. In addition, I will also pay the following amounts on behalf of Gul Alam Mian to the mortgagees in the month of *Baisakh* 1959.

- | | | |
|----|-------------------------------------|--------|
| 1. | Mortgaged Amount to Jolpur Mian | 1500/- |
| 2. | Mortgaged Amount to Gul Hameed Mian | 1400/- |
| 3. | Mortgaged Amount to Khan Nawab Mian | 540/- |
- Signed by Deputy Minister, Central Office, 06-07-1956¹⁰

A SharĪ Review of the Decree

In this decree, the time for repayment of the loan had been fixed from the mortgagor to the mortgagees, which is the month of *Baisakh*. The reason behind fixing this month is that it was the month in which the harvest of wheat started, and the mortgagee usually derived benefit from it which is not permissible in Islam. According to hadith:

"كل قرض جر منفعة فهو ربا"

"Every loan that entails benefit is usury"

Decree No. 242: Rules for signing the mortgage documents

All the concerned official of Swat should take into consideration the following rules while signing the official documents of mortgage.

Whoever wants to write a deed of sale, mortgage or any other agreement in the *tehsil*, he will have to pay the amount first to other person, which is going to be written down in the document of mortgage in front of the *Aamil* (the administrator). If someone did not give the money in front of the *Aamil* and he signed the document, then the *Aamil* will be dismissed from his job. 20-07-1955¹¹

A Sharġ Review of the Decree

This decree is also according to *shariah*, as the main purpose of *shariah* is to abolish all kinds of dispute within society. The purpose of paying in front of *Aamil* is to make evidence.

Decree No. 243: Kalam Jirga regarding Mortgage, Sale and affidavit

On the report of *Jirga Kalam*, practice according to the above decree No. 242 has been canceled for *Kalam* from today. Instead of it, the following order dated: 16-08-1955 is issued which is recorded in the official register, page no # 640 at *Tehsil Kalam*.

As *Kalam* is a backward region compared to other regions. Therefore, the above order will not be followed in their case.

As the people of *Kalam* do not have often cash. Therefore, they give the value of cash to other party in the form of cattle or maize during the writing of a sale deed, mortgage or affidavit. In this case, if one party confesses to the *Aamil* of the area that I have received the amount of sale deed, mortgage etc. in one lump sum, then it is permissible for the *Aamil* to sign the contract.

This order is only for the area of *Kalam*. (This order is received through the ruler of Bahrain, and will be applicable onward). 16-08-1955¹²

A Sharġ Review of the Decree

The loan written in the document must be given in the form of cash. However the people of *Kalam* do not often have cash, so they can also give cattle or grains equal to the value written in document. As the people of *Kalam* also give different commodities instead of cash for buying and selling, so it has become a custom (*Urf*) over there that transactions are done with cattle or grains instead of cash.

Similarly, jurisprudence states:

"الْعَادَةُ مُحْكَمَةٌ"

"Legal codes can be based on traditional law"

Decision can be made through custom. Whether it is in general or specific, it can become a source of jurisprudential law.

"اسْتِعْمَالُ النَّاسِ حُجَّةٌ يَجِبُ الْعَمَلُ بِهَا¹³."

"Custom is the source of *shariah* and must be practiced accordingly."

However, custom must be compatible with the *Shariah* law. If it is so, then must be followed.

Decree No. 244: Dispute over pledge

First Party: Maulvi Abdullah Jan, Resident of Qambar

The second party: Sher Malik, Resident of Qambar

I, the first party, Mr. Abdullah Jan, confess and write that I have purchased the land from the second party, Mr. Sher Malik. Sher Malik. Now Sher Malik claimed that this land is given to you as a pledge. To resolve the dispute, the oath on the Holy Quran was prescribed for Sher Malik, but I did not want to take oath from him and left the possession of the land to him. I am not going to claim the land ever.

From the Register, Tehsil Aba Khel Barat Khel, Page No. 354
20-03-1959¹⁴

A Sharġ Review of the Decree

In this decree, as the applicant did not have any evidence, so it was asked to the defender to take an oath. But the plaintiff abandoned his claim before the oath would be taken. Therefore, there is nothing wrong and this decree is according to the *Shariah*.

Decree No. 245: Tenure of Pledge

If someone is going to write a mortgage deed in the *tehsil*, its validity will be only for two years. The *Aamil* is not allowed to give them more than two years. After the completion of term, the mortgagor and mortgagee can request for extending the term from one to two years.

If any document lacks in mentioning the tenure specifically, stamp will not be issued for it. The term can be extended according to the above procedure only.
(28-04-1964)¹⁵

A Sharġ Review of the Decree

In this decree, a period of two years has been fixed for the pledge. According to *Sharia*, there is no fixed term for a pledge, but the pledge shall remain in the possession of the mortgagee until he recovers his loan.

"الآن حكم الرهن الحبس الدائم حتى يقبض دينه"¹⁶

"A pledge means that it shall be in the possession of mortgagee until he recovers his loan."

Further it states:

"الاجل فى الرهن يفسده"¹⁷

"Fixing a term in a mortgage agreement invalidates it".

However, in this decree, the word "*Rehan nama*" has been used instead of *rehan* (pledge), which means that the mortgage documents will be valid for two years and after two years it is necessary to be renewed. Therefore, it is not prohibited. Beside this, if the decree means that the loan given for mortgage will be only for a period of two years, then it is also permissible¹⁸.

Decree No. 246: Rules for writing mortgage documents

After today, if sale or mortgage documents are to be written in central offices or *tehsils*, the following details should be mentioned during its entry in the register.

1. The boundaries of land sold or given as pledge shall be recorded.
2. The payment or arrears of the sale or loan shall be written in detail.
3. The thumb or signature of the seller and mortgagor shall be recorded.
4. If there are any other necessary conditions, they should be mentioned in detail. (15-06-1966)¹⁹

A Sharĭ Review of the Decree

The purpose of this decree is to eradicate all kinds of dispute. Therefore, it is ordered to write down all the details in order to avoid future disputes. Similarly, the main purpose of writing a document is to record evidence so it should be in complete form, as Dr. Wahbatul-Zahili says:

"ثم بين الله كيفية الكتابة وعين من يتولاها: بأن يكتب كاتب مأمون عادل محايد، فقيه متدين يقظ: الحقّ دون ميل لأحد الجانبين، مع وضوح المعاني، وتجنب الألفاظ المحتملة للمعاني الكثيرة"²⁰.

"Then God instructed that how to write a document and advised to select someone that is trustworthy, righteous, impartial, intelligent, religious, and attentive. He should write the truth without leaning toward one side, using words with clear meanings, while avoiding ambiguous words"

So both *Shariah* and *Wali Swat* decree serve the same purpose, thus it is compatible with *Shariah*.

Decree No. 247: Sale of pledge and Repayment of loan

I am Karim Bakhsh Mian, son of Mulla Mian, Mian Jo Khel Resident of Damane of upper Swat, I am writing this contract, that I have purchased the land from Qanbar Mian for three thousand three hundred rupees (Stamp No. 152 dated 23-07-1952), which is given as a pledge by Mian Saadullah Jan to Qanbar Mian for a sum of two thousand nine hundred rupees for a period of ten years under Stamp No. 600 dated 23-08-1950. Whenever I will repay the loan to Mian Saadullah Jan, I will take the possession of the land.

Furthermore, I will not sell this land to Hazrat Adam, Shams Al-Hadi and their grand children. If I do so, then this contract will be considered invalid. It is written for evidence.

(From the Register of orders of Adviser of upper Swat, Page No. 77)²¹

A SharĪ Review of the Decree

Two different points is worth explaining in this decree. First one is that to explain the ruling of *shariah* regarding selling a pledge. Second, selling on the condition that the buyer will not sell it to such and such person, otherwise the sale will be considered invalid.

According to *Shariah*, if the mortgagor wants to sell the pledge, the sale will be subject to the mortgagee's permission or repayment of his debt. If the mortgagee gives permission, the sale is valid. Otherwise it will be considered invalid. Similarly, if the mortgagee wants to sell the pledge, the permission of mortgagor is needed²².

The second aspect of the decree is that selling something with such condition that is not the requirement of contract, neither it is beneficial for seller or buyer, then the sale is valid and the condition is null.²³

Decree No. 248: Regarding the weed of mortgaged land

(Orders for Tehsil Madian Region Cheil)

A. According to the custom of Chel, the mortgagee will get back his money in the month of *Baisakh*. Till then, he is allowed to get benefit of the land and take grains and weed of the autumn harvest. However, he is not allowed to fertile it further. (Jirga Members Cheil Dara)

B. We, the feudals of Shenko Dara state that grass and fodder remains in the ownership of mortgagee in our area in a case where the land is given for a period of one year. However, if the tenure of the mortgaged land is more than one year then it will become the property of mortgagor. (Jirga Members Shenko Dara, 10-04-1948)

C. We, the feudal of Cheil Dara declare that according to our custom, if a person gives a land as a pledge to another person then the mortgagee will take grains of that field only. He has no right to take grass and fodder along with it.

However, the year in which he receives his loan back, he can take grass and fodder along with grains of that year.

(Members of the Jirga, Cheil Dara, 11 March 1950)²⁴

A Sharġ Review of the Decree

In this decree, the beneficiary of mortgaged land is declared the mortgagee. Although, in previous decrees, it is explained that getting anything above loan is *riba* (interest). So, this practice is not correct according to *Shariah*.

RESEARCH FINDINGS

1. In the state of Swat, the task of making laws was assigned to the local *Jirgas* of each region.
2. In the state of Swat, the mortgagee used to take benefit from pledge which is a form of *riba* (usury).
3. Out of the eleven decrees mentioned above, seven decrees are valid from the Sharia point of view and four decrees are not valid but they fall under the category of usury.

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