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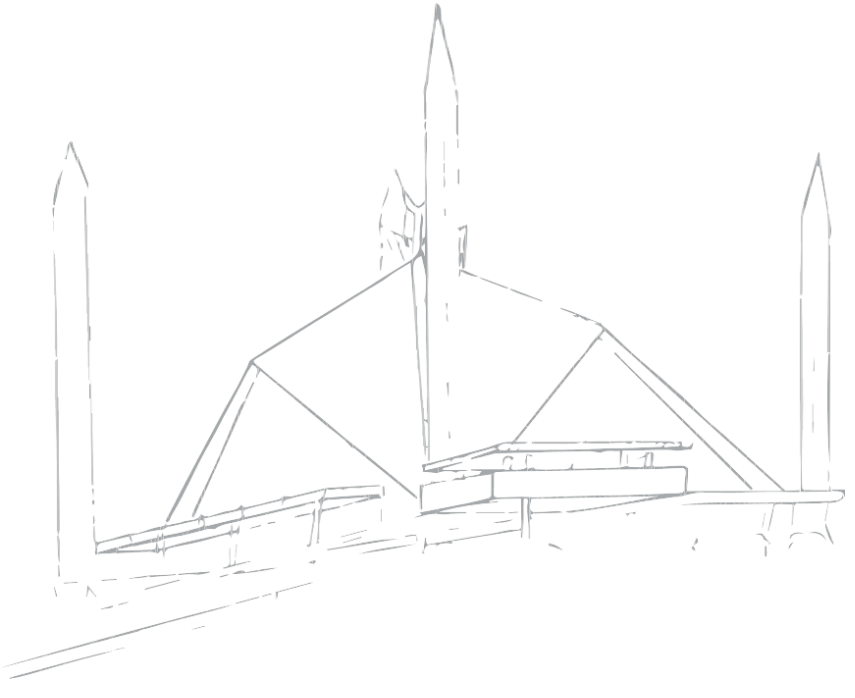

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CONTENTS

Effectiveness of Current Mediation Centres in Family Disputes

Halima Sadia[1*]

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Iqra Mushtaq[***]

Abstract

This research aims to explore and study the effectiveness of Alternate Dispute Resolution (ADR) in resolving family disputes while observing the aspiration and implementation of mediation centres throughout Pakistan. The concept of mediation in family cases is comparatively analyzed with formal litigation procedures prevalent in Pakistan. The investigation sheds light on the hurdles faced by the litigants in the judicial system of Pakistan and its possible solutions under ADR system pertinent to women-centric issues. A significant portion of this study discusses the benefits of introducing mediation centres to encourage women from under-developed areas to bring forward their domestic issues at earliest possibilities. The prime issues investigated include what are the standard mediation ethics and rules, what obstacles female litigants in Pakistan face in the Family Courts and what is the role of mediation centres in this scenario. In a nutshell, this study contends that the feasibility and necessity of involving ADR in family cases is very high rather essential. Finally, it is suggested to improve and

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increase the mediation power play in family litigation of Pakistan.

Keywords: ADR, Female Litigants, Pakistan, Mediation, Centres, Family Law.

1. Introduction

"An ounce of mediation is worth a pound of arbitration and a ton of litigation!" — Joseph Grynbaum.[2] Mediation is assumed to be the most amicable way to resolve the disputes under the ambit of ADRs. It is "[a] flexible, voluntary, and confidential form of ADR, in which a neutral third party assists parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision whether or not to settle and on what terms."[3] The legislature in Pakistan defines it as "a process in which a mediator facilitates dispute resolution by encouraging and negotiating communication between the parties in order for them to arrive at a mutually satisfactory agreement."[4] Thus taking into consideration its flexible nature, it must be the first choice in civilized and developed societies, particularly for adjudicating family disputes. It is because in family disputes, the consequences mostly affect the parties throughout their lives, either in the form of mental agony or domestic trauma or in the form of some physical abuse.[5] Apart from these personal sufferings, women in most conservative areas and tribes of Pakistan are compelled to bear the social pressure while resolving their matters against their own families through courts.

[2]"Dispute Resolution Quotes," ADR Toolbox, http://www.adrtoolbox.com/library/adr-quotes/, accessed June 07, 2021.

[3]'Mediation', *Practical Law*, accessed 1 March 2021, http://uk.practicallaw.thomsonreuters.com/7-107-6830?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[4]'The Alternative Dispute Resolution Act' (2017), sec. 2(i).

[5]Salman Ravala, 'UPDATE: Alternative Dispute Resolution in Pakistan - GlobaLex', *Hauser Global Law School Program*, June 2008, https://www.nyulawglobal.org/globalex/Pakistan_ADR1.html.

Particularly, women have concerns of infringement of their privacy rights during trial and after the disposal of matter due to general ignorance and backwardness of the community.

The mediation centres, established under the initiative taken by the higher judiciary to establish ADR centres in Punjab specifically,[6] are a ray of hope, in terms of making accessibility to justice possible for the victims from far flung areas through these centres. As a matter of fact, such centres are designed not only to cater to the dispute, rather at the same time, they are supposed to ensure the protection of privacy rights while resolving the matter in an amicable way outside the courts. Yet unfortunately, ADR mediation centres are not able to function effectively in backward areas of the country where domestic abuse against women is barely reported. The mediation centres in Punjab that cater to resolve the family conflicts are highly encouraging for both partners particularly for females to settle the matter before jumping into the hectic litigation procedure. However, the limitations faced in the country for mediation are lack of well-equipped modern mediation centres in rural areas and lack of awareness regarding mediation to the ordinary person.

It is the need of the hour to make necessary legislations and amendments in family laws throughout the country with the provisions of mandatory mediation before entering the formal litigation like the legislation of family law in developed countries.[7] For instance, in Australia, it is mandatory for the parties in family litigation to visit mediation centres

[6]Todd Walker, 'Mediation | ADR in Pakistan', *Weinstein International Foundation*, accessed 2 March 2021, https://weinsteininternational.org/pakistan/.

[7]Helen Cleak, Margot Schofield, and Andrew Bickerdike, 'Efficacy of Family Mediation and the Role of Family Violence: Study Protocol', *BMC Public Health*, 14, no. 1 (21 January 2014): 57, doi:10.1186/1471-2458-14-57.

first and then go to court if mediation fails.[8] It will be very convenient for women to get justice without threatening the prevailing system in their societies in case the legislators and mediation centres break this stereotype by their efforts. There are a number of family disputes where women are highly abused but reluctant to go to courts due to their conservative tribal and social taboos. In the prevailing situation, mediation centres can be helpful to resolve these issues and keep them confidential simultaneously. Currently, the mediation centres are out of reach for the marginalized group; therefore, establishing more mediation centres throughout the country can surely help out these victims to get out of distress.

The research methodology opted for this study is of qualitative nature. The data is collected through secondary sources by using the online resources including research papers, articles, books, and journals specific to ADR. Moreover, responses of practicing lawyers in ADR and currently operational mediation centres were recorded through live interviews. Further, different case studies have been relied upon for comparative analysis.

2. Mediation Centres in Family Disputes

Encouragement of mediation centres in family disputes became a popular institute by the end of the 19th-century. States around the world also recognized it by giving mediation centres statutory value, particularly in family disputes resolution. Some countries stipulated it mandatory before intervention of courts like Australia.[5] This gives ample evidence for its preference for family disputes. From the very start, mediation centres

[8]"Family Mediation and Dispute Resolution" An Australian Government Initiative, Family Mediation and Dispute Resolution | Family Relationships Online, https://www.familyrelationships.gov.au/separation/family-mediation-dispute-resolution, accessed December 18th, 2020.

formally recognize the need for confidentiality and privacy which makes the process exceptionally suitable to resolve family matters amicably. Moreover, the mediation centres' feasibility for resolving family matters makes them a highly encouraging option in the modern era for disputes resolution. It not only covers the area of divorce or separation, but also deals with child custody, maintenance, dowry related conflicts, domestic trauma, abuses and other innovative family issues.[9]

In Pakistan, NGOs like The Asia Foundation and Riphah Mediation Centre Islamabad[10] are offering outclass services that are regulated through state laws and international best practices encompassing modern era requisites. While non-regularized and orthodox-mediation methods are widespread throughout the country like *jirgas*, *panchayats*, local community heads, doing the same job with more adverse effects than relief from the curse. The state has also shown concern and involvement in this field by enacting a law on ADR that is 'The Alternate Dispute Resolution Act, 2017'. This statute has enhanced the scope and role of mediation centres, which will pave an easier and amicable path in resolving family disputes in future. After discussing the inspiration of mediation centres in the world and Pakistan, it is important to mention the problems faced in normal litigation which further supports the encouragement of mediation to resolve matters relating to family conflicts.

3. Challenges of Formal Court Litigation

The litigation process generally comprises four stages, which are society, police, lawyers, and courts. All of them play a vital role in the process and

[9]Marian Roberts, *Mediation in Family Disputes: Principles of Practice,* 3rd ed. (New York: Taylor & Francis, 2020), 67.

[10]Riphah International University, "Ripha Mediation Centre", https://riphahmediationcentre.org/sample-page/about-rmc/riphah-mediation-centre/ , accessed June 18th, , 2021.

dispensation of justice. Every litigant has to go through these four stages in a litigation process. Pakistan is struggling hard to uplift its judicial standards, while the main hurdle is the majority's ignorance regarding basic human rights in the first stage and a flawed mechanism in the last three stages. These hurdles linger on the dispute and make it extremely difficult to attain justice.[11] For the case of a woman litigant, these stages become even more cumbersome as the majority of the women in the rural areas are bound with unnecessary outdated customs and traditions alongside the technical and procedural loopholes in the justice system. In a society where a woman traditionally seemed to be confined in her house by remaining an ignorant symbol of pride and obedience, without relishing her due rights, it became nearly impossible for her to raise voice in order to seek justice. The one who breaks down the chains of these outdated customs faces strong backlashes from all the four stages. In such an extreme scenario, the ADR through the mediation system comes up with fine solutions and to help people by saving them from all these problems and hurdles.

Mediation always had a positive impact on resolving family disputes. A recent study has shown that mediation has been successful in resolving disputes related to divorce, child custody and other domestic abuses amicably.[12] It not only reduces the burden on courts, but in fact, it builds a bridge between parties of disputes to resolve their matters in a more dignified manner. Mostly in family disputes, there are two types of matters: divorce and child custody (in some cases also maintenance). These cases are of extreme personal nature and emotional aspects of parties cannot be

[11]Ammaz Khan, and Rabia Manzoor, "Corridors of Knowledge for Peace and Development Report", *Sustainable Development Policy Institute,* (2020): 304-22, doi:10.2307/resrep24374.26.

[12]JB Kelly, "Family Mediation Research: Is There Empirical Support for the Field," *Conflict Resol. Q.* 22 (2004): 4.

ignored in civilized cultures. Mediation manages to properly handle these issues by removing the hard and fast procedures, protocols that hurt the privacy and sentiments of the parties that are found in litigation otherwise.[13] The ADR has a strong impact in resolving family matters as it adheres to its set rules and ethics that make it the most desirable option to avail at the first instant in order to resolve the conflicts. The ethics and settled rules of ADR have been examined below.

4. Code of Conduct in Mediation

The mediation centres work with their set of rules and principles and strongly believe in the protection of every right which could be mishandled during the normal litigation process. These rights include the right to privacy, confidentiality, and protection from abusive encounters.

First and foremost, mediation ensures rights to privacy in personal disputes and provides a comfortable environment to resolve family conflicts. Parties to the dispute avail this option to keep their information confidential and to curb privacy infringements. Whereas, during court litigation, parties could hardly avail such an option, where the disputes are resolved in open courts without having much control upon media reporting. By keeping privacy as top priority, while conducting private mediation process, confidence of families to resolve their personal matters in the mediation process has boosted.[14] It is not only that the parties are usually entitled to end-to-end encrypted conversations, in fact, they enjoy actual authority and control over the disputed affairs. In this way, privacy related

[13]Linda Sileberman, and Andrew Schepard, "Court-Ordered Mediation in Family Disputes: The New York Proposal," *NYU Rev. L. & Soc. Change* 14 (1986): 741.

[14]Connie Atkinson, "Kingsley Napley," The Advantages of Mediation in Resolving Family Disputes, https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/the-advantages-of-mediation-in-resolving-family-disputes, accessed March 2, 2021.

concerns of females are curtailed to a great extent.[15] Moreover, the privacy related concerns of females are directly linked to the participation of females in the mediation process as mediators. Though, privacy of parties is one of the main principles of mediation still, battered women prefer female mediators over male mediators. They hold this opinion that their privacy and information will be at stake, if male mediators conduct the whole procedure other than female mediators.[16] The subject of privacy cannot be complete unless the parties' matters remain confidential throughout the process after the disposal of the matter and mediation has set rules for it.

With reference to the confidentiality of the parties, it is subjected to a unique rule. The information of the parties is kept confidential at the very first place. Also, the mediator is separately obliged to enforce the confidentiality related provisions. However, the parties can themselves relinquish this right after the disposal of the matter at hand. Such steps are highly welcoming for those battered females who come from backward areas.[17] In 2014, a guide was issued for mediators in England, which stated that mediation is a 'Confidential meeting', in which, parties to the dispute agree that all the communications are just for the purpose of settlement. No conversation will be leaked as long as it is prejudicial against any of the parties. For instance, in family disputes, if the communication reveals that life, health or safety of children is at risk then the conversation can be made public. Otherwise, it would be counted as breach of the confidentiality right of the parties. Above all, neither a court can compel the mediator nor the parties can make the conversation public. This privilege can be waived off

[15]Roberts, "Mediation in Family Disputes", 71.

[16]Ramani Jayasundere, "Mediating Domestic Violence Disputes in the Community Mediation Programme in Sri Lanka: Issues of Women's Equality and Equity," *Academia.edu* (2011).

[17]Roberts, "Mediation in Family Disputes", 73.

only with the consent of parties to dispute and the mediator itself.[18] Hence, privacy and confidentiality rights have been guarded very well in mediation procedures.

Beside privacy and confidentiality, mediation works to curb other abuses through its own procedure. It could thus be capable to cater neglected serious issues in Pakistan like in advanced countries, for instance domestic abuse and mental torture. The importance of these mediation centres is their way of working which can be more elaborated after the investigation of family law scenarios in Pakistan Family Courts.

5. Obstacles Faced by Female Litigants: Pakistan Perspective

Women in Pakistan have heterogeneous status according to the country's heterogeneous ethnic and cultural diversity. However, the common misery present in each of them is the presence of a division, large or small, of women who are oppressed and considered to be fragile creatures. They face social taboos, unnecessary restrictions, and above all to speak up against the family dispute is deemed unacceptable. Women face double cruelty in family disputes; firstly, through the original culprit and secondly, at the hands of outdated customs.[19] This oppression by society was further intensified through the problematic court procedure.

Before 1964, family cases in Pakistan were dealt with in civil courts along with civil cases. However, with the enactment of the Family Courts Act, 1964, separate courts were created. They are meant to deal with family cases specifically and to bring some fundamental changes in the law related

[18]James Munby, "Family Mediation in England and Wales: A Guide for Judges, Magistrates and Legal Advisor", (2018): 04.

[19]Filomena M Critelli, "Between Law and Custom: Women, Family Law and Marriage in Pakistan", *Kornblu Journal of Comparative Family Studies* 43, no. 5 (2012): 678, http://www.jstor.org/stable/23267840, accessed March 28th, 2021.

to litigation in family disputes by providing speedy justice to women and children.[20] Although the provisions of the Qanoon-e-Shahadat Order, 1984 and other technicalities of the Code of Civil Procedure, 1908 and the Code of Criminal Procedures, 1898 have been removed, but there are still many flaws in their procedure, which make family litigation also a problematic court procedure in Pakistani case scenario. When it comes to court procedures, many factors get involved in it like time, money, social pressure, oppression by opponent parties, false allegations, lack of knowledge and education, threats on out of court settlement, etc.[21] These factors make a procedure more complex in family courts where the litigant parties are women and children.

In family disputes, women and children are involved as primary litigants. In Pakistan, during litigation in family courts, the parties mostly use tactics of character assassination of the opponent party to win the case. Therefore, in front of children, their parents alleging each other make the matter more sensitive which is also a serious nature of drawback of court procedure.[22] Problematic court procedure and ever-lasting court litigations have proved the paramount importance of alternative dispute resolution methods. Though family cases are supposed to be handed down in an expeditious manner, in contrast to other civil matters, however, many other hurdles stand in the way of family disputes to get resolved by the formal court system. The other main problem is less awareness of complex legal procedures. The reason behind this is the lack of awareness among females about the support system they can receive after reporting cases. Moreover,

[20]Hafiz Muhammad Siddique, and Syed Naeem Badshah, "Family Courts in Pakistan", *Al-Idah* 38, no. 2 (2020): 56.

[21]Osama Siddique, "Law in Practice–The Lahore District Courts Litigants Survey", (2010): 46.

[22]Lori S. Kornblum, and Daniel Pollack, "Family Court or Not? Raising Child Abuse Allegations Against a Parent", (2020).

there is a smaller number of female staff in courts, prosecution, and police in small towns. Likewise, in legal institutions a very little number of administrative positions are headed by females which directly affect the number of female litigants.[23]

Importantly, courts, police, defense counsels and other court administrative staff are rarely accessible to females. A woman in a court still stands as a taboo in many underprivileged areas and the patriarchal affected court system has failed to mitigate this taboo. The only remedy for these problems is mediation, which is speedy in nature, cost effective and free of societal taboos. As a matter of fact, female mediators are also not present in mediation procedure, but this issue is being answered currently by ADR methods. This follows the financial restraints of women on a larger scale.

Furthermore, when it comes to litigation, it is not just social pressure or problematic court procedure, which makes it so complex that a layman would think a thousand times before entering into it. Besides all these, financial restraints faced during litigation are also one of the hurdles that make it more difficult. The financial restraints are perceived even in the developed countries like United States of America, United Kingdom because litigation is so expensive while for a developing country like Pakistan where millions of people are living beneath the poverty line, going through such an expensive process is just a horrible experience if we look at some statistics of a survey, it shows that nearly 38% of the litigants have a monthly income of less than 10 thousand and nearly 24% of the litigants have a monthly income which is less than 20 thousand which means 62%

[23]Khan, and Manzoor, "Corridors of Knowledge for Peace and Development", 318.

of the litigants earn less than 20 thousand per month.[24] Moreover, 55% of the litigants use public transport; from which surely there are some persons with a lower income and cannot afford their conveyance.[25] Other than that, the legal representatives do not just charge an expensive fee but also demand a sum apart from their fee as procedural charges, and court fee, etc.

For a society where people are facing poverty, illiteracy, unemployment, and along with it, they also have to bear a strong financial bill to go for litigation, it is backbreaking for them. Alternative dispute resolution provides an ease to persons for whom bearing such an expensive litigation is difficult. Even in countries like the USA, UK people prefer going for arbitration and mediation to solve their disputes unless there is no way except going to court.

6. Operational Mediation Centres and State of Affairs

Private mediation centres exist in the country which provide services up to the international standards. The case study of 'The Asia Foundation and Aga Khan Reconciliation Centres' and other private mediation centres are covered in this section. These mediation centres are providing private mediation in Pakistan; the former covers the Punjab region, while the latter covers their community around the world. Aga Khan National Conciliation and Arbitration success rate is 80%.[26] The overall study of mediation centres in the country shows a small number of female participations as mediators. The mediation centres in far flung areas usually receive inheritance cases. Also, these boards decide maintenance with mutual agreement of the parties and as per their status. In few mediation centres,

[24]Osama Siddique, "Law in Practice–The Lahore District Courts Litigants Survey", (2010): 13.

[25]Ibid., 11.

[26]Abdul Wali, Interview by Ms. Zoya Chaudary, Islamabad May 22, 2021.

mediators work as volunteers. Basic motive of mediation is a journey from dispute resolution towards dispute prevention. The Asia Foundation collaborates in the Punjab region mediation centres where the family disputes are amicably resolved and particularly women show high level of satisfaction from their procedure of resolving disputes.[27] These mediation centres and other private mediation centres work within their own capacity and have limitations as well. Let us look at the gray areas now.

Mediation centres have their limitations to cater to the level and intensity of family disputes. Most of the mediation centres are not extended to far flung areas of the country where they are desperately needed to dispense justice to the miserable ones. Most of the people in the country do not even know about the concept of ADR and mediation as an alternative to the formal litigation process. Also, the number of mediators is very low and usually provides services as volunteers or they are funded by the NGOs. Moreover, the law colleges and universities are lacking in resources to provide necessary education and training for the future counsels and mediators. Furthermore, more efforts on the part of the state are required. There is no existing uniform procedure and network of state-owned mediation centres throughout the country.

7. Proposed Mechanism and Legislative Reforms

To overcome this lacuna, there should be some special enactments. For instance, in *nikah nama* (marriage contract), there may be a clause compelling to mediate in case of any conflict. Pakistan has a district level council system, so to avoid delay; the government may make mediation or ADR committees on the union council level as a quasi-judicial authority to

[27]Justice M. Anwar ul Haqq, "Pakistan- Alternative Dispute Resolution", The Asia Foundation, April 8, 2021.

assist people in more effective manner.[28] Family laws should contain a provision of ADR as a dispute settling method. Mediation centres should be established everywhere in the country, so that it can become more reliable. It should be added in the curriculum and law students shall be educated about why mediation is not flourishing at a pace, which it deserves the most. Lawyers should also ask parties to opt for ADR before going to the courts and encourage them to choose mediation. As people are more reluctant, in that scenario, mediation through court shall be practiced more. This will help to reinstate the trust and awareness of the general public and it will also help private mediation flourish.[29] Mediation and ADR subjects must be taught at university level. Lawyers and judges must be trained to be mediators in Pakistan. Infrastructure and framework for it is also required. An appropriate enactment on this subject is the need of hour The family courts itself order mediation proceedings for reconciliation, which proves its significance.[30]

8. Conclusion

It is concluded that mediation centres that are currently operational across the country are highly effective in resolving family disputes. As the data collected suggests its success ratio of disposing of the matter is efficient in comparison to normal court proceedings. Moreover, it gives a sense of privacy and confidentiality to women belonging to under-developed and far-flung areas of Pakistan while being a party to family disputes. Along with addressing different social and cultural issues, ADR also provides remedy against financial restraints by providing much cheaper means to the justice system. It is thus highly recommended in Pakistani society to boost

[28]Ahmed Sami, Interview by Halima Sadia, May 24, 2021.

[29]Khan Suleman, Interview by Iqra Mushtaq, May 30, 2021.

[30]Barrister Ali Sheikh, "Law of Divorce & Khula in Pakistan", DOCPLAYER, accessed March 17, 2021.

up the dispensation of justice by introducing the mediation centres at local level. Even though family laws of Pakistan have their own procedure of filing and proving claims still the process is complex in nature. On the other hand, mediation centres happen to be a human friendly dispute resolving medium in different foreign jurisdictions that stands as a best practice for Pakistan's judicial system pertaining to family cases. Efforts of federal legislative bodies by passing The Alternate Dispute Resolution Act, 2017 – to resolve civil disputes through the help of ADR can certainly be another example to introduce a parallel system for family disputes as well. It would not only lessen the burden of courts, but also, it will bring a relief to women in distress to resolve their family matters efficiently amicably. Interactive sessions with private mediation centres in Pakistan highlighted different operational limitations e.g., reach & accessibility to remote areas and awareness related to ADR system – can possibly be catered by legislators and policy makers through active involvement of judicial bodies in order to introduce state-owned mediation centres throughout the country.

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Determination of Damages in Medical Negligence Cases: An Overview of *Sharī'ah* & English Law

Dr. Rukhsana Shaheen Waraich*

Dr. Muhammad Fayaz**

Ms, Sadia Halima***

Abstract

Medical profession is considered as one of the noblest professions of the world. Despite the wealth and social prestige that this profession enjoys, it attracts a large number of complaints too from patients and their families. Sometimes these complaints are genuine and medical practitioners are responsible for the harm thus caused. The NHS has a proper mechanism of payment and pays in billions for indemnification for medical errors. However, there is no uniform criteria for quantification of the loss. Pakistan follows English Law in cases of medical negligence. However, Pakistan lags way behind in compensating the claimants. *Sharī'ah*, on the other hand, has a complete tariff system *'Diyah'* for indemnification in cases of homicide and bodily injuries. Pakistan can learn from English law, NHS and *Sharī'ah* and adopt a uniform mechanism for monetary liability and manage it through proper institutions. This article aims at revisiting the mechanism of indemnification in both legal systems and scrutinizing the shortcomings and giving recommendations.

KeyWords: *Sharī'ah, Medicine, Liability, Malpractice, Indemnification,*

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English

1. Introduction

Medical malpractice is not only an issue of developing countries but of developed countries too. Every year thousands of precious human lives are lost due to medical malpractice. Statistics suggest that it is ranked amongst the first three causes leading to death in the United States. Each year there are more than four hundred thousand patients visiting hospitals in the United States, this number may be even more, who suffer from the harm caused to them by the medical negligence.[1] According to the data of The National Audit Office in 2005, there are up to 34,000 deaths a year in the National Health Service (NHS) in the United Kingdom due to medical errors.[2] Medical litigation claims and costs in the UK are rising.[3] Thus, payments of damages and legal costs rose significantly too. Cases related to medical malpractice are dealt with by courts under "Law of Torts".

According to NHS Resolution, NHS compensation payouts in 2021/22 amounted to £2.4 billion. This is an increase on the previous year's figure of £2.2 billion[4]. English law has a good system of bifurcation of the losses, and they pay huge amounts to redress the grievances of claimants for medical malpractice. However, they do not have a standard criterion for quantification. Thus, English Law lacks the uniformity in quantification and payments. Pakistan follows English Law for deciding the cases of medical malpractice. However, Pakistan lags way behind in compensating the

[1]John T James., "A New, Evidence-based Estimate of Patient Harms", *Journal of Patient Safety* (2013): 122-8.

[2]National Audit Office, *A Safer Place for Patients: Learning to Improve Patient Safety*, 2005.

[3]Lane J, Bhome R and Somani B. National trends and cost of litigation in UK National Health Service (NHS): a specialty-specific analysis from the past decade. *Scottish Medical Journal*. 2021; 66(4): 168-174. doi:10.1177/00369330211052627.

[4]https://businessinthenews.co.uk/2022/12/28/claims-against-the-nhs-have-increased-in-the-past-five-years-costing-billions/.

claimants. There have been few cases and that too with very meager indemnification. On the other hand, *Sharī'ah* doesn't bifurcate the different kinds of losses, rather provide a lump sum amount for the loss. The system of damages in *Sharī'ah* is very relevant in the matter of medical malpractice, *Sharī'ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. Pakistan can adopt an excellent system of indemnification if the *diyah* system is adopted and manage it well by following English procedures. For this reason, this article is divided into two parts. Part 1 discusses the system of damages in English Law while Part 2 elaborates the system of indemnification in *Sharī'ah.*

2. Damages in English Law

The UK's NHS[5] is considered and formally declared to be one of the safest and fastest charities providing health care support to patients in the country.[6] Although it strives hard to ensure quality care and high standard of health, despite these steps, medical negligence claims have a good share in NHS funding. According to NHS Resolution, NHS compensation payouts in 2021/22 amounted to £2.4 billion. This is an increase on the previous year's figure of £2.2 billion.[7] Thus, no Healthcare system can be perfect and without malpractice litigation and claims. Every good healthcare system not

[5]The National Health Service (NHS) came into being as a repercussion of the Second World War. It became functional on July 5th, 1948, when health secretary Aneurin Bevan opened Park Hospital in Manchester. All medical practitioners and staff i.e., hospitals, doctors, nurses, pharmacists, opticians, and dentists came together under one umbrella organization for the first time for the medical services that were intended to be free for all. The central idea was to establish a health care service that will provide services to all and funded entirely from taxation; thus, all people would not spend equally for gaining health services rather they will spend according to their means.

[6]https://www.theguardian.com/society/2017/jul/14/nhs-holds-on-to-top-spot-in-healthcare-survey (accessed July 14, 2017).

[7]https://businessinthenews.co.uk/2022/12/28/claims-against-the-nhs-have-increased-in-the-past-five-years-costing-billions/.

only has good structure and services but ought to have good legal system too for redresses of patient's claim. However, there is no uniform system of computing the indemnification for the loss of the patients. Medical malpractice claims are mostly brought in respect of death, personal injuries and financial loss suffered due to the negligence of the defendant. Principles applied for the estimation of damages in medical negligence cases are similar to the one applied in general cases of negligence in tort. New, systematically, and scientifically derived solutions are needed to what has now become an ageing problem for the NHS in England.[8]

The principle of 'restorative justice' is widely applicable in the Law of Torts where the complainant's previous position is restored.[9] Thus he/she should be fully compensated as far as it could be in terms of money. This principle was enunciated in the judgment of *Livingstone vs. Rawyards Coal Company*[10] by Lord Blackburn. The honorable judge clearly delineated that when assessing the harm caused to a complainant in terms of money, damages, or reparation, all efforts shall be made to bring such person to his/her previous position – before the person was wronged.

The principle of restorative justice is akin to the performance of a contract. This determines the position of the party before and after the specific performance of the contract. This principle can easily be invoked when the pecuniary loss is under consideration since this can easily be repaired to restore the previous position of the complainant, however, a difficult situation may arise when a pecuniary loss is not the focus, for

[8]Carter, Alexander W., Elias Mossialos, Julian Redhead, and Vassilios Papalois. "Clinical Negligence Cases in the English NHS: Uncertainty in Evidence as a Driver of Settlement Costs and Societal Outcomes." Health Economics, Policy and Law 17, no. 3 (2022): 266–81. doi:10.1017/S1744133121000177.

[9]Jo Samanta and Ash Samanta, *Medical Law* (Hampshire: Palgrave Macmillan, 2011), 114.

[10](1880) 5 App. Cas.25 at 39.

example, when someone's loved one is passed away due to the medical negligence of any doctor. The courts, for obvious reasons, cannot restore this position.[11] The courts, in such a situation have a completely different approach by applying a different principle called – the principle of reasonableness or fairness.[12] This is a difficult question to assess properly what would be just, fair, and reasonable. The courts look for similar situations and cases and find out what was previously paid, owing to the same level of harm caused to the complainant.[13] A claim for the damages usually includes:

a. Reasonable and fair monetary compensation for the injury caused.
b. Small amount of damages can be granted under the head of pain and suffering.
c. Loss of amenity can be demanded to be compensated. It is the loss of ability to participate in the activities which the claimant used to participate before the injury caused due to the medical negligence.
d. Medical expenses can be claimed.
e. Loss of earnings.
f. Future pecuniary losses.[14]

Brief details are discussed below:

2.1 Pecuniary Loss

A patient who is a victim of medical negligence usually suffers from two types of losses i.e., pecuniary, and non-pecuniary. Loss that can be calculated in monetary terms is called as pecuniary loss for example,

[11]Michael A. Jones, *Medical Negligence* (London: Sweet & Maxwell, 2010), 971.
[12]Jonathan Herring, *Medical Law and Ethics* (Oxford: Oxford University Press, 2012), 124.
[13]Jones, *Medical Negligence*, 971.
[14]Herring, *Medical Law and Ethics*, 124.

medical expenses, traveling expenses, the cost of equipment bought because of the injury, loss of earning, future loss of earning and cost of hiring someone else for performing chores which the patient is no longer able to perform due to the injury caused to him because of medical negligence.

2.2 Medical Expenses

In English law, a patient can recover medical and other expenses as damages.[15] If the patient had to avail private medical services, he will be compensated but if he utilized NHS facilities then he will not be awarded damages for this. However, claimants can be awarded damages under this head if the patient is compelled to live in a special care home like nursing home or he has to hire a special attendant for care at home. Likewise, damages can be granted for traveling costs and additional housing or adapting accommodation for the special needs of the patient.[16]

2.3 Loss of Earning

Loss of earning must be estimated for two periods. First: the lost incomes due to the medical malpractice till the date of estimation, secondly: Future loss of earnings. Calculating the prospective loss of earning is a difficult question for the court. It has to foretell what will be the future income of the patient and what would have been, had the injury not been caused to him due to medical negligence. The court will calculate the difference and grant the damages accordingly. Court may take account of future prospects of increased income. It was suggested in *Herring vs. Ministry of Defense*[17] that court may adopt a loss of chance model where there is strong likelihood that claimant's career would have taken a particular course which would have

[15]Ibid.
[16]Jones, *Medical Negligence*, 1001-1002.
[17][2003] EWCA Civ 528.

led to higher income, for instance promotions or shifting to a better place of work. If the injury caused by medical negligence has reduced the life expectancy of the patient, the court may consider pre-accident life expectancy and grant damages for the loss of earnings of those years. This rule was enshrined in the decision of the House of Lords in *Pickett vs. British Rail Engineering Ltd.*[18]

It becomes more difficult for courts to estimate future loss of earnings where no previous history of income or no record can be found. Court simply grants a lump sum. It mostly happens when injury is caused to young children.

2.4 Non-Pecuniary Loss

Non-pecuniary loss includes pain and suffering, and loss of amenity consequential upon the injury caused due to medical negligence. The principle for award of damages in this case would be that it must be just and reasonable as the principle of restoration is impossible in this case.

2.5 Pain and Suffering

Under this head, a patient can be awarded damages for the pain and suffering borne by claimant as a result of injury because of medical malpractice. If he faces humiliation, discomfort or any part of his body got disfigured, he can demand for damages. Likewise, if he realizes that his life expectancy has been significantly reduced because of the negligent behavior of the medical practitioner, he is entitled to damages. If this injury affects the marriage prospects, it will be taken into account in award of damages. This addresses the loss of companionship and comfort and not to the financial benefits of the marriage. Similarly, if a patient develops any

[18][1980] A.C. 136.

psychiatric condition due to the injury, it will be reflected in the award of damages.

2.6 Loss of Amenity

Loss of amenity includes the loss of activities of claimant, his job satisfaction, hobbies, and recreational activities. Court will consider all these losses during award of damages. This will include in the damage even if the patient is unconscious and does not realize the loss of all these activities.

Patients are not always granted damages according to the calculations made after taking into account the heads mentioned above. These damages can be reduced if the patient's own negligence contributed to the harm caused to the patient in addition to the negligence of the doctor.[19] Instances may arise when a patient does not disclose some of his medical history that may be instrumental for diagnoses and prescriptions. A patient was incorrectly diagnosed in *Ingram vs. Williams*[20] but it was held that the doctor was not negligent as the patient did not disclose that she was suffering from incontinence.[21] Likewise, if a patient did not take necessary steps that would have helped in mitigating the harm she is suffering, damages would be reduced. For example, where a patient should have followed up the necessary treatments, but she didn't, in this case compensation will be reduced. But if there was a negligence on the part of the patient that she didn't disclose a certain fact and inquiring about that fact was equally important for the doctor for making a correct diagnosis and prescription, but he failed to ask, in this case he will be liable and the negligence on the part of patient would not be counted as contributory

[19] Herring, *Medical Law and Ethics*, 125.
[20] [2010] EWHC 758 (QB).
[21] Unintentional Passing of Urine.

negligence. In *P vs. Sedar*[22] a patient was not held to be contributory negligent when she did not notify the doctor about not giving her follow up appointment.

2.7 Secondary Sufferers

Secondary victims are those people who didn't have directly suffered the injury due to the negligence of the doctor rather her beloved relative is the victim of medical negligence, and this secondary victim has suffered mental distress due to the harm inflicted on his beloved. Courts are quite hesitant in granting damages to the secondary victims for the distress they suffered due to harm to primary victims. But it's not completely impossible. There are certain exceptions where courts may overlook the position of secondary victim and recognize the causation between her and the defendant's negligence. For instance, what has been observed by the patient's relative is exceptionally awful or where the news was communicated in a negligent manner that caused psychological injury. Following cases may clarify the stance of the courts further:

In *Sion vs. Hampstead Health Authority*,[23] the son of the claimant met with an unfortunate accident. He was taken to the hospital. Defendant failed to make a diagnosis that the patient is bleeding from his kidney. He went into a coma after three days of accident and suffered a heart attack. He was kept under intensive care, but he couldn't survive and after fourteen days of accident, passed away. His father has been at his bed side throughout this period. He brought the claim in front of the court of Law for psychiatric illness that he developed due to these fourteen days when he witnessed the collapse of the condition of his son. Although there was proximity between

[22][2011] EWHC 1266 (QB).
[23][1994] 5 Med LR 170.

defendants' action and claimant's psychological illness, the learned court held that it was not a sudden horrifying event, unfortunately it was an expected outcome of the fatal accident and deterioration of his condition later on.[24]

In *Taylor vs. Somerset Health Authority*,[25] a patient died due to the heart attack that he suffered at his job's place. He did not die instantly, rather he was taken to the hospital after a heart attack. He died in the hospital after some time. His wife Mrs. Taylor was informed about his heart attack. She came to the hospital and after twenty minutes of her arrival, she was told about the death of her husband. She identified the dead body of her husband in the mortuary. As a result, she claimed that she has got a psychiatric illness thus she deserves damages. The House of Lord held that the claimant can only recover the damages when she has actually seen or heard the primary injury or death.

2.8 Bereavement

The Fatal Accidents Act grants damages for bereavement. Thus, an amount of £11,800 is awarded as bereavement damages to the spouse of the deceased, his parents, or children.[26] The sum amount is to be distributed equally between parents if both claim for bereavement damages. There is no need to prove financial dependency for bereavement damages.[27]

2.9 Dispensation of Award

Damages used to be awarded in lump sum form till recently for the suffered loss as well as future losses but now the court has got the authority to make

[24]Claudia Carr, *Unlocking Medical Law and Ethics*, New York: Routledge, 2013), 8.

[25][1993] 4 Med LR 34.

[26] "The Fatal Accidents Act" (1976), sec. 1(A).

[27] Ibid.

decisions of periodical payments. These payments can be reviewed and increased after some time if it turns out that patient suffers greater loss then estimated earlier and it can be decreased if proved otherwise at a later date. Thus, the court has the power to grant a lump sum award and if it considers reasonable it can make it periodical.[28]

This concludes the brief of the damages in England for medical malpractice. Calculation of damages has been quite problematic for the judges.[29] It is challenging for the judges specially to estimate the appropriate compensation for the non-pecuniary losses. For example, what should be the appropriate compensation for loss of a limb, eye, or hand? Secondly, future losses are a kind of guesswork for the judges. Sometimes, a lump sum amount is awarded for future loss and care needed for the patient, but he unexpectedly doesn't survive that much and dies shortly. This issue was addressed by allowing the periodical payments but that mandates that both the parties will be hanging for a very long time because of the dispute.

The current system of medical malpractice compensation is not adequate according to the majority of the people. A significant percentage – 70% - shows that patients are dissatisfied with the system.[30] Main drawbacks of the system can be summed up as:

a. The litigation process is slow.
b. Legal cost is rather huge.
c. The procedure is stressful for both parties.
d. It leads to secretiveness instead of revelation.
e. This system discourages the process of learning lessons from mistakes.
f. Some claimants receive more compensation than they need, and some

[28]Jones, *Medical Negligence*, 980.
[29] Herring, *Medical Law and Ethics*, 56.
[30]Jonathan Herring, *Q & A Medical Law* (Oxon: Routledge, 2015), 16.

patients do not receive at all. Sometimes even for the same damage.[31]

There have been multiple proposals for reform in the system. One such proposal is the NHS Redress Act, 2006. The main proposition of the idea is to settle the claims under £20,000 out of court in a separate tribunal. It does not intend to replace the current court system, rather an alternative for the minor claims which would require explanation, apology or payment so that the litigation may be expedited at both forums along with low cost. This Act has not yet been translated into implementation.

Another proposal for the reform of the system is a no-fault scheme. This scheme proposed that every patient should be redressed who suffers with medical mishap without invoking the proof of negligence or labeling the doctor as negligent. This system is already implemented in New Zealand. There are pros and cons of the system. This system may reduce the legal cost; patients who suffer may be redressed as in current system two patients who suffer same medical mishap, may have two different fates in redress. One may get huge damages because he was fortunate enough to identify and prove the negligence, the other with the same mishap may not be lucky like the former and may be left with nothing after a long legal battle. Another benefit of the no-fault scheme is that it will remove enmity between doctors and patients which is an obvious result in case of litigation based on negligence. This system makes doctors more open about the mistakes and help them learn from it while the tort-based system tends to hide their mistakes. No fault scheme tends to find the fault in the system and not on the particular individual as in the case of tort-based litigation. Sometimes, it is the system who is to blame rather than the individual. It reduces the level of stress and anxiety that medical practitioners

[31]Ibid.

continuously complain about in the current system.

It's not all sunshine about this scheme; there are some real problems with it on the other side. No-fault scheme tends to redress the patients who suffer from medical mishap, but it will become pretty complex to distinguish between those who are facing the usual side-effects of the treatment which happens in the allopathic system and those who suffer from medical mishap. Obviously, this system does not intend to pay every single person who falls ill but the complications in this scenario are real. Moreover, this system lacks accountability. Tort based system requires to identify the tortfeasor and publicly brand him as negligent and require him to compensate but in the no fault scheme, it only announces that the patient has suffered a mishap without identifying the individual who caused this mishap through his negligence. This will obviously eliminate the factor of accountability that is mandatory for deterrence and improvement. Lastly, it is very costly and places a huge burden on the governments. But it is not about the cost; it's more about who bears the burden that the tort-based litigation system is borne by the disabled and ill people. No fault scheme can be proved as a better alternative to the current system if it is properly combined with the disciplinary orders by the health regulatory authorities.

3. Monetary Compensation in *Sharī'ah*

Sharī'ah has prescribed various punishments of diverse nature to safeguard the rights of individuals. Some penalties are retributive in nature while some are deterrent. Some aim at rehabilitation whereas others are preventive. Actions and omissions are declared crimes on the basis of the rights and interests violated. Thus crimes in *Sharī'ah* are classified by jurists in categories of *Ḥudūd* (fixed punishments), *qiṣāṣ and diyah* (Punishments for

killing and hurt) and *ta'zīr* (state prescribed meaning).[32] The topic of *diyah* includes culpable homicide, manslaughter, indirect homicide and bodily harms.

The last-mentioned types of punishments are relevant to medical negligence and its punishments. The topic of *qatl al-khatā* covers all the wrongful deaths that are caused unintentionally due to mistakes or misadventures including deaths that are results of the negligence, mistakes, or misadventures of the medical practitioners. Therefore, this Law is applicable to cases of medical malpractice in the same way as it is valid in other cases of unintentional homicide. *Sharī'ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. This entire realm of *diyah* and *arsh* is almost a complete tariff for estimating the damages for medical malpractice. If mindfully incorporated in the country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many non-Muslim countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the laborious task of estimation of reasonable amount for damages. These concepts are not alien for Pakistan's legal system. But they are ineffective for medical malpractice for two reasons.

1. Clauses related to *diyah* are inserted in Pakistan Penal Code, whereas courts do not allow trying and charging the medical practitioners under criminal law unless there is gross negligence.

2. *Diyah* is calculated according to the rate of silver according to Pakistan's law and thus it is very less and does not fulfill the need.

[32]Abū Zahra, *Al-Uqūbah* (Cairo: Dār al-Fikr, n.d), 59.

Thus there is a dire need to revisit these concepts of *Sharī'ah* for the purpose of formulation of a law for medical malpractice for Pakistan. Following is the brief summary of the concept of *diyah* and the compensation fixed by *Sharī'ah* in terms of camels, *dirham* and *dinār*. For explanation, the amount is converted into Pakistani rupees to give a clear picture of the appropriate amount for compensation. It is proposed that this model be adopted for monetary compensation for medical malpractice in Pakistan.

3.1 *Diyah* (Blood Money)

The word "*diyah*" is used for the damages payable to the deceased's family. It may be defined as the "Liability for the financial compensation accrued due to causing homicide". In Islamic criminal law, *diyah* will be paid in cases of accidental and semi-intentional homicide. It may be fixed and paid in cases where retaliation *(qiṣāṣ*) was the original sentence, but it was dropped and the option of *diyah* was adopted for some reason.[33] Allah commands to pay the monetary compensation to the deceased's family in the case of wrongful death in the following verse:

> وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إلا أَنْ يَصَّدَّقُوا...
>
> And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] .[34]

Likewise, many traditions of the Prophet (PBUH) explicate the rulings of *diyah*. For instance, it is narrated from Abdullah ibn Mas'ūd:

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[33]Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-Sanā'i'fī Tartīb al-Shar¯a'i,* vol.7 , (Beirut: Dār al-Kitāb al-'Arabī, 1974) 252; Abū Al-Walīd Muhammad Bin Aḥmad. Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, Beirut: Dār Al-Gharab Al-Islāmī, 1988.192; Abū Muhammad Mawfiq Al-Dīn 'Abdullah Bin Aḥmad bin Muhammad Ibn Qudāmah, *Al-Mughnī,* vol. 8, Cairo: Maktabah Al- Qāhirah, 1968.261.

[34]Al-Qur 'ān 4:92.

قضَى رسول الله -صلي الله عليه وسلم- في دِية الخطأ عشرين بنت مَخاضٍ، وعشرين ابنَ مَخاض، وعشرين ابنةَ لبُون، وعشرين حقَّةً، وعشرين جَذعَةً.

The Messenger of Allah (PBUH) ruled that the *diyah* in the case of accidental killing should be twenty she-camels in their second year, twenty he-camels in their second year, twenty she-camels in their third year, twenty she-camels in their fourth year and twenty she-camels in their fifth year.[35]

3.2 Amount of *Diyah*

First topic that calls for discussion in this regard is about the type of property that is payable as *diyah.* Jurists are divided into three different camps about the types of property that can be paid as financial compensation for the loss of life.

According to Imam Abū Hanīfah[36], Imam Mālik[37] and early opinion of Imam al-Shāfi'ī[38] three types of properties can be given as monetary compensation for accidental homicide. These properties are camels, gold, and silver as it is mentioned in the *Ḥadīth* where Prophet (PBUH) sent a letter to the people of Yemen and explained different matters and wrote:

وَإِنَّ فِي النَّفْسِ الدِّيَةُ مِائَةٌ مِنَ الْإِبِلِ

Indeed, the damages, for the homicide is 100 camels, and

وَعَلَى أَهْلِ الذَّهَبِ أَلْفُ دِينَارٍ

[35]Aḥmed Ibn Hanbal, *Musnad,* vol. 4 (Cairo: Dār al-Ḥadīth, 1995), 210, Ḥadīth no. 4301.

[36]al-Kāsānī, *Badā'i'al-Sanā'i'fi Tartīb al-Sharā'ī',* vol.7 , 253.

[37] Ibn Rushd, *Bidāyat al-Mujtahid,* vol. 4, 194.

[38]Abū Isḥaq Ibrāhim Bin 'Alī Bin Yūsuf Shīrāzī, *Al-Muhadhdhab fī Fiqh Al-Imām Al-Shāf'ī.,* vol. 3, (Dār Al-Kutab Al-'Ilmīyyah,), 212.

And for the people of gold, it is 1000 Dinar.[39]

Imam Aḥmed ibn Ḥanbal and two companions Imam Ḥassan ibn Shaybānī and Abū Yūsuf of Abū Hanīfah are of the view that there are six types of properties that can be given as monetary compensation for accidental homicide. These properties are camels, gold, silver, goats, cattle and full clothing. They form their opinion on the basis of Hādīth of Prophet Muhammad (Peace be Upon Him) and *Āthār* of ‘Umar (may Allah be pleased with him) mentioned in Sunan abī Dāwūd. It says:

عَنْ عَمْرو بْنِ شُعَيْبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، قَالَ: " كَانَتْ قِيمَةُ الدِّيَةِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: ثَمَانَ مِائَةِ دِينَارٍ أَوْ ثَمَانِيَةَ آلَافِ دِرْهَمٍ، وَدِيَةُ أَهْلِ الْكِتَابِ يَوْمَئِذٍ النِّصْفُ مِنْ دِيَةِ الْمُسْلِمِينَ "، قَالَ: فَكَانَ ذَلِكَ كَذَلِكَ حَتَّى اسْتُخْلِفَ عُمَرُ رَحِمَهُ اللَّهُ، فَقَامَ خَطِيبًا فَقَالَ: أَلَا إِنَّ الْإِبِلَ قَدْ غَلَتْ، قَالَ: فَفَرَضَهَا عُمَرُ عَلَى أَهْلِ الذَّهَبِ أَلْفَ دِينَارٍ، وَعَلَى أَهْلِ الْوَرِقِ اثْنَيْ عَشَرَ أَلْفًا، وَعَلَى أَهْلِ الْبَقَرِ مِائَتَيْ بَقَرَةٍ، وَعَلَى أَهْلِ الشَّاءِ أَلْفَيْ شَاةٍ، وَعَلَى أَهْلِ الْحُلَلِ مِائَتَيْ حُلَّةٍ، قَالَ: وَتَرَكَ دِيَةَ أَهْلِ الذِّمَّةِ لَمْ يَرْفَعْهَا فِيمَا رَفَعَ مِنَ الدِّيَةِ.

‘Amr ibn Shu‘āib narrated from his father who narrated from his grandfather that: “The value of the blood-money at the time of the Apostle of Allah (Peace be Upon Him) was eight hundred dinars or eight thousand *dirhams*, and the blood-money for the people of the Book was half of that for Muslims. He said: This applied till Umar (Allah be pleased with him) became caliph and he made a speech in which he said: Take note! Camels have become expensive. So ‘Umar fixed the value for those who possessed gold at one thousand dinars, for those who possessed silver at twelve thousand

[39]Abū ‘Abd Allah Muḥammad ibn ‘Abd Allah al-Hākim al-Nīshāpūrī, *Al-Mustadrak ‘alā al-Saḥīḥayn*, vol. 4 (Beirut: Dār al-Kitāb al-‘Ilmiyyah, 1990), vol. 1, 552, Ḥadīth no. 1447.

> (*dirhams),* for those who possessed cattle at two hundred cows, for those who possessed sheep at two thousand sheep, and for those who possessed suits of clothing at two hundred suits. He left the blood-money for *dhimmis* (protected people) as it was, not raising it in proportion to the increase he made in the blood-wit.[40]

Imam Abū Hanīfah responded to this *athār* and maintained that ‘Umer only did it when they were the assets and wealth for people but when he introduced salaries for people; he retreated to the camels, gold and silver and declared them to be the property that will be used to pay blood money.[41]

Imam al-Shāfiʿī, according to his later opinion, maintained that original *Diyah* is 100 camels, and it is mandatory on the person who accidentally killed others that he should deliver him 100 camels. If he does not own, then he should strive to acquire them. And if he doesn’t find them, in this situation he will deliver their price to the deceased's legal heirs. He too based his opinion on the *athār* of ‘Umer mentioned earlier when he raised the amount of gold and silver coins to match with the value of camels. Thus, camels are the original property that should be a standard for tariff.[42]

As mentioned earlier, *diyah* for accidental homicide is 100 camels. These camels must be of different age and sex as mentioned in the *Ḥadīth* of Prophet (Peace Be Upon Him). All jurists are unanimous that it should be of five types as it was narrated that Ibn Masʻūd said: “The Messenger of Allah (Peace Be Upon Him) ruled that the *diyah* in the case of accidental killing should be twenty she-camels in their second year, twenty he-camels

[40]Abū Dāwūd, *Sunan*, vol. 4, 184, Ḥadīth no. 4542.

[41]Abū ‘Abd Allah Muḥammad ibn Hassan ibn Shaybānī, Kitāb *al-Aṣl,* vol. 4 (Karachi: Idārat al-Qurʻān wa al-ʻUlūm al-Islāmiyyah), 452.

[42]Shīrāzī, *Al-Muhadhdhab,* vol. 3, 212.

in their second year, twenty she-camels in their third year, twenty she-camels in their fourth year and twenty she-camels in their fifth year."[43] This is the standard amount of *diyah* according to Abū Ḥanīfah. Imam Mālik and Imam al-Shāfi'ī[44] only differ with him about one type of camel. They preferred twenty he-camels in their third year instead of twenty he-camels in their second year as this is also mentioned in another *Ḥadīth* narrated from Ibn Mas'ūd.

This system of *diyah* is still prevalent in Arab countries and is redressing the financial loss caused by the accidental homicide. Their Supreme judicial authority announces the value of *diyah* of a particular time. In 2011, the Kingdom's supreme judicial authority announced the amount of *diyah* is raised to SR300, 000 ($81,000) in cases of accidental deaths[45]. Same amount was ordered to be given to the martyrs that lost their lives in unfortunate crane crash accident in Grand Mosque[46]. As far as the amount of *diyah* is concerned in other commodities like gold and silver, it is one thousand gold coins unanimously. The standard weight of gold coins in Islamic caliphate was 4.25 grams.[47] Thus, one thousand dinars will be equivalent to 4250 grams of gold. At current market rate of gold, it amounts to approximately 247,747 USD[48]. This amount will mitigate the monetary loss for many years.

Jurists are divided in the exact amount of *diyah* in silver coins. Ḥanafī jurists consider the amount as 10,000 silver coins while *jamhūr* deem it to be 12,000 silver coins. One silver coin in Islamic caliphate was

[43]Aḥmed ibn Hanbal, *Musnad*, vol. 4, 210, Ḥadīth no. 4301.
[44]Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 193.
[45]http://www.emirates247.com/news/region/saudi-arabia-triples-blood-money-to-sr300-000-2011-09-11-1.417796 (accessed March 7, 2016).
[46]http://www.arabnews.com/featured/news/806481(accessed March 7, 2016).
[47]The Encyclopedia of Islam, s.v. "Dinār".
[48] *Market prices as of May 14, 2022*

around 2.91 to 2.97 gram of silver[49]. At this weight, the standard amount of *diyah* will be around 2.0 to 2.5 million that is very less for the monetary compensation of loss of life.

When *qiṣāṣ* and *diyah* Laws were promulgated in Pakistan, Silver was adopted as the standard for calculation of *diyah* that is extremely low.[50] Each year finance division (internal finance wing) of Government of Pakistan announces the amount of *diyah* for that particular year according to the rate of silver[51]. For the year 2021-2022, *diyah* amount is fixed to be Rs. Rs.4,261,205/- (rupees four million two hundred sixty-one thousand, two hundred and five only)[52]

Silver is no longer a market indicator and the amount of *diyah* according to its rate defeats the very purpose of *diyah* that is to redress the financial loss of the family. Camels were adopted to evaluate the amount and those who wanted to pay through gold and silver, they had to pay according to the value of camels. At present, gold is the market indicator; it is a wealth and always will be. Therefore, gold should be adopted in Pakistan as *diyah* for accidental homicide. Thus, doctors or hospital administrations should pay according to the gold rate if a patient dies because of their mistake or negligence that will be sufficient for them for quite some time.

Another important matter regarding this issue is the time of payment. All jurists have unanimous opinion regarding the time of payment. It can be delayed for three years[53]. Every year one third of the *diyah* has to

[49]The Encyclopedia of Islam, s.v. "Dirham".

[50]Dr Mehmood Aḥmed Ghazi, *Mahazirat e fiqa* (Lahore: Al-Faisal Nashran, 2005), 421.

[51]http://www.finance.gov.pk/circulars.html.

[52]https://www.finance.gov.pk/circulars/circular_14072021.pdf.

[53]al-Kāsānī, *Badā'i' al-Sanā'i',* vol.7 , 256; Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 4, 196.

be paid.[54]

3.3 Who will pay the *diyah*?

Islamic law incurs the liability of payment of *diyah* on *'āqilah*[55]. This system wasn't initiated by Islam; rather it dated back to the pre-Islamic era. Islam regulated and refined this system. In pre-Islamic era *'āqilah* was defined as adult sturdy males who used to be responsible for safeguarding the entire tribe. There is a difference of opinion among jurists regarding the definition of this legal term. According to Ḥanafīs, those male, adult and free registered soldiers are *'āqilah* who are registered in same payroll (*dīwān*)[56].

الْعَقْلُ عَلَى أَهْلِ الدِّيوَانِ مِنْ الْعَاقِلَة.

(*Diyah* is upon the people of *dīwān* among *'āqilah)*[57]

They rely for their definition on the practice of 'Umer (may Allah be pleased with him). During the time of the Prophet (Peace be Upon Him), tribesmen used to pay the *diyah* but with the passage of time this tribal system did not remain intact as it was in the past. Many people moved to different cities and started living in areas other than their tribes.

فَلَمَّا كَانَ فِي زَمَنِ عُمَرَ - رَضِيَ اللَّهُ عَنْهُ - وَدَوَّنَ الدَّوَاوِينَ صَارَ التَّنَاصُرُ بَيْنَهُمْ بِالدِّيوَانِ فَكَانَ أَهْلُ دِيوَانٍ وَاحِدٍ يَنْصُرُ بَعْضُهُمْ بَعْضًا وَإِنْ كَانُوا مِنْ قَبَائِلَ شَتَّى فَجَعَلَ عُمَرُ الْعَاقِلَةَ أَهْلَ الدِّيوَانِ.

At that time, 'Umer (may Allah be pleased with him) had

[54]Ibn Qudāmah, *Al-Mughnī,* vol. 8, 376.
[55]Ibn Rushd, *Bidāyat* vol. 4, 209.
[56]Muḥammad ibn Aḥmed ibn 'Arafah al-Dusūqī, *Hāshiyat 'āla al-sharh al-Kabīr li- abī al-Barakāt sīdī Aḥmed al-Dardīr 'āla al-Khalīl*, vol. 4 (Dār al-Fikr), 282.
[57]al-Sarakhasī, *Al- Mabsūt,* Vol. 27, 125.

> launched the system of *dīwān*. All the names of soldiers working in one unit were registered in it for the purpose of administration. This unit has to pay the *diyyah* if anyone mistakenly killed anyone or caused injury. If no such unit is available for a person, then his tribesmen will be *'āqilah.*[58]

An opinion of Mālikī *fiqh* is similar to the notion of Ḥanafīs. It is narrated in some of the classical books on Mālikī *fiqh.*[59] According to this opinion,

أَنَّ الْعَاقِلَةَ عِدَّةُ أُمُورٍ الْعَصَبَةُ وَأَهْلُ الدِّيوَانِ وَالْمَوَالِي وَبَيْتُ الْمَال

> *'Āqilah* would be *'aṣabah* (agnatic male tribesmen), people of *dīwān*, *mawālī* (slaves) and then *bait al-māl.*

However, if the wrongdoer is from the people of *dīwān* and he is still getting stipend from *dīwān*, in this case his *dīwān* will pay the *diyah.*[60] It says:

لَكِنْ أَهْلُ الدِّيوَانِ مُقَدَّمُونَ عَلَى الْعَصَبَةِ إنْ كَانَ لَهُمْ جَوَامِكُ تُصْرَفُ لَهُم

According to an opinion of Mālik[61], Shāfi'ī and Ḥanbalī, Agnatic male tribesmen are *'āqilah* and thus liable to pay for *diyah.*[62] Imam Shāfi'ī did not accept *ahl al-dīwān* as *'āqilah* because at the time of the Prophet (peace be upon him), clans of offenders used to pay and this practice was not abrogated or extended by him.[63]

والعاقلة هم العصبات الذين يرثون بالنسب أو الولاء غير الأب والجد والابن وابن الابن

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[58]Ibid.

[59]Muḥammad ibn 'Abdullah al-Kharshī, *Sharḥ Mukhtasir Khalīl li- al-Kharshī*, vol. 8, 45.

[60] Ibid.

[61]An opinion of Mālikī *fiqh* negates the stance of *'āqilah* being *ahl al-dīwān* and stresses upon the original rule of *'āqilah* being *'aṣabah.*

[62]Ibn Qudāmah al-Maqdisī, *Al-Mughnī,* vol. 8, 390.

[63]Shīrāzī, *Al-Muhadhdhab*, vol. 3, 239.

Imam Sarakhsī responding to this objection, remarked that the decision of ‘Umer was made in front of the companion of the Prophet (Peace be Upon Him) and none objected or rejected his decree. Thus, this decision has the sanction of *ijmā‘*.[64]

With respect to the medical negligence claims and its payments, the option of *‘aṣabah* is not very practical. However, the example of *dīwān* can be followed. Associations of medical practitioners may mandate payment of premium in order to pay medical negligence claims. Likewise, the Pakistan Medical Commission can run such programs on the basis of *Ta’mīn*.

4. Conclusion

English Law has an excellent system of bifurcation of the loss and NHS has paid huge amounts to claimants to redress for medical malpractice but there are no criteria of quantification of the loss. Thus, there is no standard tariff to follow. On the other hand, *Sharī‘ah* doesn’t bifurcate the different kinds of losses, rather provide a lump sum amount for the loss. The system of damages in *Sharī‘ah* is very relevant in the matter of medical malpractice, *Sharī‘ah* explicates ample rulings for monetary compensation of wrongful death. Alongside, it covers bodily injuries too in adequate detail. This entire realm of *diyah* and *arsh* is almost a complete tariff for estimating the damages for medical malpractice. If mindfully incorporated in a country's law, not much is left for judges to brainstorm for the adequate compensation, thus preventing the entire topic of capping that is hot debate in many countries. Pakistan can formulate a law for medical malpractice by setting the tariff on the basis of *diyah* thus ending the huge disparity between the damages decreed by courts and will spare judges from the laborious task

[64]al-Sarakhasī, *Al- Mabsūt,* Vol. 27, 125-126.

of estimation of reasonable amount for damages. As the damages are huge, the system of *āqilah* can be employed and the entire institution can take part in compensating the loss in order to lessen the burden of the defendant. The example of *dīwān* can be followed. Associations of medical practitioners may mandate payment of premium in order to pay medical negligence claims. Likewise, PMC can run such programs based on *ta'mīn*.

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Critical Analysis of Mediation Law of Islamabad (Alternative Dispute Resolution Act, 2017)

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Abstract

Justice is the base and foundation of a society. The entire judicial device of the contemporary system is based upon this fundamental principle. The grave implication of inefficient disposal of justice which leads to frustration, lack of confidence in the litigation process, and the exorbitant cost of litigation. The idea of Alternative Dispute Resolution (ADR) is not novel and is deeply rooted in our society in specific forms along with '*panchayat'* or '*jirgah'*; the modern formal adjudication system could not fulfill the needs of the litigants. With the development in the neighborhood and worldwide laws, it has resulted in formalizing the guidelines for the substitute-based approaches in Pakistan (Alternate Dispute decision Act, 2017) to solve the disputes and fashion a separate sphere of legal practice. The research is geared towards the future of the ADR Act, 2017 in Pakistan and the way it is going to be effective for fast and expeditious justice for folks who are not satisfied with the litigation process. The qualitative research methodology was applied to explore and critically analyze the enactment. The objective of this research is to investigate the impediments to mediation in Pakistan and the prospects of extension via an exclusive approach. It is observed that mediators continue to be key to the fulfillment of the manner which might be imposed upon otherwise unwilling parties. It requires the competence, ability, and

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charisma of the mediators that could make the litigants believe in the process. Furthermore, it was also observed that the Alternate Dispute resolution Act, of 2017 paves the path however it is not exhaustive nor comprehensive, so another legislative upgrade is required.

Keywords: ADR, Mediation, Act 2017, Mediation Law Islamabad

1. Introduction

Any technique of resolving a dispute apart from by means of the very last court docket order in litigation is referred to as ADR. It covers each adjudicative (arbitration, professional dedication, adjudication) and non-adjudicative techniques (mediation, negotiation, conciliation, and early impartial evaluation). At the same time as adjudicative approaches are more formal and parties have less manipulation over the outcome, non-adjudicative strategies have more involvement of the parties and more scope for innovative settlements in conjunction with privacy and confidentiality.[1] One of the primary motives parties opt for ADR in their lawsuits is that, in contrast to adversarial litigation, Alternate Dispute procedures are often collaborative and permit the parties to apprehend every different position. It additionally permits the parties to be provided with more creative solutions that a court docket would not be legally allowed to impose.[2]

The term 'Alternative Dispute Resolution', in a very accurate manner, is an alternative parallel system to adjudicate the matters informally. ADR is a method to resolve disputes outside the premises of formal judiciary and adjudication bodies by the appointment of an

[1]Alternate Dispute Resolution, https://jamapunji.pk/protect-yourself/what-alternative-dispute-resolution, Last Accessed May 2021.

[2]Mitropoulos Panagiotis and Howell Gregory, "Model for Understanding, Preventing, And Resolving Project Disputes", *Journal of Construction Engineering and Management*, 127: 3(2001), 63-70. www.researchgate.com . Last Accessed: May 2021.

intermediary to settle the matters. It refers to techniques through which resolution takes place other than courts and includes, but is not confined to, arbitration, mediation, conciliation, and neutral assessment.[3]

ADR is not a novel legal pathway for resolving disputes, rather it has been the mainstream mechanism. Almost all the societies had an ADR system alongside the formal and official court system. It can be said that ADR is a modern revival of past time community service of the folks and experienced people as the present-day mediation experts. Though not all countries[4] have had the same positive effects still most praise it.

2. Alternative Dispute Resolution System in Pakistan

The Constitution of Pakistan, 1973 lays down the basis for ADR. It does not mention ADR directly, but it presents well-known guidelines for it. Article 2A, inter alia, requires the state to provide a social structure which enables Muslims of Pakistan to live a life in accordance with Islam in social, political, and financial matters. Whereas in Islam, there is a concept of *tahkim* and *sulh* for dispute resolution[5] which can be materialized via the ADR mechanism. Moreover, Pakistan is a signatory of various treaties which recognized and enforce arbitration such as the Economic Cooperation Organization (ECO), South Asian Association for Regional Cooperation (SAARC), World Trade Organization (WTO), United Nations Commission on International Trade Law (UNCITRAL), and World

[3]Section 2(a), Alternative Dispute Resolution Act, 2017, The Gazette of Pakistan, Extraordinary Published by Authority, Islamabad, 30 May 2017. Available at https://na.gov.pk/uploads/documents/1495101925_486.pdf Last Accessed, March 2021. (Hereinafter ADR Act 2017).

[4]Jeffrey W, Stempel. "Reflections on Judicial ADR and the Multi-door Courthouse at twenty: fait accompli, failed overture, or Fledgling Adulthood", *Ohio St. J. on Disp. Resol*. 11 (1996): 297.

[5]Qazi Attaullah and Lutfullah Saqib, "Tracing the Concept of ADR in Shari'ah and Law - A Comparative Study", *Hamdard Islamicus, XXXIX* 3: 30 (2007).

Intellectual Property Organization (WIPO).[6] At a domestic level, various laws were formulated for this purpose such as:

3. The Small Claims and Minor Offences Courts Ordinance of 2002.
4. Sections 102-106 of the SBNP Local Government Ordinance of 2001.
5. Chapter XXII of the Code of Criminal Procedure of 1898 (summary trial provisions).
6. The Arbitration Act of 1940.
7. Alternative Dispute Resolution Act 2017.

The introduction of ADR legal instruments in Pakistan was not a mere legislative initiative rather the apex Judicial authority[7] instituted a committee to establish ADR in collaboration with the Law and Justice Commission of Pakistan. The committee as constituted by the chief justice of Pakistan aims to incorporate a mechanism of ADR throughout the country. The members of the committee include chief justices of all the provincial high courts, the law secretary, and members of provincial and federal judicial academy.[8] This committee is not only providing a supporting role for ADR mechanism institutionalization in Pakistan instead regulating the same as well.

[6]Salman, Ravala. "Alternative Dispute Resolution in Pakistan", available at https://www.nyulawglobal.org/globalex/Pakistan_ADR.html, Accessed 10 June 2021.

[7]Alternate Dispute Resolution Committee, Law & Justice Commission of Pakistan Islamabad, IJCP, Available at http://www.ljcp.gov.pk/ADR/index.html, Accessed March 2021.

[8] Ibid.

8. Alternative Dispute Resolution Act, 2017

The ADR mechanism is expanding and getting its due place in Pakistan at a very high momentum. Recent legislation includes Islamabad's Alternative Dispute Resolution Act, 2017 and draft accreditation rules. ADR Act, 2017 was adopted in Pakistan on 30th May 2017. The said act details the ADR techniques to be implemented and the procedural details for civil matters. The ADR tools provided via ADR Act, 2017 include, but are not limited to, arbitration. mediation, conciliation, and neutral evaluation. Its subjects include civil, commercial, and family law, freedom of association, collective bargaining, and industrial relations.

ADR is being adopted and applied worldwide in domestic and international litigation. The expedient, reliable and quite personal resolution of conflicts is what attracts people towards ADR. Mostly, the commercial matters are being addressed via ADR. The principle working underneath this process is to resolve a conflict between the two parties without involving the authoritative role of the third party. Instead, a party appointed to facilitate the resolution of conflict is considered to be unbiased and mutually agreed upon as well not imposing the rule rather aiding the solution.

The use of Alternative Dispute Resolution (ADR) has become widely accepted as the quickest, most efficient, and confidential way to resolve disputes between parties, particularly in commercial sectors worldwide. The legal principle behind ADR is to resolve disputes outside of court, with the assistance of an impartial third party who uses their expertise to resolve the matter through mutual agreement and award, based on the evidence available, while avoiding the parties from the technical complexities of procedural law. Unlike court orders that may favour one party over the other, in arbitration, both parties agree to certain conditions

and ultimately reach a mutually satisfying resolution. Nowadays, arbitration has become the mainstream method for resolving commercial disputes and offers an alternative to the "one size fits all" approach of traditional litigation processes. Unlike traditional court proceedings, technical rules of procedure and evidence are not always applicable in ADR.[9] However, as different communities and international laws have evolved, ADR has become more complex.

The purpose of this Act is to provide an alternate system for civil and criminal disputes which would be speedy and ensure justice. This Act facilitates the settlement of disputes without resorting to formal litigation. The ADR Act, 2017 was legislated particularly for the speedy and immediate resolution of conflicts. It needs to be considered and is noteworthy that the referral of dispute for ADR is mandatory with the exception of certain circumstances where the court is of the opinion that such a dispute cannot be resolved by way of ADR.[10]

When the parties agree the court docket shall refer civil matters mentioned in the schedule to ADR for settlement.[11] ADR specifically follows three modes of resolution: arbitration, mediation, and conciliation. At the same time as referring to the matter for ADR, the court shall appoint a neutral or any other person agreed upon by both parties.

The parties to the dispute are required to participate in the ADR proceedings in a personal capacity or through duly authorized representatives or attorneys. The matter is to be disposed of within thirty days after referral from court. The referred issue may be resolved by

[9]Majid Ali & Li Lu Geng, "Alternative Dispute Resolution (Adr) in Pakistan: The Role of Lawyers in Mediation Procedure", *International Journal of Research* 6:4 (2019): 2348-6848, https: //www.researchgate.net/332779955, accessed April 8, 2021.

[10]Sec3, ADR Act, 2017.

[11]Ibid.

mediation, conciliation, or a different mode of ADR.[12]

Whereas the time frame to resolve matters through arbitration is sixty days. So, the arbitrator is bound by the court to resolve within sixty days. The time is fixed but can be extended[13] if the court deems the grounds for delay or extension suitable.

In case an agreement is reached between the parties as a result of mediation or reconciliation the same should be documented by the neutral. The agreement or settlement document must be duly witnessed and signed by the neutral parties to the matter or their representatives. Afterwards, the settlement must be submitted and reported [14] to the court for the announcement of judgment and issuance of final decree.

Failure of ADR: If the appointed Neutral cannot provide a settlement between the parties, or no award is agreed upon then the matter must be brought into the notice of court. An official report about the facts and proceedings should be provided. Hereinafter, the court will take up the matter from the stage it was referred to ADR.

The court may refer cases falling u/s 345 of the Code of Criminal Procedure, 1898 after consultation with both parties and with their uninfluenced free will based assent to settle the matter via ADR.[15] The parties themselves can refer such offenses to ADR as described in law. The next steps after references are the same as in civil matters. Neutral has to be selected either by the parties or by the court. The appointed neutral has to resolve the case within 30 days of reference. Once the offence is compounded, the neutral has to document the proceeding along with the

[12]Section 8, ADR Act, 2017.
[13] Ibid.
[14] Section 9, ADR Act, 2017.
[15] Section 13 (1), ADR Act, 2017.

signature of two witnesses and his own.[16]

Failure: If Neutral fails to prosecute the same, the court shall take up the matter. While the court proceeding will continue from the stage a matter was referred to ADR initially. The cost and fees of ADR will be the liability of the parties as per mutual agreement.[17] Evaluator has to be appointed by the court for the determination of financial matters.

In the new legislation, upon referring the matter to ADR, the Court shall direct the parties to appear before the Neutral or ADR Centre, as the case may be, on the fixed date and time decided by the Court.[18] The First schedule of disputes includes issues such as those between landlords and tenants, pre-emption disputes, civil matters covered by the Small Claims and Minor Offences Courts Ordinance, 2002, Companies, and banking matters. Section 28 of the subjected Act and section 89-A of the Code of Civil Procedure, 1908, to the extent of Punjab will be repealed upon the enactment of this law. Additionally, the Qanun-e-Shahadat Order, 1984 will not be applicable[19] to any Alternate Dispute Resolution proceedings. The main loopholes or shortcomings are discussed as under:

1. Consent of the parties is necessary for any Alternative Dispute Resolution method.

2. Mostly, the Alternative Dispute Resolution is court supervised.

3. So far, no Court annexed Alternative Dispute Resolution system exists.

[16] Ibid.
[17] Section 15, ADR Act, 2017.
[18] Section 6, ADR Act, 2017.
[19] Section 28, ADR Act, 2017.

4. The ADR methods do not provide enforcement, which is granted in litigation; therefore, there should be a mechanism wherein ADR decision should give judicial backing just like a consent decree.

5. Parties have the option to discontinue the negotiation proceedings at any stage. This raises significant and valid questions on the credibility and efficiency of the ADR system.

6. Appeal and revision should not be barred.

7. This Act lacks provisions of confidentiality regarding ADR proceedings.

9. Mediation Law in Islamabad

Mediation is not obligatory in the ADR Act, of 2017. There are currently no provisions in the Act that mediation must be taken into consideration as mandatory.[20] Neither is there a provision to settle disputes in a courtroom-annexed mediation. A court could refer a civil dispute to mediation as long as both parties are in favor of it; but they cannot impose or compel mediation provisions on anyone. The courts can refer cases to mediation; however, all parties need to comply with it. They can stipulate a time frame for the mediation to be completed within the given period, which normally includes the result being reported back to the courtroom.

Among ADR strategies, mediation has proved itself to be the most flexible, most powerful, and person-friendly approach. Mediation has set up three predominant streams: commercial, family and network.

All require distinct approaches, but the principle of a neutral third

[20]Section 7, ADR Act, 2017.

person, helping parties to discover the solution, is essential to all three. Mediation is the most commonly used ADR process, but ADR Act, 2017 does not emphasize on mandatory mediation. The terms ADR and mediation are now used interchangeably, although Alternative Dispute Resolution encompasses more than a few strategies, certainly, one of those is mediation.

In many countries of the world, mediation has been introduced as a mandatory requirement of law.[21] While in ADR Act, 2017 the term mediation has been used but so far it has remained ineffective, due to its non-mandatory nature as far as the courts are concerned.

4.1 Weaknesses/Obstacles Towards Mandatory Mediation

There is no question that ADR is an effective and powerful tool for the promotion in order to get access to justice, but there are some weaknesses that are acting as barriers to the effective ADR system which can be:

a. Ignorance and neglect to the mechanism generally.

b. Inadequacy on the part of legal professionals and officials.

c. Non-existence of a sustainable and well-functioning mechanism.

d. Lack of experts to facilitate and regulate mediation.

e. Reluctance among lawyers to practice mediation professionally.

4.2 Settlement Through Mandatory Mediation

As compared to other parts of the world, most settlement of cases through mandatory mediation has been termed as free and fair especially regarding

[21]Navin Merchant "Training of ADR Skills Is A Must" , in Alternate Dispute Resolution, ed. Qaisar Mufti (Karachi: ICMP Press,2005), 26-34.

infiltration by vices such as bribery. Over the years, the judicial offices have declined the confidence of people under the taint of bribery and partial adjudication. But the mediation process makes the people believe they are part of the process as both parties have a role in selection and appointment of mediator. Also, the whole setup of hearing the parties reduces and decreases the potential biased decisions and malpractices. This poses greater trust and confidence in this system above the conventional court systems.[22]

Mediation on a voluntary basis has been introduced in Pakistan since a long time ago and is mentioned in ADR Act, 2017 as well. But now efforts should be made to make mediation mandatory for parties before knocking the door of court for resolving their dispute as instituted in Turkiye and other parts of the world.

In Messrs. Alstom Power Generation through Ashfaq Ahmad v. Pakistan Water and Power Development Authority through chairman and another it is held that dispute resolution via mediation and other alternate modes is a globally accepted manner of dispute resolution. There seems no hindrance to accept this as a means of dispute resolution. Further, it is empirically an inexpensive, low cost, expedient, convenient, advantageous and successful parallel system for adjudication.[23]

In another case, Dr. Mrs. Yasmin Abbas v. Rana Muhammad Hanif and Others[24] the Court observed that there should be no impediment to accept mediation as a means of dispute resolution. Different modes of dispute settlement are being inculcated as a fast and speedy resolution mechanism. It is quite evident from the case law and active participation

[22] PLD [2007] Lahore 581.
[23] Ibid.
[24] PLD [2005] Lahore 742.

of judicial authorities that ADR is the ultimate solution to the case backlog of Pakistan particularly in the civil justice system.

5. ADR Centre Accreditation & Mediation Accreditation Draft Rules

ADR Centre Accreditation and Mediation Accreditation (Eligibility) Rules[25] have been drafted to be promulgated from 2023. The rules are being made under section 25 of the ADR Act 2017. The rules provide a framework to incorporate and institutionalize the mediation centres. Interestingly, the rules are to be interpreted in accordance with ADR Act 2017. The rules provide a detailed guideline for infrastructure of mediation centres. An ADR center applicant is required to be a body corporate. The ADR center must have enough space and to ensure the appropriate space the facility must have 02 rooms for private sessions, 01 room for common session and the managerial and administrative rooms should be separate designated areas as per the rules made by the federal government.

Any applicant for accreditation of a mediation center or applicant mediator must apply through the prescribed form provided in the rules. The accreditation also depends on the site inspection report carried out by the concerned officers designated by the accreditation committee. It should be noted that no eligibility criteria have been provided for a person to be mediator. Whereas different countries provide a set criterion to be implemented. In Europe, the standard was issued under the title of 2008 Mediation directive. Moreover, it is one of the significant areas in the

[25]The ADR Mediation Accreditation (Eligibility) Draft Rules, 2023, Available athttps://molaw.gov.pk/SiteImage/Misc/files/ADR%20Mediation%20Accreditation%20Rules%2C%202023.pdf, Accessed March, 2021.

complete ADR mechanism[26] to be governed and regulated.

Mediation qualifications in the USA can vary depending on the state and jurisdiction. However, there are certain qualifications[27] that are generally required to become a certified mediator. Individuals seeking to become a mediator typically need to complete a certain amount of mediator training from an accredited program. This training may cover topics such as conflict resolution, communication skills, negotiation techniques, and ethics in mediation. Many programs also require participants to complete a certain number of supervised mediation sessions. Many states require mediators to meet certain eligibility criteria related to their moral character. This may involve a background check or screening process to ensure that the mediator has not engaged in any unethical or illegal behavior that could compromise their ability to effectively mediate disputes. The qualifications for becoming a mediator in the USA can be rigorous, but they are designed to ensure that mediators are equipped with the necessary skills and knowledge to effectively help parties resolve disputes in a fair and impartial manner. For instance, Florida court provides a comprehensive guide[28] prepared by the Florida dispute resolution center. This guide addresses issues like qualification of mediator, mediator certification, a list of certified mediation training programs, good moral character screening procedures, eligible activities, and code of conduct.

On the other hand, if we analyze, the rules implemented in Pakistan need to be extended and revised in order to meet the international standards

[26]Feasley, Ashley. "Regulating Mediator Qualifications in the 2008 EU Mediation Directive: The need for a Supranational Standard." *J. Disp. Resol.* (2011): 333.

[27]Devine, Paul F. "Mediator Qualifications: Are Ethical Standards Enough to Protect the Client". *Louis U. Pub. L. Rev.* 12 (1993): 187.

[28]Guidelines for becoming a Mediator, https://www.flcourts.gov/content/download/215958/file/how-to-become-a-mediator-guide.pdf, Last accessed March, 2021.

and qualifications for ADR mechanism. It would be high time to update the rules in light of international experience as Pakistan is working to establish and expedite the ADR mechanism.

6. Mediation Centres in Pakistan

Mediation centres aim to help resolve civil, family, juvenile, and other such matters in less tense settings. Statistically, court mediation programs have shown success in saving the time and money of parties involved in the dispute. The primary focus during the dispensation of justice is diverted toward winning the trust of the parties with the court's services while providing them with options that would reduce the chances of future disputes. Research conducted to gauge the effectiveness of quick mediation methods reveals that litigants are relatively more satisfied with the mediation centres, even going to be extended to advocating the establishment of more facilities for out-of-court settlements for the purpose of expediting the cause of justice. Research shows that litigants prefer to first approach these centres rather than going through the rigors of trial because they are time and energy consuming. The more efficient way would be to provide direct access to parties to approach these centres rather than the intervention of the judicial courts. There is an urgent need of training on mediation and motivation of the lawyers so that they can use and promote the alternative system in the best possible way.[29]

Internationally, the mediation centres have been positively received by people such as Turkey and Italy. In Pakistan too, once mediation becomes mandatory the need to promote said mediation centres should be taken seriously because the benefits of this system can easily trickle down

[29]Syed Muhammad, Haider. "ADR through Centuries: Modern Law Can Gain Much from Traditional Mechanism", *Journal of Research and Reviews in Social Sciences Pakistani Coden: IRRSSP* 38: (2020).

to the most vulnerable people of the society. Moreover, this mechanism is also proving helpful for resolving commercial/business disputes as well.

Some jurisdictions like Turkey and Italy have experimented by making mediation mandatory in certain fields of litigation and it has brought very good results.[30] On 22 June 2013, mediation was adopted on a voluntary basis in Turkey, with 6325 cases to be addressed via mediation in civil regulation disputes.[31] This laid down the way for a mediation system by which parties were free to resort to a mediator as long as they had a civil law dispute, the final results of which might be determined via party agreement. It is to be noted that from June 2013 till November 2017, a total 21, 517 cases were being resolved via mediation and the wide 19,292 of which ended with an agreement[32] thus setting the formal system free of this huge case backlog. However, 90% of voluntary mediations cases were from labor disputes[33] which were resolved in an expedient manner.

The main motive behind the mediation derive was cost effective, speedy, and efficient settlement of disputes. It is evident the labor disputes need it the most, as, due to economic and financial restraints the litigants cannot afford to prolong the matters. The mediation or ADR introduction occurred on 1 January 2018, whereas until 15 February 2018, only the labor disputes reached 37000, 6500 of which have been already effectively resolved even as 2800 of which have not.[34] This shows that in less than two

[30]Mian Mudassar, Umar Bodla, "Alternative Dispute Resolution in Pakistan", *Journal of Research and Reviews in Social Sciences Pakistani Coden: IRRSSP* (2020).

[31]Idil, Elveris, "Mandatory Mediation is the New Game in Town", (2018). Retrieved from: http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/, accessed June 2021.

[32] Ibid.

[33]Tankut, Centel, "Labour Dispute Resolution in Turkey", *Springer International Publishing* (2019).

[34]Idil, Elveris, "Mandatory Mediation Is the New Game In Town", (2018), http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/, accessed June, 2021.

months, the total agreement numbers in mandatory mediation extended to almost one-quarter of the total agreements reached under voluntary mediation over a period of four years.[35]

While all these developments may be considered a positive sign, mandatory mediation was adopted without the benefit of a pilot project. Subsequently a debate and discourse were generated whether mandatory mediation can be introduced or should be refrained from as the mediators, educators, judicial officers weighed in diverse opinions.[36] The purpose was to study, monitor and rationalize the implications of mandatory mediation practice by making the numbers available. This made it possible to observe and diagnose the problems at a very early stage. The unethical practices could be recognized and curtailed via making the mediation details public. It was vital at this stage to use the big data so the government can extend and replicate the same mandatory mediation from labor dispute settlement to other areas of litigation such as commercial and consumer disputes. This can be a great lesson for Pakistan to inculcate the ADR and mandatory mediation in particular to enhance the disposal of justice and expedite the backlog cases to be resolved.

7. Conclusion

The lawyers practicing inside the courts will be the main foundation blocks of strength in spreading ADR in particular mandatory mediation. Lawyers have to be persuaded with the aid of the chance of receiving a lump sum amount for being attorneys in mediation which gives an opportunity to resolve the disputes hastily and successfully. Trials typically take years and,

[35]Tankut, Centel. "Mediation in Labour Rights Disputes: In Labour Dispute Resolution in Turkey", *Springer, Cham* (2019): 135-154.

[36]Serpil, ISIK, "Mediation as an Alternative Dispute Resolution Method and Mediation Process in Turkish Law System: An Overview", *In Annales de la Faculté de Droit d'Istanbul* 48: 65 (2016): 55-87.

in our country, expenses are generally paid part by part throughout the trials till the end. Similarly, they ought to be made to keep in mind that successful mediators from legal professionals will usually attract new customers trying to strive for mediation who might in any other case have refrained from the court.[37] A National Action Plan deems necessary for the promotion and institution of mandatory mediation.

After careful evaluation of the abovementioned relevant laws both general and specific that include provisions for ADR mechanisms in Pakistan, it can be observed that there is no specific legal framework governing community mediation, the training and qualifications of mediators, and the community mediation centres in Islamabad. Regardless of the advent of courtroom-annexed mediation under the act, there are no explicit rules which govern the conduct of mediation, the education and qualifications of mediators, and the mediation centres standards. The recently drafted and to be promulgated rules provide guidelines for establishment and accreditation of ADR centres but are silent on the education and qualification of mediators. By introduction of mandatory mediation in labor courts and generally commercial matters a lot of weight can be put off from the formal courts. The backlog cases can be resolved in an efficient and expedient manner via mandatory mediation. The international experience must be utilized in Pakistan to achieve the same results. Although mandatory mediation seems a curtailment of liberty of parties, but it does not necessitate the award thus it must be introduced in ADR Act, 2017 for the jurisdiction of Islamabad as a pilot project.

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[37]Kalanauri Zafar Iqbal, "Implementation Strategy for ADR in Pakistan", http://pgil.pk/wp-content/uploads/2017/08/Implementation-strategy-for-ADR-in-Pakistan.pdf, accessed June 2021.

White-Collar Crime – Is it a Factual Criminality?

Rabia Zafar*

Abstract

The present qualitative and historical study is primarily conducted to explore the phenomenon of recognizing white-collar criminality in the legal parlance. The white-collar crime is as old as the phenomenon of corruption in society. Nevertheless, until the recent past it was not recognized as a crime or a social evil. It was commonly asserted that crime could not be perpetrated by the privileged section of the society. The only type of criminality was assumed to be street-criminality, that is, crime from the poverty-stricken people. Sociologists and criminologists have long debated over this form of criminality. Those debates followed recognition of the fact that corruption even by the privileged sector of society gives birth to 'white-collar crime' necessitating its criminalization. In the context of Pakistan, corruption exists since its birth, therefore, various laws were enacted from time to time to control its devastating effects over the masses. This research has undertaken to analyze the historical recognition of white-collar crimes, it's devastating effects on the economy, the legal structure of Pakistan to control its effects and the proposal for an effective mechanism in this regard. This study reveals that Pakistan battled this form of criminality by enacting numerous statutory laws. However, there is no denying the fact that mere legislations are not sufficient to combat white-collar criminality. The efficacy of administrative institutions is vital to reap the fruits of the given legal framework for controlling white-collar crime.

Key Words: Crime, White-Collar Crime, blue-collar crime, Street criminality, Legal institutions, and Administration.

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1. Introduction

The concept of crime has been given multiple definitions throughout the history of its use. However, most dominant and accepted understanding of said term is that "a crime is an act prohibited by the law[1] or *mala prohibita* (offenses defined by legislature as crime).[2] In another definition, it is explained as human action constituting a serious offense, either against an individual or the state authority, eventually punishable by law.[3] In legal notion, it is defined as "[a]ny harmful act or omission against the public which the State wishes to prevent, and which upon conviction is punishable by fine, imprisonment, and/or death. No conduct constitutes a crime unless it is declared criminal in the laws of the country."[4] This principle is stated in Latin as *nullum crimen sine lege*, that is, no crime without law.[5] Paul Tappan, a criminologist, put forth a legalistic definition of crime. In his words, "[c]rime is an intentional act or omission in violation of criminal law (statutory and case law), committed without defense or justification, and sanctioned by the state as a felony or misdemeanor."[6]

No society is an exception to the issue of criminal behaviors. Forms of crimes may differ from society to society. Several acts may be characterized as crime by one society and legal in other societies, hence categorization of crime may differ. Nevertheless, no society can deny its

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[1]Dawn L. Rothe and David Kauzlarich, *Crimes of the Powerful* (New York: Routledge, 2006), 3.

[2]Richard D.Hartly, *Corporate Crime* (USA: Santa Barbara, California Denver, Colorado Oxford, England 2008), 3.

[3]Concise English Dictionary, 11th ed., s.v. "crime".

[4]Business Dictionary, s.v 'crime'', available at http://www.businessdictionary.com/definition/crime.html, Last Accessed 15-4-2018.

[5]Imran Ahsan Nyazee, *General Principle of Criminal Law (Islamic and Western)* (Islamabad: Shariah Academy IIUI, 2007), 76.

[6]Dragan Milovanovic, "Legalistic Definition of Crime and an Alternative View," *Annals International Edition Journal of Legal and Social Sciences* 54, no. 1 (2006): 78.

existence. The criminological studies deal not only with street and/or blue crimes, rather they also include financial/economic crimes known as white-collar crimes. Although this type of criminality is as old as the phenomenon of corruption in the society, yet until recent past it was not recognized as criminal conduct or a social evil.[7] Qadri notes the observations from Barnes and Tetters

> There has always been crime among businessmen. There have always been instances of violation of trust … But the American people seemed to believe that anyone who betrayed a trust or who mulched the widow's mite in a shady but legal deal, would eventually suffer if not here, surely hereinafter. Existing practices however were generally accepted as being within the canons of good business. Business therefore was justified in pulling shrewd deals. The victim either didn't report what was done for fear of being ridiculed, or received little sympathy because he had fleeced in a social, approved and even legal deal…[8]

Thus, the white-collar criminality engaged the attention of the students of criminology quite recently, and in the due course, it came to the notice of the public as well.[9] During the 18th century, economic activities were immensely diversified, and significant change was observed in the economic world.[10] These revolutions gave rise to an entirely different sort of economy, that is, the industrial economy. The traditional domestic

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[7]Edwin H. Sutherland, *White-Collar Crime* (New York: The Dryden Press, 1949),1-12.

[8]Prof. S.M. Afzal Qadri, *Criminology Problems and Perspectives*, 5th ed. (Lucknow: EBC Publishing, 2005),405.

[9]Sutherland, *White-Collar Crime*, 1-12.

[10]Mahesh Chandra, *Socio Economic Offences* (Bombay: Publishers Tripathi, 1979), 24.

structure, where the craftsmen and artisans worked in their home, was replaced with a culture of factories. The large-scale factory systems turned into modern and captivating set-ups. These factories were mostly established in big cities and towns. Therefore, the abundant opportunities of transportation and massive production of factories available in the cities gave rise to relocation of masses from the rural and underdeveloped areas to the cities.

This industrial growth witnessed the drop of home-made handcraft leading to an increase in urbanization. Thus, the reformation through industrial revolution paved the way to an entirely new type of society, which preferred logic over faith. It promoted competition in place of collaboration and believed in science more than the religion.[11] People became septic, putting their faith in material world only, eventually getting passionate to earn money only. Thus, with the passage of time, urbanization, industrialization, and newly structured society proved to be the breeding platform for numerous nefarious activities, wrongdoings, and irregular behaviors in the entire commercial, industrial and trade sectors. Eventually newer forms of criminal activities came into notoriety, termed as white-collar crimes. They included but are not limited to supplying adulterated food, cybercrimes, evading taxes, counterfeiting, corruption etcetera, that is, affecting the entire socio- economic fabric of the society and the State.[12] The following discussion is an account of emergence and recognition of this new form of criminality in human history of crimes.

2. Early Voices against Wealthy Criminals (1866 to 1951)

Edward A. Ross was the first social scientist who started debate over the

[11] Ibid.

[12] See,http://shodhganga.inflibnet.ac.in/bitstream/10603/57410/8/08_chapter%201.pdf, Last accessed 21-2-2018.

notion of white-collar crime in 1866. He named such offenders as "Criminaloid.".[13] In his book entitled "Sin and Society" he mentioned numerous types of crimes committed by people who were not regarded as criminals in those days. Such as the railroad magnate who picks the pockets with rebate, and manufacturers who murders with adulterants instead of weapons. Likewise, those who cheat on a company prospectus rather than a deck of cards. Irony was that despite these wrongs, they were privileged not to be treated as malefactor.[14]

In 1872, Edwin C. Hill presented a paper before an international congress on the 'Prevention and Repression of Crime', noting that growth of organized business crimes required cooperation of real estate investors, owners, manufacturers and other honest people.[15] In 1935, jurist Albert Morris defined criminals of the upper class as, "… several but unidentified groups of criminals whose intelligence, social position, and criminal technique let them move among their fellow citizens effectively immune to prosecution and recognition as criminals."[16] Likewise, several jurists attempted to define that new concept in different perspectives. In due course this concept gained full attention and recognition among the criminologists and sociologists.

3. Evolution of Term "White-Collar Crime" (1939 to 1962)

The official or recorded history of corporate or white-collar crime, dates to 1939.[17] A sociologist and criminologist, Edwin E. Sutherland, is considered a leading historical figure in maturing the concept of white-collar crime

[13]Erich Goode, *Deviant Behavior* (USA: Routledge ,2016),136.

[14]Edward Alsworth Ross, *Sin and Society: An Analysis of Latter-Day Iniquity* (Houghton Mifflin, 1907),7.

[15]Qadri, *Criminology Problems and Perspectives,* 405.

[16]Albert Morris, *Criminology* (New York: Longmans, Green and Co, 1935), 152-158.

[17] Hartly, *Corporate Crime,* 2.

within the notion of criminality. While addressing the American Sociological Society in December 1939, Sutherland first used the term white-collar criminal. In his speech, Sutherland attempted to uncover the crimes committed by the rich and affluent people. Significantly, he proclaimed the notion to put on trial powerful elite criminals, who until then managed to escape the legal trap easily, due to their social status, strong political affiliations, and strong economic connections.[18] People of that time assumed that crimes are specifically committed by persons of low socio status. This traditional assumption was strongly negated by Sutherland in his speech. He asserted the theory to recognize the happening of criminal practices by people of high socio-economic background, thus, presenting the term 'white-collar crime' for such criminal activities.

Up to that time, on the basis of research and data analysis it was believed that poverty was the prime cause for crime. Therefore, criminologists were entirely focused on street criminology; and never considered white-collar criminals. Dilemma was that the data which criminologists relied upon to formulate their theories contained biased information. Therefore, Sutherland took initiative to reveal the fact that criminal activities undertaken by elite class are highly ignored & resultantly their criminal acts are not reported in official criminal record, which is regarded as primary source by criminologists to gather data for crime rate assessment. Sutherland stated two reasons for biases in the official criminal record. Firstly, persons having high socio-economic class are more powerful financially and politically, thus more likely to escape conviction and arrest, than persons who do not possess such powers and connections. Secondly, even if white-collar offenders are caught, the justice system gives an entirely privileged treatment, unlike street-criminals. He put forward

[18]Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956), 1-2.

various factors to augment his argument,

> [T]hey are not arrested by uniformed policemen, are not tried in criminal courts, and are not committed to prisons; this illegal behavior receives the attention of administrative commissions and of courts operating under civil or equity jurisdiction. For this reason, such violations of law are not included in the criminal statistics nor are individual cases brought to the attention of scholars who write the theories of criminal behavior.[19]

Concerns of Sutherland regarding the notion of white-collar criminals could be summarized as, 1) White-collar criminality is a factual criminality, because undoubtedly it violates the criminal law. 2) The criminal law treats such criminals distinctly than other criminals, hence making them administratively different class of criminals. 3) The theories purported by the criminologists, asserting crime as a consequence of various conditions like poverty, sociopathic and psychopathic conditions, are flimsy on multiple grounds. Firstly, because these theories are based on considerably biased data with respect to the socio-economic status of criminals. Secondly, they just exclude white-collar criminals. Thirdly, they do not provide general characterization of all criminality, not even they explain the criminality of underprivileged and deprived class. 4) Ultimately there is a need to arrive a theory, which must determine the criminal behavior generically, covering both types of criminalities, that is, white-collar and lower-class alike. 5) Sutherland, recommended that hypothesis regarding white-collar criminality must be made, in terms of 'differential association

[19]Arjan Reurink, "White-Collar Crime: The Concept and its Potential for the Analysis of Financial Crime," *European Journal of Sociology* 57, no. 3, (2016): 387-388, doi:10.1017/S0003975616000163.

and social disorganization'.[20]

Initially, the argument presented by Sutherland did not get much recognition in the thought, theories, and research of the criminologists.[21] However, later, in the 1940s Sutherland initiated a major study regarding elite crimes. His thorough study on this issue came up in the form of publication of a book entitled, White-collar Crime 1949, as his last major contribution in the history of white-collar criminality, before his death in 1950. In order to collect accurate data and statistics pertaining to crimes by high socio-economic class, he analyzed legal decisions of civil, administrative, and criminal tribunals, against 70 largest US mining, manufacturing and mercantile corporations.[22] Finally, his continuous efforts and crucial contributions brought criminologists on point to recognize the concept of white-collar criminality, which for a long time had hardly been mentioned and rarely been discussed in academic writings even. Furthermore, it was acknowledged that his book 'White-Collar Crime' is a significant contribution to the discipline of criminology. Other researchers also gained inspiration from his writing. Accordingly, one scholar described the period between 1940 to 1960 as the "Classical Period" pertaining to

[20]The 'differential association theory' deals with the socialization process while investigating why people tend to commit crime. Thus, it studies the socialization patterns of individuals, like their interaction with law-abiders or violators, in order to investigate their tendency towards criminal behaviors. The white-collar criminals, generally belong to well-off families having respectable neighborhoods, usually having good educational background and without much effort on their part they somehow get into business set ups, where such criminality has usually become a kind of lifestyle. Contrariwise the criminals from lower-class come from poverty-stricken families and neighborhoods, while being away from law-abiders they join the groups of juvenile offenders around them and learn the techniques for law-breaking. This is known as the process of differential association. The 'social disorganization theory' gives way to criminal behaviors because the community is not firmly organized such behaviors. The law usually seems in conflict with the aspirations of business competitive environment. Hence, the businessman though willing to abide by the law, yet compelled to adopt their methods of his competitors. See Edwin H Sutherland, "White-Collar Criminality", *American Sociological Review 5*, no.1 (1940): 11-12, https://www.jstor.org/stable/2083937.

[21]Reurink, "White-Collar Crime," 388.

[22]Sutherland, *White-Collar Crime*, 17-27.

study and research of white-collar crime.[23] Significantly, Sutherland initiated debate on controversial issues while confronting the existing theories of criminology.

4. Controversy of Sociologists and Criminologists on White-Collar Criminality

Sutherland's earth breaking work in the field of white-collar criminology was followed by several studies on this issue. The inclusion of white-collar offenses in the category of crime gave rise to objections by sociologists. The sociologist asserted that the so-called criminals of such offences do not consider themselves as criminals, thus their acts do not amount to crimes. In this wake, during the early fifties a debate commenced between Burgess and Hartung. Thus, the latter asserted that white-collar crime and black marketing should be considered sociologically as a crime, just like any other kind of crime. The former, contested that the denotation of criminals ought to be confined to individuals who regard themselves as criminals, and likewise deemed by the society. This argument was refuted by Mannheim too. Furthermore, it is obviously uncertain that white-collar offenders would ever regard themselves as violators of law. Even the most vehement critic of Sutherland's concept, Dr. Gilbert Geis, turned down the argument that legal offences of corporate executives are not crimes just because of the reason that they do not perceive their activities as crime.[24] Another criminologist and sociologist, Donald R. Cressey in 1950 contributed to developing the notion of white-collar criminality by exploring the psychology of criminals as to why some of the people violate financial trusts

[23]Diane E. Vaughan, *Recent Development in White-Collar Crime Theory and Research*, In *"The Mad, the Bad, and the Different*, ed. I.L. Barak- Glantz and R. huff, (Lexington MA: Lexington Books, 1981), 135.

[24]Qadri, *Criminology Problems and Perspectives,* 410.

while others do not.

Vilhelm Aubert, a sociologist in 1952, proffered the theory of relationship between white-collar crime and the social structure of society. He highlighted the need to take into consideration the interdependence of the origin and function of social norms and the origin of deviations and considered it significant to look at the attitude and opinion of white-collar criminals.[25] Marshall B. Clinard, a contributor to understanding of white-collar and corporate criminality, in 1946 investigated black market illegality during war time. For the very first time in his research Clinard unveiled the notion of 'Occupational Crime' and defined the white-collar crime as "a violation of the law committed primarily by groups such as businessmen, professional men, and politicians in connection with their occupations."[26] Further, Robert E. Lane in 1953 conducted his research upon white-collar crime at a macro level. He investigated violations of labor regulations and trade practices of the shoe industry in the New England shoe industry.[27] It is evident from above mentioned contributions of criminologists and sociologists, that the notation of white-collar criminality reached its climax in that period and received significant attention from jurists.

5. Legal Recognition of White-Collar Crimes (1970 to 1988)

Rosoff, *et al* deliberate that the 1970s brought an end, the period during which large scale businesses were considered as the solution to widespread shared prosperity, rather than a problem. Social disruption and several crucial corporate scandals, like in the USA the Watergate and Lockheed

[25]Kam C Wong, "From White-Collar Crime to Organizational Crime: An Intellectual History," *Electronic Journal of Law* 12, no. 1 (2005).

[26]Ibid.

[27]Robert E. Lane, "Why Businessmen Violate the Law," *Journal of Criminal Law, Criminology and Police Science* 44, no. 2, (1953): 159.

sham brought new spirit.[28] In 1971, then-president Richard M. Nixon wanted more data about the opponent democratic party's strategy in the forthcoming 1972 election, from the party's offices in the Watergate apartment and office complex.[29] Since then, once again those holding power, their legitimacy was called into question and Sutherland's concern regarding violation of laws by the powerful and rich, gained momentum.

In the 1970s, the law enforcement bodies also started taking interest in dealing with white-collar crimes, hence crime units were formed in the federal and local prosecutorial agencies. During this decade, it was seen that the federal government had allocated unprecedented large-scale fund for research upon white-collar criminality.[30] Yablonsky mentioned that the problem of decline in business ethics and white-collar crime as a growing phenomenon was detailed in an article titled "Fraud Fraud Fraud". This article described several different white-collar crimes which appeared in the headlines during a week.[31] Eventually, for the first time in the 1990s both well-organized data and grant of money for white-collar crime research became more readily available by the government. Due to these facilities, empirical work on white-collar crime shifted from primary qualitative case studies to systematic study of sources of different forms of white-collar crime.[32] Thus in 1990 white-collar crimes got government certification and gained formal status.

6. Definition of White-Collar Crime

Social scientists and criminologists offer a variety of ways to define white-

[28]Reurink, "White-Collar Crime," 388.

[29]Lewis Yablonsky, *Criminology Crime and Criminality* (New York: Harper and Row, 1990), 328.

[30]Reurink, "White-Collar Crime," 388-389.

[31]Yablonsky, *Criminology Crime and Criminality,* 331.

[32]Reurink, "White-Collar Crime," 389.

collar crime. Various terms are used in this context, such as, occupational crimes, organizational crime, elite deviance, *criminaloide*, corporate crime, political crime.[33] An acceptable definition of white-collar crime to all groups is not yet developed. However, the most accepted definition is given by Sutherland in his book white-collar crime as, "a crime committed by a person of respectability and high social status in the course of his occupation."[34] In 1996, National White-Collar Crime Center (NWCC) organized a workshop which was joined by numerous white-collar crime specialists. Only purpose behind the conducting workshop was to formulate an active definition of white-collar crime. Thus, the conceptual debate on this genus of crime reached its climax, and the conference, agreed upon a its formal definition as,

> Illegal or unethical acts that violate fiduciary responsibility or public trust, committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain.[35]

It is also defined as,

> Offenses that are socially injurious and blameworthy acts committed by individuals or groups of individuals who occupy decision-making positions in corporations and businesses, and which are committed for their own personal gain against the business, and corporations that employ

[33]Hartly, *Corporate Crime*, 4.
[34]Sutherland, *White-Collar Crime*, 9.
[35]Reurink, "White-Collar Crime," 407.

them.[36]

The above-stated definitions reveal that white-collar crimes are special forms of crime unlike ordinary crimes, that is, theft, rape, pick-pocketing, snatching, looting and murder. They are committed by the class of people holding certain status, power, or influential position in society unlike habitual street criminals. Being of distinct nature white-collar crime does not involve any type of physical violence; however it is not a victimless crime.[37] Such crime include bribery, insider trading, fraud, terrorist financing, labor racketeering, ponzi schemes, cybercrime, price fixing, price gauging, unfair labor practices, unsafe working conditions, environmental crime, embezzlement, copyright infringement, money laundering, occupational health and safety crimes, identity theft and forgery.[38] Offenders who are accused of these crimes are known as white-collar criminals.

In contrast to the concept white-collar crimes there is a term "Blue-collar Crimes". This term was coined in the 1920s referring to American workers who perform menial labor jobs. These jobs were quite grubby and messy, so workers were instructed to wear dark colored clothes to lessen the visibility of stains and dirt. In pursuance of given direction many of them wore blue color shirts, hence the term blue-collar.[39] Thus, criminal acts committed by persons, who are socially and economically powerless and do not hold any influential position in society, are categorized as blue-collar

[36]Nancy K Frank, and Michael J Lynch, *Corporate Crime, Corporate Violence: A Primer (*Harrow and Heston, 1992),17.

[37]Fredericks, Rima E McComas, and Georgie Ann Weatherby, "Recidivism, Deterrence, and Social Impact," 1.

[38]Rothe and David Kauzlarich, *Crimes of the Powerful*, 10; See also: Hartly, *Corporate Crime*, 21.

[39]Yolanda Williams, *Blue-Collar Crime: Definition, Statistics & Examples*, Available at; https://study.com/academy/lesson/blue-collar-crime-definition-statistics-examples.html. Last accessed 21-2-2018.

crime. And those criminals are referred to as blue-collar criminals or street criminals. Blue-collar crimes are elaborated as, violations of law undertaken by the individuals having lower social status in the society. Such conduct directly inflicts harm to the person or property of others. Most of the time these types of crime would instantaneously happen without any prior indication from the perpetrators. Moreover, their adverse effects are commonly observable by the masses in society.[40]

Thus, there is a clear line of distinction between these criminalities. But it is a fact that white-collar criminality took a long time to be legally recognized as crime. As studied earlier, initially heated debates, various juristic opinions and heavy criticism was followed by the recognition of the notion of white-collar crime. After covering such a long distance of complications, ultimately the notion of white-collar crime fully took roots and was recognized all across the world. Likewise, Pakistan was no exception to the white-collar crimes. Realization about prosecution and punishing white-collar criminals was also inaugurated in Pakistan.

7. White-Collar Crime in Pakistan

At the time of independence of Pakistan in 1947 and afterwards during fifties and sixties, seven million people migrated from adjacent India to Pakistan for rehabilitation, and in exchange, previous inhabitants of Pakistani territory left for India. After exchange of territories, allotments of properties were started to the migrants in Pakistan, and that allotment process opened a pandora box. Nefarious grabbing of properties, massive corruption and serious malpractices of white-collar crime by influential

[40]Zion Zachary, 'Crimes of the Powerful (White-Collar) vs. Crimes of the Powerless (Blue-Collar) - Is There a Distinction between How These Crimes Are Perceived by the Public and Penalized by Judicial Systems in the USA?' (Middlesex University, 2016), 7. file:///C:/Users/HP/Downloads/Dissertation.pdf. Last accessed 21-2-2018.

people and bureaucrats on all level was seen. Since mid-seventies, culture of accumulation of rotten wealth, bank balance, and culture of "*begum"* (high gentry wife), "*bigghas"* (land), "*bengels"* and best brought up of next self-generation (daughters and sons), inundated nation under injustice, inequality, and corruption. Since mid-eighties, political subculture of pajeros, public fund, plots, protocol, paved a way to the white-collar criminality. Black Money earned by this affluent class by ill-ways, later whitened by global laundering, gave birth to another white-collar crime i.e., money laundering.[41]

7.1 Legal System and Administration of Pakistan Since 1947

It is noteworthy that, primary object of the legal system of any country is to provide equitable justice to all subjects of the state without any prejudice. But discrimination is certain to happen, thus in every system it is true to exist. Everywhere we find loopholes in the system, which need to be inquired into.[42] As discussed, corruption exists in our country since its birth, therefore, various laws were enacted to bridge those gaps. Such as, Public and Representative Offices Disqualification Act, 1949 (PRODA), Pakistan Criminal Law Amendment Act, 1958, Elective Bodies (Disqualification Order, 1959 (EBDO), *Ehtesab* Act, 1996 (Repealed).

Mere legislation is not the solution, unless a given law has feasibility. Administration is the entity that determines the law-and-order situation of any country. Administration law creates administrative agencies and empowers them to carry out public policies that are settled within

[41]Dr,Abdul Majeed A. Aulakh, *Crime and Criminology: A Comparative Study In The Context Of Islamic Republic Of Pakistan,* 2nd ed. (Lahore: Federal Law House, 2005), 211.

[42]Zafar and Associates, *White-Collar Crime in Pakistan*, available at; http://law.zafcointl.com/area_wcc.html, Last Accessed 21-2-2018.

government and passed by parliament.[43] Thus, in order to penetrate the deep root of the issue of corruption, one needs to examine the working of administration of the country. Let's study the brief history of the administrative structure of Pakistan since 1947.

After independence, the civil system of Pakistan was borrowed from the public administration system of British India. Pakistan retained the same pattern, just changed the nomenclature, from Indian Civil Service to 'Civil Service of Pakistan' (CSP), later morphed into "District Management Group" (DMG). Under the adopted structure the executive branch was at its apex. That system was structured mainly to maintain law and order situation, and tax collection[44] District officers were considered the cornerstone of the administration. Tax collection, administering police, was under their control, they held the status of chief magistrates of their districts.

Initially in Pakistan, administration was highly centralized. The democratic government of Bhutto made attempts to empower civilian bureaucracy. Eventually, reforms of 1973 were brought that promoted a sense of egalitarianism within the bureaucracy which fairly reduced the powers of the CSP. In fact, the reforms just re-organized the pattern, though they could not bring any significant change in structure. However, by 1978, a military coup removed Bhutto from his office, and in order to gain a constituency for himself, General Zia conducted party-less, local elections. This act made corruption more rampant. Low salaries for government officials, inflation, deteriorating economy and almost non-existence of accountability provided a breeding forum to corruption. In 1988, that military stint came to an end. Subsequently, four successive elected civilian

[43]E.S.S.Wade and G.Godfrey Phillips, *Constitutional and Administrative Law*, Ed. A.Bradley, 9th ed. (New York: Longman inc,1977), 547.

[44]Sumaira Samad, "Combating Corruption: The Case of the National Accountability Bureau," *Journal of Administration and Governance* 3, no. 1(2008):91.

governments made way in the political history of Pakistan, but each government dissolved pre-maturely by military intervention.

History reveals that elected governments constantly had to face the chaotic socio-economic condition of the country, international pressure on issues like debt conditions, drug trade, and nuclear technology, and flexing of muscles by armed forces. However, these governments also had their own earth breaking record of corruption, mismanagement, and multiplication of white-collar criminality in terms of financial frauds. No effective accountability mechanism was found in their governance pattern. In view of these circumstances General Pervaiz Musharraf took over the government, by declaring a situation of inefficient, corrupt and threats to the national interest.

In 1999, Musharaf announced his seven-point agenda, which included restoration of law and order, revival of economy, dispensation of speedy and swift justice and across-the-board accountability. His supporters contested that Musharaf was a neutral army person, thus there was no political victimization in prosecuting corruption. Moreover, the purpose was to recover national wealth robbed by the corrupt people. It was further proclaimed by the Musharaf that he would cleanse and reconstruct the politics and also declared to take some major steps such as decentralization of administrative powers and politics, and separation of executive and judiciary. This was a stringent step in the context of Pakistani politics. Another radical step taken by Musharaf was the establishment of National Accountability Bureau (NAB), regulated by National Accountability Ordinance, 1999. Said ordinance repealed the Ehtesab Act 1997, and all unresolved pending cases were moved to the NAB, from the date of

enforcement of the Ordinance. [45]

7.2 Anti-Corruption Agencies to Curb White-Collar Crimes

In Pakistan, National Accountability Bureau is considered as an apex anti-corruption institution operated under the National Accountability Ordinance (NAO) 1999. NAO is considered as the most exhaustive piece of legislation in the history of Pakistan for curtailing corruption. Unprecedented powers are assigned to NAB under the said ordinance. First time ever in the history of Pakistan, white-collar crime is classified under NAO. Whereas all the back dated statutes were silent on this term.[46] Applicability of this Act is not only to public servants, but its application is extended to "holders of public office" and "persons" involved in corporate business.

NAB was aimed to prosecute public service officials, politicians, and other citizens who were either involved in gross abuse of power. In the initial three years, the leading function of this apex anti-corruption institution was only to detect, investigate, and prosecute the white-collar crime. Later, in addition to enforcement functions, NAB was also empowered to ensure prevention of white-collar criminality and to make people aware of it.[47] For instance awareness campaign "Say No to Corruption", and other slogans, such as " ذنجیر کی کرپشن ڈالیں توڑ", "فرض کا آپ احتسابی خود" and "پاکستان خوشحال پاک سے عنوانی بد"[48] etcetera. Today, In Pakistan six anti-corruption agencies are working, two at the federal level

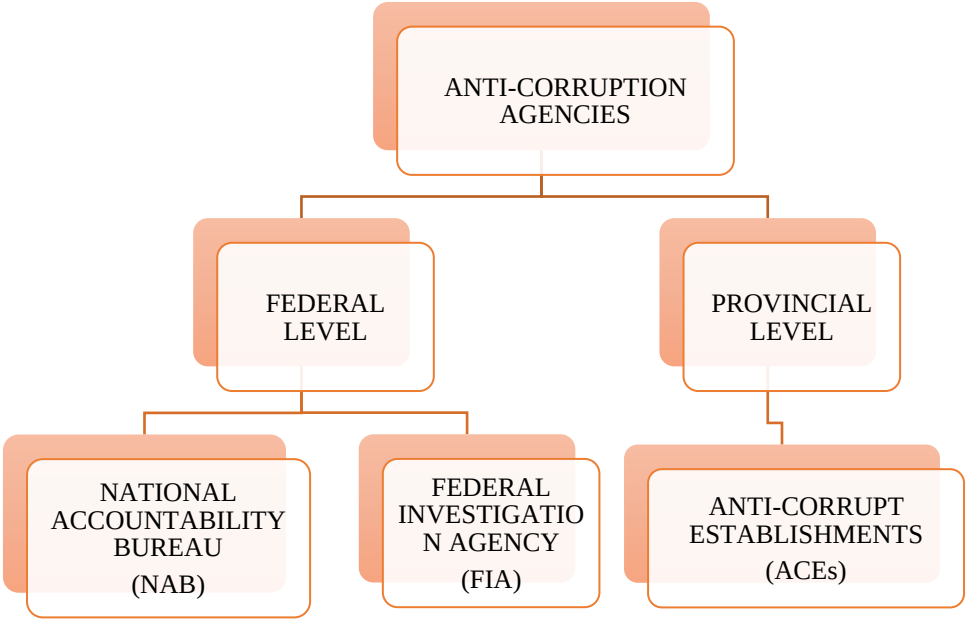
[45]Sumaira Samad, "Combating Corruption: The Case of the National Accountability Bureau," *Journal of Administration and Governance* 3, no. 1(2008): 92.

[46]Zafar and Associates, White-Collar Crime in Pakistan, Available at; http://law.zafcointl.com/area_wcc.html, Last accessed 21-2-2018.

[47]National Accountability Bureau, "About us," Available at. http://www.nab.gov.pk/home/introduction.asp#Accountability Last accessed 21-2-2018.

[48]ibid.

and four at the provincial level. National Accountability Bureau (NAB) and Federal Investigation Agency (FIA) are at federal level, and Anti-Corrupt ion Establishments (ACEs) running at provincial level.



Anti-Corruption Agencies in Pakistan

7.3 Lessons for Pakistan

Despite the presence of above-stated detailed legal framework, the administrative/executive authorities are found to be unprincipled and crooked institutions. They give hand to a particular privileged class of society. Therefore, in view of the present devastating situation, there is a need to transform the strategy in line with the international best practices. Pakistan may learn lessons from Denmark, and certain reforms should be incorporated in the Pakistani legal system. Denmark is not convinced by

bulky laws, instead they consider fair and transparent working of 'administration' more productive for said purpose.

Denmark is said to be the least corrupt country. It is constantly ranked as one of the most prosperous countries in the world, enjoying a high level of income equality, with highest per capita income. It has also become the highest tax paying country. "Getting to Denmark" has become a metaphor for the case of transforming corrupt, weak, mal-functioned state into strengthened and prosperous country.[49] It was noted in a report by the University of Copenhagen that Denmark is the world leader in two dimensions, that is, accountability mechanism of government, and their criminal justice system.[50] Astonishingly, Denmark has very few numbers of laws to curb white-collar crimes. Some laws are there to minimize the abuse of power in administration sector of state. In 1676, first explicit legislation was made to ban acceptance of gifts and bribery by the royal servants. In 1690 king issued a law regarding embezzlement and fraud and criminalized it as theft. The sentence was lifetime hard labor, until money was repaid to king's treasury.[51]

From 1819-1830, Supreme Court judges and top officials were assigned the task to visit different regions of the country to audit administration, especially the account books of public officials. Thus, it made top officers to introduce new accountancy system. Their history reveals that combating corruption and establishment of rule of law has

[49] Dr. Mette Frisk Jensen, "The Question of How Denmark Got to Be Denmark – A Historical Pathway of Fighting Corruption," last modified January 12, 2015, http://anticorrp.eu/news/the-question-of-how-denmark-got-to-be-denmark-a-historical-pathway-of-fighting-corruption/. Last Accessed 2-8-2018.

[50] Sabir Shah, 'Denmark's 356-Year Long Journey towards Curbing Corruption', *The News*, 21 February 2016, International edition, https://www.thenews.com.pk/print/99768-Denmarks-356-year-long-journey-towards-curbing-corruption.

[51] Ibid.

remained primary concern of Denmark for 350 years since 1660. They devoted centuries, to eradicate corruption from administration sector and put base of law and order in state. Finally, in the 19th century, their committed, honest, and sincere efforts, substantially minimized corruption rate from the administration of state.[52] Now, Public institutions working in Denmark are efficient, transparent, and free of corruption. Justice system of this country is uniform and effective in sentencing offenders irrespective of their status. Prevalence of rule of law gives rise to harmony, certainty, and peace in society.

Pakistan needs to make effort to bring change by employing the strategy to reform the administration bodies. New appointments in the administrative domain must be based on academic excellence, and on merit rather based on political relations or connections. Administration can work efficiently only, if it is given in hands of skilled, and expert people who are specialized and have sufficient knowledge in the relevant field of administration. Moreover, administration of any country plays a key role in encountering corrupt practices, therefore, mere selection of fair candidates is not enough. There is a need to formulate a strong and empowered task force to keep check and balance upon the working of administration, like Denmark's model.

8. Conclusion

The detailed discourse on, white-collar criminality, reveals that the concept of white-collar criminality has existed since the existence of ordinary crime, but the proper term "White-Collar" took stages to be fully matured. Controversy of sociologists and criminologists however existed initially, but consequently resulted in agreement on the notion of white-collar

[52] Ibid.

criminality. It is further seen that the notion of white-collar criminality is a fully established principle in Pakistan legal system also and exists in our country since its inception. Pakistan was always active in combating these crimes by establishing various institutions and bureaus, thus, it is observed that in Pakistan there is no scarcity of legislations or institutions to fix that unique form of criminality, the working of these institutions is however suspicious or distrustful, hence need to be reformed holistically. The legal system of Denmark is proposed for Pakistan to curb the white-collar criminality from society.

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Entrepreneurs' Financing Sources and Crowdfunding as Newly Emerged Source of SMEs Financing

Khadijah Batool*

Abstract

Entrepreneurship is a procedure regarding the formation of Small and Medium Enterprises (SMEs) that are the main source of creation of wealth, investments, eradication of unemployment and brings new ideas in emerging as well as developed economies. SME's financing methods differ from country to country. However, leading sources are financing through banks and alternative or non-bank financing sources. Present research explores crowdfunding as one of emerging sources for financing entrepreneurs. It is an online fundraising from a large number of people (crowd) through the intermediation of crowdfunding platforms. Unfortunately, not much concentration is given in the SMEs sector of Pakistan. Banks prefer lending to large scale companies. Lending process from banks is too formal and complicated. For this reason, SMEs cannot afford costly and complicated lending processes and seek alternative financing sources. Crowdfunding as a financing source for SMEs is a quite a new concept, and very few studies have dealt with this concept. Present research is different in the context of application of crowdfunding in Pakistan, hence descriptive and exploratory research methods are used.

Key Words: Entrepreneurship, Crowdfunding, SMEs, Fundraising, Business angels, Venture Capitals.

1. Introduction

Crowdfunding is deemed as a financing source for start-ups and

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entrepreneurs. The prevalent form of crowdfunding is a somehow a recent concept. Very few studies have dealt with this concept in the perspective of entrepreneurs' financing sources where it has proved to be the best solution as an alternative financing source.[1] In common parlance, the sector of Small and Medium Enterprises (SMEs) deal with it. Entrepreneurship refers to the activity of setting up a business or businesses, taking on financial risks in the hope of profit.[2] An entrepreneur is someone "...who sets up a business or businesses, taking on financial risks in the hope of profit."[3] In other words, entrepreneurship is basically concerned with the consumption of resources in managing and assuming the risks of an enterprise and maximizing the profits from the business venture.[4] The entrepreneur is usually deemed as an innovator of new ideas, goods, services and business.[5]

Entrepreneurship is a procedure regarding the formation of SMEs and business projects while SMEs symbolize the firms or businesses in small and medium sizes. SMEs and entrepreneurship are assumed as the source of jobs or employment creation, financial development, and financial revolution.[6] SMEs are considered as the backbone of economies around the globe and are important means of financial development.[7] In Pakistan these SMEs play an important character in the development of innovative trade and industry. Unfortunately, Pakistan's SMEs contribution is less in contrast to the other countries however, their impacts cannot be denied. The

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[1] Laila Sabagh, "The SEC's Regulation Crowdfunding: The Issuer's Dilemma" *Administrative Law Review Accord* 2, no. 2(2017): 115.

[2] *English Oxford Living Dictionary*, 12th ed., s.v. "Entrepreneurship."

[3] Ibid.

[4]Esuh Ossai Igwe Lucky, "Is Small and Medium Enterprise (SME) an Entrepreneurship?" *International Journal of Academic Research in Business and Social Sciences* 2, No.1(2012):345.

[5] *English Oxford Living Dictionary*, 12th ed., s.v. "Entrepreneur."

[6] Lucky, "Is Small and Medium Enterprise (SME) an Entrepreneurship?" 346.

[7]UK Essay, "Major Sources of Finance and Funding for SMEs," last Edited December 5,2017, https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php.

reason behind the underdevelopment of the SMEs sector is that not much importance and attention is given by financial authorities in this sector which makes it complicated.[8] In this scenario, crowdfunding has emerged as one of the important sources of SME's financing.

2. Notion of Crowdfunding

Crowdfunding is, like its name denotes, funding little amounts of money from a great number of investors (crowd). In contrast to financing through banks, crowdfunding accumulates money from the large number of public.[9] Crowdfunding has been defined as, "[t]he practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet."[10] It is practiced through online platforms in which an individual or group of persons can get the funds from crowd for the purpose of financing a business or project. These platforms or online portals are also called crowdfunding platforms. They work as intermediary institutions. For instance, crowdfunding platforms collect funds from the crowd and then distribute them to the entrepreneurs or small size businesses who initiate project campaigns with new ideas.[11] These platforms are run through the internet which becomes the source of communication for the project initiator (small and medium entrepreneurs) and the crowd (investors).

[8] Madiha Shafique Dar, Shakoor Ahmed and Abdul Raziq, "Small and Medium-Size Enterprises in Pakistan: Definition and Critical Issues," *Pakistan Business Review* 19, No 1(2017): 47.

[9] C. Steven Bradford, "Crowdfunding and the Federal Securities Laws," *Columbia Business Law Review* 1, (2012):5.

[10] *English Oxford Living Dictionary,* 14th ed., s.v. "crowdfunding".

[11] Sentot Imam Wahjono and Muhammad Nasir Etl, "Islamic Crowdfunding: A Comparative Analytical Study on Halal Financing," *International Journal of Business and Finance Research* 39, No 1(2017):2.

3. SME's Financing Sources

Financing sources of SMEs can be classified into two types: bank financing sources and alternative or non-bank financing sources. The bank financing sources consist of bank loans, bank overdrafts etcetera. On the other side, non-bank sources consist of personal savings, family and friends, angel investors, venture capital, crowdfunding, hiring, and leasing, trade credits and grants. Further detail of entrepreneur's financing sources is given below:

A. Bank Financing Sources

Bank Loans

Bank loan is a sum of money borrowed from a bank through which the borrower is obliged to payback on specified date and time. The refunding of the loan will depend on the volume, duration of the loan and the percentage of interest. Repayment of loans includes the interest which serves as the fee charge. If the borrower needs further loan, the bank will not be agreeable to enlarge the loan without an enlarging security.[12]

Bank Overdraft

An overdraft is settled money in which a client can obtain cash through his current account. Bank overdraft is an excellent resource of short term finance to support a business. The charges differ from the bank's loan; however, they are correlated with the interest's percentage of the banks. One benefit of overdraft is that it is speedy to business when compared to a loan. However, overdraft is not so beneficial for small size businesses as interest rate is very high; moreover, the business is not authorized to

[12]Robert Makorere, "The Role of Microfinance", *Global Business and Economics Research Journal* 3, no 4 (2014):6.

overdraw beyond the overdraft limit. If small firms do so, the bank may punch the business by means of a hefty charge for going beyond the limit.[13]

B. Non-Bank Financing Sources

Personal Savings

Commonly, personal savings are the initial point for the majority of SMEs where the possessor uses them for the purpose of commencing his/her business.[14]

Friends and Family

Second most common source of SMEs is financing through friends and family. In the beginning of a business, generally friends and family are creating an investment in the possessor management as much as in the corporation. Primarily, SMEs are expected to rely upon their personal funds and interior equity finance such as family funds.[15]

Business Angels

Business angels (BAs) are also identified as angel investors. They are well off persons who invest in some probable high growth businesses.[16]They are the type of investors who provide their skills, expertise, information, and

[13] UK Essays, "Major Sources of Finance and Funding for SMEs," Last Edited December 5,2017, https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php?vref=1(Accessed October 3, 2018).

[14] Ibid.

[15] Khaled Alhabashi, "Financing For Small and Medium Enterprises: The Role of Islamic Financial Institutions In Kuwait," (PhD Thesis, University of Gloucestershire, 2015), 33, http://Eprints.Glos.Ac.Uk/3428/1/Financing%20for%20Small%20and%20Medium%20Enterprises%20The%20Role%20of%20Islamic%20Finance%20Institutions%20in%20Kuwait%204-10 2015-Signed_Redacted_Signature%20only.Pdf (Accessed August 5, 2018).

[16] UK Essays, "Major Sources of Finance and Funding for SMEs," Last Edited December 5,2017,https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php?vref=1, (Accessed October 3, 2018).

interactions in the projects they invest in. They act like private investors who are ready and willing to invest in new small and medium enterprises in order to support these small businesses and gain profits simultaneously.[17] Normally business angels are involved at the initial stage of the business. These BAs may invest in the form of groups, investment clubs or on an individual basis. The famous example of business angels is "The British Business Angel Association" (BBAA) which offers assistance in planning and introduction of commerce proposals.[18]

Venture Capitals

Venture capital is also known as private equity investment. Venture capital does not consist only of investment through funds, but it also consists of skills and time. It is the primary and distinctive source of funding for SMEs who do not have access or have limited access to get loans through traditional capital markets. It is an alternative financing source, but not perfect and small businesses do not get successful through this source unless they have potential to give extraordinary returns to the venture capitalists.[19]

Difference between Venture Capital and Angel Investor

The angel investors and venture capital are most familiar alternative sources of funding and also have a number of similarities like both tend to prefer companies connected with technology and science. Likewise, both have a

[17] Veland Ramadani, "The importance of Angel Investors in Financing the Growth of Small and Medium Size Enterprises" *International Journal of Academic Research in Business and Social Sciences* 2, No. 7(2012): 306.

[18] UK Essays, "Major Sources of Finance and Funding for SMEs," Last Edited December 5,2017, https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php?vref=1, (Accessed October 3, 2018).

[19] John B. Maier, "The Role of Venture Capital in Financing Small Business" *Journal of Business venturing* 2, no 3 (1987): 207, https://doi.org/10.1016/0883-9026(87)90009-7.

number of points to differentiate them.[20]

Angel Investors	Venture Capital
Angel investors prefer to fund the companies that are at an earlier stage of development.[21]	Venture capitalists may come at a later stage than business angels when a company has been growing up and operating for a bit.[22]
Angel investors invest their personal money.	Money invested by Venture capitalists comes from pension funds, corporations, and other sources.
Angel investors may or may not desire to take seat on the company's Board of Directors.	Venture capitalists require a seat on the company's board of directors.
Angel investors invest less than one million.	Venture capitalists invest more money, usually at least two million.

Hire Purchase and Leasing

In leasing and hire purchase, the new business acquires an asset without giving full price. The company uses such assets for a fixed period of time after which one party may agree to sell and another party may agree to buy at a reduced price or to return it. In a lease agreement, the company possesses the equipment but does not own them. The utensils or machinery is returned to the landlord, at the end of year. Some benefits of leasing utensils consist of having and benefiting from an asset without giving the

[20] Business, "Difference between An Angel Investor and Venture Capitalist" Last Modified August 28, 2018, https://www.business.com/articles/angel-investors-vs-venture-capitalists/(Accessed October 3, 2018).

[21] Growthink, "What's the Difference between Angel Investors and VCs," https://www.growthink.com/businessplan/help-center/what-difference-between-angel-investors-and-venture-capitalists (Accessed October 3, 2018).

[22] Secure Docs, "The Differences between Angel Investors & Venture Capitalists" Last Modified November 9, 2017, http://www.securedocs.com/blog/the-differences-between-angel-investors-venture-capitalists (Accessed October 3, 2018).

full cost.[23]

Trade Credit

Not surprisingly, due to complicated processes and higher expenses and less availability of bank loans, SMEs turn towards purchasing the products from other businesses (suppliers) to run their business. In trade credit, supplier provides out his manufactured goods to a customer and in return expects to receive sale price and agreed ratio of interest of that product at a later date. The majority of trade creditors permit for a time of 30 days or for a long duration prior to payment are made, this may permit the business to utilize money in the short term. Trade credit may be truly important to individuals, small size businesses who have small resources to start their business.[24]

Grants

Grants are frequently accessible from local councils and other government institutions. For instance, the government may make rules to support needy businesses or individuals for the purpose of the development of innovative business.[25]

Crowdfunding

Crowdfunding is, like its name denotes, funding little amounts of money from a great number of investors (crowd). In contrast to financing through banks, crowdfunding accumulates money from the large number of

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[23] UK Essays, "Major Sources of Finance and Funding for SMEs," Last Edited December 5, 2017, https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php?vref=1 (Accessed October 3, 2018).

[24] Ibid.

[25] UK Essays, "Major Sources of Finance and Funding for SMEs," Last Edited December 5, 2017, https://www.ukessays.com/essays/business/major-sources-of-finance-for-smes.php?vref=1 (Accessed October 3, 2018).

public.[26] Crowdfunding has been defined as, "The practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet".[27] Likewise, the present research explores this kind of financing source, thus the subsequent part of this chapter would discuss it in detail.

4. Crowdfunding as Newly Emerged Source of SMEs Financing

Crowdfunding has emerged as an alternative source of fundraising. This notion has the potential to challenge the regulatory frameworks of banks and other securities regulation.[28] As discussed above, for the purpose of starting the business, SMEs need financial support through which they can grow and advance their business. However, lack of financial resources is considered as the main problem for the development of SMEs. The SMEs suffered the largest crash of the global financial disaster in 2008. Moreover, during that time, financial load was put on SMEs and essential resources for their business were not provided. In this regard SMEs remained without the access of bank loans and other credit sources from the financial industry while crowdfunding supported SMEs in this situation.[29]

Banks, according to Bill Gates, are unproductive, particularly for the underprivileged. Even the deficiency of the simplest structure of banking rejects an individual to transmit and save money according to their will.

[26]C. Steven Bradford, "Crowdfunding and the Federal Securities Laws," *Columbia Business Law Review* 1, (2012):5.

[27] *English Oxford Living Dictionary*, 14th ed., s.v. "crowdfunding".

[28] Vitale, M, "Crowdfunding: Recent International Developments and Analysis of Its Compatibility with Australia's Existing Regulatory Framework," (2013):3, http://papers.ssrn.com/sol3/papers.cfm?abstract id=2324573,(Accessed October 3, 2018).

[29] Vitale, M, "Crowdfunding: Recent International Developments and Analysis of Its Compatibility with Australia's Existing Regulatory Framework," (2013):3, http://papers.ssrn.com/sol3/papers.cfm?abstract id=2324573,(Accessed October 3, 2018).

Consequently, Bill Gates quotes banks as: "Banking is necessary, banks are not"[30].In this situation, it is important to ponder whether SME should only rely on bank loans or to find alternative sources of financing. The reply of this point is the last one, as it is undoubted that without available and reasonable monetary support lots of companies will not be competent to build up their innovative ideas and businesses. For this reason, alternative sources of financial support are needed to originate and practice, and crowdfunding is one of them.[31]

Consequently, crowdfunding is known as an alternative means of financing.[32] It is also a recent method of investment through private equity, which is primarily based on start-up companies and entrepreneurs who are in the want of financial resources to carry on or develop their business process through different sources.[33]

Crowdfunding originated from the idea of "crowdsourcing" and signifies one aspect of the same phenomenon that consists of crowd voting and crowd formation.[34] The word "crowdsourcing" originates from "crowd" and "outsourcing," focusing on the meaning of farming out particular performances to a crowd of external and internal individuals.[35] Furthermore,

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[30] Medium Corporation, "Banking Is Necessary, Banks Are Not." Last Modified March 22,2016,https://medium.com/@ozanpayments/banking-is-necessary-banks-are-not-says-bill-gates-e1fbb02516c8 (Accessed October 3, 2018).

[31] Zorica Golic, "Advantages of Crowdfunding as an Alternative Source of Financing of Small and Medium-Sized Enterprises," *Preliminary Communications* 8, (2014): 40, DOI: 10.7251/ZREFIS1408039G.

[32]Jordana Viotto da Cruz, "Beyond Financing: Crowdfunding as an Informational Mechanism." *Journal of Business Venturing* 33, (2018): 2, DOI: 10.2139/ssrn.2870545.

[33] Marco Eckhardt, "Equity Crowdfunding in Finland, an Alternative Investment Option," (Master Degree Thesis, International Business, 2016),5, https://www.theseus.fi/bitstream/handle/10024/110711/Degree%20Thesis%20Equity%20Crowdfunding.pdf?sequence=1(Accessed October 3, 2018).

[34] Leimeister, J. M, "Crowd sourcing: Crowdfunding, Crowd Voting, Crowd Creation," *Magazine for controlling and management* 56, No 6 (2012): 388.

[35]Kleeman et al., "Under Paid Innovators: The Commercial Utilization of Consumer Work through Crowdsourcing," *Science, Technology and Innovation Studies* 4, No 1 (2008): 6.

crowdfunding is wholly embedded in crowdsourcing which declares that it is stemmed from micro finance that is actually closely linked to Micro lending.[36]

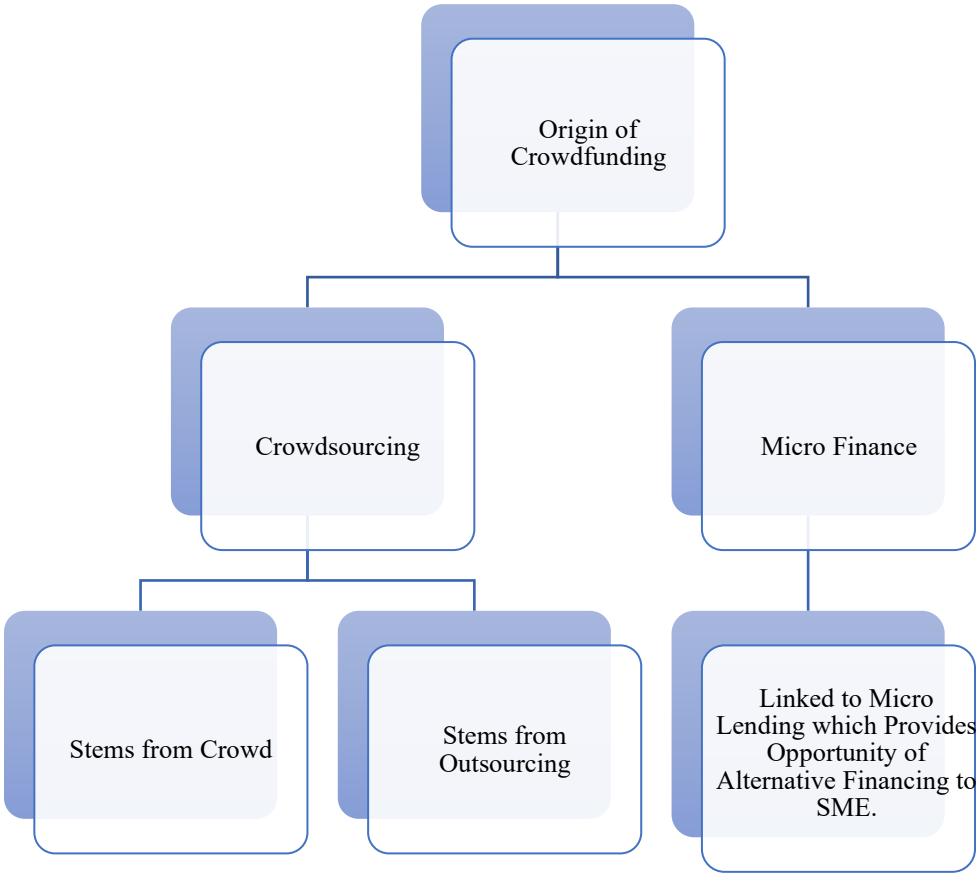
Micro lending is a notion which introduces the innovative ideas of small size businesses and gives an opportunity to those individuals who do not have access to avail traditional financing from recognized institutions. This new type of investment source arose in a structured mode at the time of financial crisis when various problems were suffered by artisans, start-up enterprises and other small business companies in collecting funds.[37]At the time of the financial crisis, banks formed complicated monetary formalities which became the source of extreme risk on a worldwide level.[38] Conventional banks were less agreeable to provide financial support to small size enterprises at that time, and SMEs started to seek other financial sources. This attracted numerous individuals to seek for alternatives and, specifically, a smaller amount of financial mediation among the investor and investee.[39] Furthermore through diagram origin of crowdfunding can be explained as:

[36] Ethan Mollick, "The Dynamics of Crowdfunding: An Exploratory Study". *Journal of Business Venturing 29*, No 1(2014):1.

[37]Info Dev Innovation and Entrepreneurship, "Crowdfunding's Potential for the Developing World," Last Modified October 24, 2013, https://www.infodev.org/infodev-files/wb_crowdfundingreport-v12.pdf,(Accessed October 3, 2018).

[38] Ron Martin & Jane Pollard R., eds., "Handbook on the Geographies of Money and Finance, Crowdfunding: Understanding Diversity," (United Kingdom: Edward Elgar, 2017) 1.

[39]Info Dev Innovation and Entrepreneurship, "Crowdfunding's Potential for the Developing World," Last Modified October 24, 2013, https://www.infodev.org/infodev-files/wb_crowdfundingreport-v12.pdf,(Accessed October 3, 2018).



The Crowdfunding concept was not introduced in the internet era, but the internet has just made things easier.[40] Despite the absence of internet facilities in the ancient era, nominal and similar history of crowdfunding can be traced since the 1700s and currently it is being emerged and practiced through online platforms in the entire world.

Even though crowdfunding looks to be a very recent phenomenon, history of crowdfunding can be traced since the 1700s. The earliest

[40] The Next Web, "The Past Present and Future of Crowdfunding," Last Updated January 9, 2014, https://thenextweb.com/insider/2014/01/09/past-present-future-crowdfunding/,(Accessed December 15, 2018).

documented instance of crowdfunding can be found since the 1700s in Ireland. At that time, it was more identified as micro lending, which gave opportunity to avail loans for the families who have small amounts of income in rural regions of Ireland. The alleged Irish Loan Fund was from one of the greater programs, which was started by Jonathan Swift who had described that there were many individuals with small amounts of income and those who do not have experiences to achieve loans, were supported through this fund. With the passage of time, this lending form was improved and by the 1800s more than 300 such types of programs were established.[41]

A familiar name that emerged along with lot within the background of micro financing is Dr Mohammad Yunus (Bangladeshi economist), who started a research project jointly with his graduate students in 1976 and the purpose of this research project was to bring opportunities for individuals that are in need of financial support and eventually he won the Nobel prize.[42] The result of his project became so victorious and it had more than 30,000 members after 5 years of establishment of this project.[43]

Internet based campaigns were started from the mid of 1990 and two websites were launched at that time, which were "six degrees.com" and "AOL instant messenger.com" through these websites people started to make online profiles and purpose of these profiles to get connection with their friends to share information and remain in touch with them. Likewise, donation fundraising was introduced in 2000 and people started to supply

[41] Marco Eckhardt, "Equity Crowdfunding in Finland, an Alternative Investment Option," (master's degree Thesis, International Business, 2016),11, http://www.theseus.fi/bitstream/handle/10024/110711/Degree%20Thesis%20Equity%20Crowdfunding.pdf?sequence=1, (Accessed October 3, 2018).

[42]Info Dev Innovation and Entrepreneurship, "Crowdfunding's Potential for the Developing World," Last Modified October 24, 2013, https://www.infodev.org/infodev-files/wb_crowdfundingreport-v12.pdf,(Accessed October 3, 2018).

[43] Ibid.

the funds on charity bases. Example of a charity fundraising site is Justgiving. It was a challenge for fundraisers, but it remained under practice more than 11 years, and some UK registered charities have also benefited from it.[44]

In 2005, the earliest micro lending website was known as Kiva.org.com. This website attracted lenders from everywhere, collected small loans in especially personalized form and then encouraged entrepreneurs in the course of several projects by supporting through this small amount of large people. The receiver pays back this loan with a high rate of interest. But sometimes interest may or may not be included in paying back the loan.

In 2007 "Lending Club" (a crowdfunding portal) launched and it was the second peer-to-peer lending site. These internet-based technologies were not only becoming the source of live chatting with friends, but social networks were introducing such types of platforms that were capable of supporting a wide variety of collective requests by SME.[45]

In 2008, Indiegogo platform was co-founded by Danae Ringelmann and Slava Rubin founded as necessity for a way to avoid the conventional routes to funding.[46] In 2009, one of the existing most famous portals introduced its website Kickstarter.com. Kickstarter authorized a group of people to create new ideas and support appealing projects with nominal

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[44] *Social Media Week, "*A Social History of Crowdfunding," Last Modified December 12, 2011, https://socialmediaweek.org/blog/2011/12/a-social-history-of-crowdfunding/ (Accessed October 3, 2018).

[45] *Social Media Week, "*A social History of Crowdfunding," Last Modified December 12, 2011, https://socialmediaweek.org/blog/2011/12/a-social-history-of-crowdfunding/(Accessed October 3, 2018).

[46] *Fortune,* "Will Indiegogo's New Personal-Cause Site Help It Stand Out in the Crowd?" Last Modified December 15, 2014,http://fortune.com/2014/12/15/indiegogo-life/ (Accessed October 3, 2018).

donations. The project funded under Kickstarter platform provides reward to the supporters if the funding target and project becomes successful. This type of funding is also called reward-based crowdfunding.[47]

On April 5, 2012, Jumpstart Our Business Start-ups Act (JOBS Act 2012), was signed by President Barack Obama and the assured goal of the JOBS Act 2012 was "to enlarge job conception and financial development by enhancing access to the public investment markets and financial supporting for growth of small and medium size companies". Beside this, universal solicitation bans and general marketing restrictions for private securities offerings, given under Securities Act 1933, has also been eradicated through the JOBS Act 2012.[48]

5. Contemporary Practices of Crowdfunding

In 2017, crowdfunding opportunities were more prevalent than ever and the most famous crowdfunding platforms are Kickstarter Prosper and Lending club.[49] These portals show that new technological infrastructure and the social approaches are now existing, and ready to furnish crowdfunding its momentum.[50] In addition, websites such as Indiegogo and fundable have also a much higher reach today than they once did, and these websites encourage individuals to come up with innovative ideas. Thus,

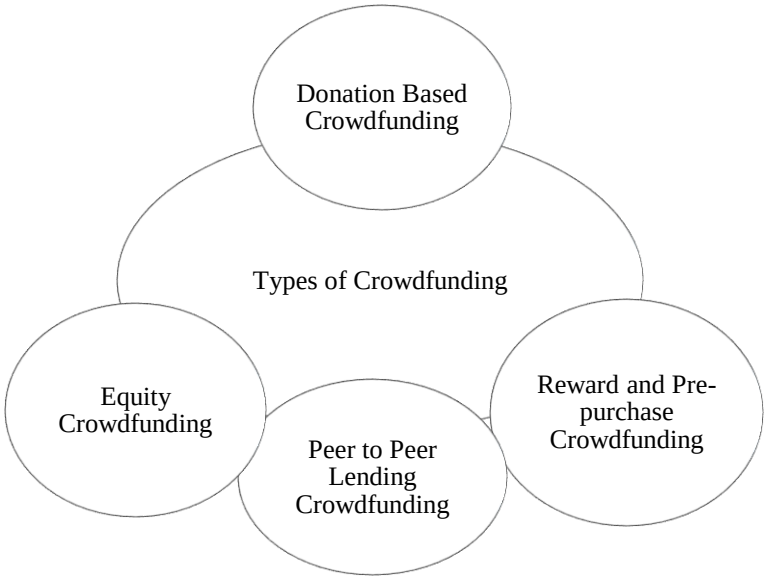
[47] Marco Eckhardt, "Equity Crowdfunding in Finland, an Alternative Investment Option," (Master' Degree Thesis, International Business,2016),14, https://www.theseus.fi/bitstream/handle/10024/110711/Degree%20Thesis%20Equity%20Crowdfunding.pdf?sequence=1(Accessed October 3, 2018).

[48] William P. Lane, "Titles II or III: Where Will the Wisdom of the Crowd Take Investors?" *Catholic University Law Review* 66, 3(2017): 723.

[49]Kiwi Report, "The Story of Crowdfunding," Last Modified December 31, 2017, http://kiwireport.com/the-story-of-crowdfunding/, (Accessed October 3, 2018).

[50] *Social Media Week, "*A Social History of Crowdfunding," Last Modified December 12, 2011, https://socialmediaweek.org/blog/2011/12/a-social-history-of-crowdfunding/ (Accessed October 3, 2018).

crowdfunding has revolutionized the world of small business.[51] We can classify crowdfunding into the following five kinds, (1) the donation model; (2) the reward model; (3) the pre-purchase model; (4) the lending model; and (5) the equity model.[52]



Types of Crowdfunding

5.1 Donation-Based Crowdfunding

Donation has been defined by the Oxford dictionary as, "something that is given to a charity, particularly an amount of funds."[53] In donation-based crowdfunding, lenders get back nothing in return for their contributions and not even the ultimate return of the sums they donated. On the other hand, though the donor's purpose is charitable, the recipient's (entrepreneur who is raising funds) objective need not be likewise. Contributions may finance

[51] Ibid.

[52] C. Steven Bradford, "Crowdfunding," *Columbia Business Law Review* 1, (2012):8.

[53] E*nglish Oxford Dictionary*, s.v. "Donation", https://en.oxforddictionaries.com/definition/donation,(Accessed May 17, 2018).

for-profit enterprises as well.[54]

5.2 Reward and Pre-Purchase Crowdfunding

Reward and pre-purchase models are also types of crowdfunding. Both models are almost similar to each other, and often come into view jointly on the same sites. In the reward model, investors expect something in the return for charity or contribution. However, that reward does not consist of interest and investors are not offered earnings of the company. The reward can be diminutive, like a key chain, or it can be in the form of giving respect, importance, and credit etcetera. For example, writing the name of an investor in a movie. Generally, the product itself is given to the investors as reward but often entrepreneurs give rewards in the form of personalized thank-you, notes or small branded gifts for instance, T-shirts or travel mugs. These smaller rewards include below the price level for the real product.[55]

The pre-purchase model is similar to the reward model. Investors do not entertain monetary returns such as interest and as alternative investors only get the access to products that the entrepreneur is manufacturing. For example, if the project initiator is making an evo *charji* device, contributors would get the evo *charji* device or the right to buy the evo *charji* device at a bargaining price upon completion.[56] Kickstarter and Indiegogo are the most important reward or pre-purchase crowdfunding sites.[57]

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[54] C. Steven Bradford, "Crowdfunding," *Columbia Business Law Review* 1, (2012):14.

[55] The Simpler Dollar, "Everything You Need to Know about Crowdfunding," Last Updated December 13, 2017, https://www.thesimpledollar.com/crowdfunding/ (Accessed October 13, 2018).

[56] C. Steven Bradford, "Crowdfunding," *Columbia Business Law Review* 1, (2012):14.

[57] Ibid.,16.

5.3 Peer to Peer Lending-Based Crowdfunding

The lending form of crowdfunding is often called peer-to-peer lending. Peer-to-peer lending is related to loans. In which investors provide amounts on a short-term basis and expect for return. In a few cases, contributors are promised interest on the capital they loan. In other cases, they are merely entitled to get the return of their principal.[58]

Two most important peer-to-peer lending sites are Prosper and Lending Club. Both websites are interest based. The loans supplied on these sites may be for business objectives. Most of the loans are offered to private individuals (SMEs) and the trend to give loans for small businesses through the above-mentioned sites is also increasing. Functions of Prosper and Lending Club sites are similar, but they are not equal platforms. Borrowers like private individuals or enterprises advertise their ideas on these websites and potential lenders re-examine the ideas of project initiators (entrepreneurs) and choose to whom they want to fund. The lowest investment amount for every loan application is $25.[59] Borrowers are charged a certain commencing fee for every loan by Prosper and lending club site. Prosper and Lending Club indicates all of the conditions and interest rates with detail. Every lender charges the lowest percentage of interest he is willing to acknowledge.[60]

Kiva is a non-interest-based site. It is, no doubt, the most important crowdfunding site via lending model. Nowadays, Kiva is being called as; "the hottest non-profit site on the globe".[61] Kiva website completely introduces characteristics of enterprises, amount of loan that has been

[58] Ibid.,20.

[59] C. Steven Bradford, "Crowdfunding," *Columbia Business Law Review* 1, (2012):20.

[60] Ibid.

[61] Ibid.,20.

requested, and explanation of purpose of using loan etc. Crowd can then go into the Kiva site, browse profiles of entrepreneurs with the facility to read all descriptions of the small and medium size companies, area, and other features, and can select an entrepreneur to whom they are willing to give a loan.[62]After completion of the project, Kiva raises and distributes this money back to lenders. Lenders on the Kiva site merely get their principal money back.[63]

5.4 Equity Crowdfunding

In contrast to the donation-based and rewards-based crowdfunding, Equity crowdfunding gives an opportunity to become part owners of the company through their shares. Equity crowdfunding is also identified as crowd investing. Equity crowdfunding happens when bulk of individuals give small amounts of funds to small size businesses through online platforms and it is defined as "a form of fundraising in which SMEs make an open call to sell a particular quantity of equity or bond-like shares in a company on the Internet platforms, hoping to attract a great series of investors".[64]

6. Crowdfunding in Pakistan

Crowdfunding is not being practiced in Pakistan because SECP has named crowdfunding as a false scheme and alleged that there is apprehension of

[62] Digital Innovation and Transformation, "Kiva: A Crowdlending Twist on Traditional Microfinance," Last Modified October 30, 2015, https://digit.hbs.org/submission/kiva-a-crowdlending-twist-on-traditional-microfinance/, (Accessed October 3, 2018).

[63] C. Steven Bradford, "Crowdfunding," *Columbia Business Law Review* 1, (2012):21.

[64] Wiley Online Library, "Signalling in Equity Crowdfunding," Last Modified March 24, 2015,https://onlinelibrary.wiley.com/doi/epdf/10.1111/etap.12157 (Accessed October 3, 2018).

fraud, money laundering and terrorism financing through such schemes.[65] In 2017, SECP warned the public that they should not be misled by fraudulent activities and should not involve themselves in the investments schemes which are launched by non-corporate bodies or individuals through electronic media, emails and mobile text messages. Furthermore, SECP pointed to an "Innovative Crowd Funding Project Pvt-Ltd Pakistan" and notified that no company with the same name is registered under SECP.[66] SECP further clarified that crowdfunding is not allowed in Pakistan and no company can raise funds through this scheme.[67]

7. Conclusion

After reviewing the financing sources for the small and medium enterprises, it is concluded that SMEs could play an important role in reducing unemployment and poverty and are also considered as backbone for the development of economies. Financing sources of SMEs are classified as alternative or non-bank financing sources, and bank financing sources. Non-bank sources consist of personal savings, family and friends, Angel investors, venture capital, crowdfunding, hiring, and leasing and grants. On the other side, bank sources consist of trade credit, bank loans, bank overdraft etcetera. Unfortunately, not much attention is paid to the SMEs sector of Pakistan. Banks prefer lending to large scale companies. Lending process from banks is too formal and complicated. For this reason, SMEs cannot afford costly and complicated lending processes and seek alternative financing sources. Crowdfunding is the best solution as an alternative

[65] More news, "SECP Declares Crowdfunding Illegal in Pakistan," Last Updated March 30, 2017,https://www.morenews.pk/secp-crowdfunding-illegal-pakistan/(Accessed October 3, 2018).

[66] Ibid.

[67]Securities and Exchange Commission of Pakistan, "SECP Warns Public about Crowdfunding", Last Updated March 27, 2017, https://www.secp.gov.pk/wp-content/uploads/2017/03/Press-Release-March-27-SECP-warns-public-about-crowdfunding (Accessed October 3, 2018).

financing source, so, it should also be practiced in Pakistan as such as it is being practiced on international level. It is recommended that SECP must permit its practices in the country as it is being practiced and regulated on an international level.

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