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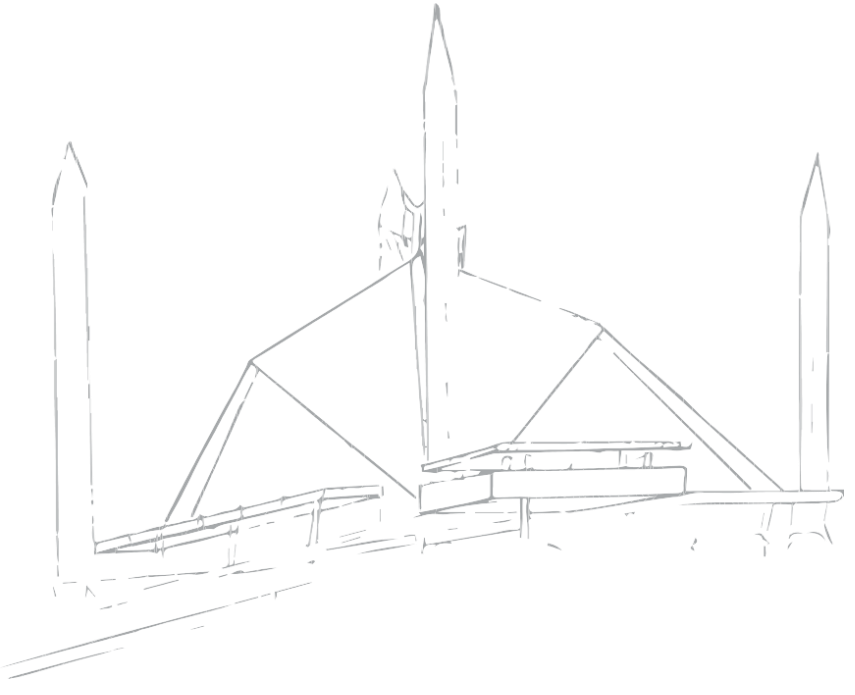

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CONTENTS

Pakistan's Current Legal Regime of Consumer Protection

Dr Rao Qasim Idrees*
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Abstract

Consumers have always remained in pursuit of their adequate rights. They depend upon the manufacturers and service providers to deal with prices, qualities as well as quantities of the products and commodities. They cannot emerge as a unified pressure group, just like manufacturers and cartels that create monopolies to build pressure upon the consumers as well as state. Unfortunately, in the given global scenario, Pakistan is yet way far behind in taking necessary steps, as taken by various other countries in this regard. When we observe the plight of consumers in Pakistan, it seems that there is no consumer protection practically existing, except for the recent provincial legislation. It is generally presumed here that customers are intelligent enough to make wise choices, while in many jurisdictions of the world it is presumed otherwise. Thus, the burden is upon commercial enterprises to disclose different details about their products instead of taking advantage of the innocence of their customers who include even illiterate, old and non-professional people. Consumers of products and services cannot be treated at par with parties of commercial dealing where one of the parties are presumed to be at an adversarial position with the other. While on the other hand a customer can never be expected to have the same level of expertise as a commercial entity. There is dire need to take it seriously in terms of implementation of existing laws in true letter and spirit and to take necessary steps for this purpose because consumer protection plays a vital role in

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social and economic justice as well as in building public morality.

Keywords: Consumer Protection Laws, Monopoly Control Authority, Consumer Rights, Commercial enterprises, Consumer exploitation.

1. Introduction

A man's instinctual incapability makes him dependent on others in many ways. No one can claim to be living a solitary life, where there is no need for others. Humans are dependent on each other by their nature and instinct. Trade forms a major part of their living, and every person is associated with the trade in one or the other way. From time immemorial human need took various forms, like exchange of required goods or selling & purchasing to acquire the needful. There is no fixation of the parties on one side. Everyone is a seller and buyer in certain aspects. If one is a producer, he is also a buyer of those things which he is not producing. So, we are all consumers and there is no difficulty to define the consumer. We are consumers when we buy something or use some service provided by others. However, the definition of consumer has been provided in various places. The definition of consumer as stated in Black's Law dictionary states consumer, "a person who buys goods and services for personal, family, or household use, without intention of resale."[1] Consumer has been defined in Provincial laws as:

Consumer means a person or entity who:

i. Buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or

[1] Thompson West, Black's Law Dictionary (10th ed. 2014).

ii. Hires any services for a consideration and includes any beneficiaries of such services.[2]

The existence of consumers is as old as human history itself. We find many ancient laws protecting consumers in different forms. In Islamic history we find many Qur'anic injunctions emphasizing the righteous dealings in trade. We find many Islamic injunctions which strongly prohibit the exploitation in financial matters. In the Holy Quran, Allah, the Almighty warns with the dire consequences which they will face in the Hereafter who cheat and fraud in weights and measures. Surah Al-Muta'ffifin reads as follows:

> Woe to the defrauders. Who, when they take the measure (of their dues) from men, take it fully, but when they measure out to others or weigh out for them, they are deficient. Do not think that they shall be raised again, for a mighty day, the day on which men shall stand before the Lord of the worlds?[3]

Likewise, in other religions, such as the Hindu religious books Vedas and Manu Samaritan also ensure consumer protection. Along with the religious teachings we find many rulers who took very serious steps to make rights protected by one or other ways.[4] For the first time in parliamentary history John F Kennedy, the American President discussed the importance while addressing the congress on 15th of March 1962. First, he gave the definition of consumers in the following words: "consumers by definition include us all, they are the largest economic group in the economy, affecting and affected by almost every public and every private decision." His speech stressed the consumer's interests with the

[2] The Punjab Consumer Protection Act, 2(c) § (2005).
[3] Al-Qur'ān, 83:1-6.
[4] Michael Pye et al., Religious Harmony (Indonesia: De Gruyter Publishing, 2006), 173-196.

introduction of their certain rights and also sparked deliberation and subsequent legislation to protect consumers. Therefore, 15th March is celebrated as World Consumers Rights Day in the memory of Kennedy's speech.[5]

With the awakening speech of John F. Kennedy, a new legal regime was born with the name of consumer protection. Different countries started their legislation to serve this purpose, but it was not a world known area of legislation until the United Nations (UN) guidelines for consumer protection. The UN framed and passed these guidelines through its general assembly on 16th April 1985 with the aim to promote consumer protection worldwide. These guidelines are some principles which provide assistance to the signatory countries for the formulation and enactment of domestic and regional laws. The countries were set free to make their domestic laws keeping in view their economic, social, and environmental circumstances.

Pakistan being a member state of UN was under an obligation to legislate in this matter so the first ever legislation was Islamabad Consumer Protection Act 1995. By the enactment of this Act the provinces followed suit and started legislations suitable to their circumstances respectively. NWFP took lead in this matter and passed their statute in 1997 ahead of all other provinces. Then Baluchistan in 2003 and Punjab in 2005 but Sindh did not bother it until 2015. These provincial statutes also required consumer courts as well as district consumer protection councils. This was a major step towards consumer protection in actual sense because special courts and councils play a vital role in the protection. Consumer courts deviated from very lengthy civil procedure with the provision of summary trials and became a very effective tool for the early conclusion of petty

[5] Richard Cordray, "The Evolution of the Consumer Movement: The Rise of Consumer Financial Protection" The Journal of Consumer Affairs 54, no. 4 (2020): 1375-1382.

nature cases. Similarly, consumer protection councils were also equipped with the powers to ensure statutory compliance in the marketplace.[6]

The need to protect the consumer's rights through special legislation is very obvious because general laws under which consumers seek remedies do not treat consumers as a special party while ignoring many other aspects. Generally, he seeks remedies under the contractual relationships like sale purchase agreements and contracts. The law of contract assumes that the parties of contract are legally equal in terms of power and information. Theoretically the contract of sale purchase is an act of free will but practically the legal consequences are attributed to the action by law without consideration whether the consumer knows or not or to what extent. In the real market the consumers have noticeably less power and information than suppliers. Because the consumer is vulnerable who depends upon the other party in many aspects. The situation is more critical in the case of developing countries like Pakistan where most of the people are illiterate and unaware of legal rights and implications.

Consumers face many risks in using fake or spurious goods, receiving misinformation, or suffering restricted choices and so on. The legal maxim *Caveat Emptor* also puts burden on consumers to buy the goods at their own risks. This maxim weighs more to the side of manufacturers and producers who are already socially and economically stronger than to consumers. They are adequate in resources to make circumstances in their favor by using different tactics. They are unified in most of the cases to create pressure groups. Moreover, in most of the cases the government is itself goods or service providers and at the same time it has regulatory powers. This situation is a glaring example of conflict of interests. This article highlights how the consumers are weak and lack

[6] Consumer Rights Commission of Pakistan, ww.crcp.gov.pk, September 17, 2022.

resources and it will also discuss the gaps which need to be filled. Although consumers are big stakeholders in the marketplace, their interests are not secure due to certain facts which will be discussed in this article.

2. Disparities in the Provincial Laws

As mentioned earlier, provinces enacted their legislations after the lapse of many years because the federation did not intend to implement the desired laws through national legislation and delegated the powers to the provinces that did not take it seriously as it was required. Consumer protection is a subject of center worldwide with the national laws[7]. According to the "United Nations Conference on Trade and Development (UNCTAD)" an approach and idea enunciates in relation to the protection of consumers.[8] Countries were given choices to make their legislations according to their economic and social needs by the UN but in the absence of national policies and the provincial scattered laws in Pakistan did not change the plight of consumers remarkably. In America there is Federal Trade Commission[9] which is a consumer protection agency that works alone throughout America with uniform policies. Similarly in India there is Central Consumer Protection Authority (CCPA)[10] having vast powers to regulate, enforce and to protect the consumers at federal level. This Authority can fine up to Rs.10 lacs for the first violation and Rs. 50 lacs on every subsequent violation and can also imprison up to 2 years to the manufacturer for false and misleading advertising. Similarly, there are a number of other countries' legislation which are central in their nature. Rather, central international cooperation has been advised by the UN. Chapter VI of the UN Guidelines is fully on

[7] United Kingdom, "Consumer Protection Act" (1987).

[8] India, "Consumer Protection Act" (2019).

[9] "Federal Trade Commission," Federal Trade Commission, November 15, 2022, http://www.ftc.gov.

[10] Shan Karias Academy, "Central Consumer Protection Authority | Current Affairs," Www.iasparliament.com, accessed November 7, 2022, https://www.iasparliament.com/current-affairs/central-consumer-protection-authority.

international cooperation which emphasizes regional and sub-regional cooperation for the purpose of consumer protection. The said guidelines are basically made to draw a comprehensive and efficient mechanism of domestic legislation in order to facilitate the consumers on a massive level.[11] "European Union Consumer Protection Cooperation Network (CPC)" which is a union of domestic officials and are working with purpose to keep an eye on the efficiency level of the laws of consumer protection in Europe. Similarly, "European Consumer Center Network (ECC-Net)" is an organization working with the purpose to facilitate and protect the consumers in terms of financial gains across the European Union and where the consumers benefited from a big financial market. The purpose of this network is to provide help the consumers for the purchasing across the borders.

Unfortunately, in Pakistan, unlike Europe where in 30 states of EU consumers have been provided a single market opportunity with the same rules, our provincial laws diversity can be seen in many material aspects. Irrespective of the fact that Balochistan enacted its legislation in 2003 but it still has been unable to establish any functional or operational policy. The situation of Sindh is not much different than KPK and Balochistan. A number of Consumer Courts are working in the province of Punjab with cooperation of District Consumer Protection Councils. District Consumer Protection Councils are aiming to spread awareness among masses and courts are there to ensure that no consumer is exploited by the manufacturers or service providers.

It is also pertinent to mention that the first ever legislation in this regard was enacted in 1995 but rules were framed in 2011 after passing of 16 years. Legislation is not much effective until its rules are framed. Similarly, KPK framed rules in 2007 after 10 years and it also did not spread

[11] United Nations, "Guidelines on International Cooperation.

its courts and district council's network in its entire province and still there are four consumer courts in KPK. Punjab has led more than all of other provinces by making 17 special consumer courts and district councils. Sindh first time promulgated its Consumer Protection Ordinance in 2004 which was lapsed as the same was not presented in the provincial assembly which shows how less important matter is for the province. It went on for a long time and again in 2015 assembly did legislation but still there is neither any consumer court nor any district council to protect the rights of consumers in the whole of province. Despite the fact consumer laws make it mandatory to set up consumer courts as well as consumer councils in each district. Same situation is in Balochistan there is also neither court nor council except mere legislation. What is the purpose of those laws which only exist in books and no mechanism is there to implement them? The creation of rights through legislation serves no purpose until the state agency executes them and enforces them.

Apart from all the above mentioned, the provincial laws are not uniformed and aligned to each other. There is no uniformity in the original as well as appellate jurisdictions of the courts in all the provinces. In Punjab, District and Sessions judge is the first forum to file a complaint and High Court is first appellate forum whereas in KPK and in Balochistan Sessions court exercises the powers of appellate courts. In Sindh the story is quite different where the Executive District Officer of revenue has been vested powers to hear the cases at first place in consumer tribunals because the Act speaks about the establishment of special tribunals which still do not exist and appeal will lie to District Coordination Officer under section 24 of the Act.

Furthermore, Punjab and Sindh consumer laws focus on the defects in goods and services whereas all other laws including Islamabad do not directly talk about the defects but the false representation of the defects in

the goods and services. More importantly, none of the laws of the entire country make the manufacturers and producers liable against consumers on the omission of material information in the goods and services. This deficiency has been tried to be covered by the Competition Commission of Pakistan in Zong order.[12]

In addition, our current legal regime is also silent about online trade practices. The development and widespread use of the internet has brought out major changes in the shopping trends throughout the world. A remarkable increase in online shopping has been noticed in Pakistan. Consumers find more choices in goods while sitting in their homes and adopting the facility of cash on delivery. 3G and 4G have also played a very vital role in maximizing digital transactions including shopping. It was reported last year, out of total online shopping orders 44% were placed by the cell phones using 3G/4G in Pakistan.[13] It is a very fast spreading trend throughout the world including Pakistan but unfortunately there is not any single provision in any of our consumer laws relating to online transactions. A number of websites are looting the customers with the fake goods while displaying others. There is a need to regulate the electronic transactions wherein consumers could feel satisfaction, reliability, transparency and trust in information.

Above all, our consumer laws do not consider the special status of consumers. They define the consumer as diligent person[14] ignoring all the circumstances which make the consumer vulnerable. The rationale behind providing legal protection while adopting special rules for consumers is very obvious because of his inferior position. There are some classes of consumers including illiterate persons, children, sick persons and old people

[12]"Zong Case," Www.cc.gov.pk, n.d., accessed November 9, 2022.

[13]"Online Shopping in Pakistan," Bargain Hunting, March 15, 2019, https://www.picodi.com/pk/bargain-hunting/online-shopping-in-pakistan.

[14] Competition Commission of Pakistan, "Capacity Building in Consumer Protection: Trends and Challenges," October 15, 2016.

which stand apart from the discussion of equality of parties. Even a normal and an educated person cannot understand the communication of new technologies and the complex technicalities of financial services and many more. Consumers must not be seen with the contract eyes which demand equality of parties. To declare a consumer diligent implies to provide room to the manufacturers and service providers from mandatory information disclosure obligations. We can remember milk case[15] in which the Supreme Court of Pakistan directed all the milk companies to label it tea whitener rather than milk because all the companies were selling tea whiteners as milk. This definition of consumer itself makes the case of consumer weak and creates the situation imbalance towards consumer protection. In the legislations of various consumer laws of European and American countries this has been considered and followed by many case laws.[16]In a country like Pakistan where illiteracy and poverty rates touch half of the population and where the justice system is also not as efficient and responsive as compared to the developed nations, to state the consumer as a normal and diligent person is nothing else but to deprive him of many rights straight away.

3. Role of Competition Laws in Consumer Protection in Pakistan

Competition laws were never part of Pakistan legal regime till 1970. The absence of competition laws resulted in the shrinking of wealth into certain hands in the early history of Pakistan.[17]When there were no anti-monopoly laws, twenty family groups were collectively holding two third of the industrial sector, eighty percent of banking as well as seventy percent in

[15]"'This Is Not Milk' to Be Written on Tea Whitener Packaging," The Nation, February 14, 2018, https://nation.com.pk/14-Feb-2018/this-is-not-milk-to-be-written-on-tea-whitener-packaging.

[16]Springer Nature, "Information Obligations and Disinformation of Consumers," 2019.

[17] UNCTAD. "Voluntary Peer Review of Competition Law and Policy: Pakistan, Overview," 2013.

insurance sectors before the year of 1970.[18] This situation, concentration of economic power into few hands, necessitated the introduction of competition laws in Pakistan.

Although competition laws are known with the different names that is antitrust laws, anti-monopoly laws and restraint of trade laws but it is basically a state policy the purpose is trade liberalization, privatization and such types of investment which foster the culture of competition in the economy[19]. William Covacic former commissioner of "American Federal Trade Commission (FTC)" said that "consumer protection laws are important complements to competition policy." Similarly, Simon Sinek a renowned author also says, "believing that your competition is stronger and better than you, pushes you to better yourselves." It can be said that the progress marked by humans and the shape of the world which we see today is the substantial result of the competition among humans. Likewise, businesses and trades are also not exceptions to this general truth. A healthy competition in trade works for the consumer's welfare in many ways. It enhances the goods as well as which are available in the area. It promotes innovation, creation and production of a variety of new things in the market at competitive prices. It puts the market players into a continuing struggle toward betterment which ultimately ensures consumer satisfaction and liberty. [20]

The need for such laws was recognized in very early ages with the aim to regulate the competitive markets. The Roman legislature adopted the rule that is *lexjulia de annona.*[21] The purpose was to protect the corn price

[18]Columbia University Press. "The Poverty Curtain; Choices for the Third World," 1976.

[19]Jaipur Printers P. Ltd. "Competition Regime in Pakistan-Waiting for a Shake Up," 2002.

[20] Federal Trade Commission, "Federal Trade Commission," Federal Trade Commission, December 21, 2018, https://www.ftc.gov/.

[21] Www.legal-Lingo.net/Lex-Julia/, n.d., accessed October 9, 2022.

and to curb unfair trade practices with heavy fines.[22]On the basis of such laws of Romans three notions were developed in Western Europe during medieval times: (i) transactions and markets should be subject to fairness, (ii) just and fair price for any transaction and (iii) prohibition of monopolistic control or market competition[23]. Following these principles an English common law doctrine 'restraint of trade' was evolved and it played a role as a precursor to the modern competition laws.

The United States was the first country in the parliamentary history which legislated following laws in this regard: (i) Sherman Antitrust Act 1890 which prohibited all those contracts which consequently creates trade barriers and enhances the market player's monopoly. The relevant sections of the said Act read as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[24]

[22]London Sweet & Maxwell. "The Law of Restrictive Trade Practices and Monopolies," 1966.

[23] D G Brian Jones, "The Routledge Companion to Marketing History" (Routledge New York, March 15, 2016).

[24] United States, "Sherman Antitrust Act," § 1 (1890).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[25]

Similarly, "Clayton Act 1914" and "Federal Trade Commission Act 1914" were also passed by US parliament to further strengthen the trade regulation by bringing a more stringent enforcement mechanism which provides the best results ever received during the consumer protection history in the past.

Keeping in view the concentration of economic power into certain hands, as above mentioned, and international trends of regulating the country's economy, the government of Pakistan also decided to make competition laws. For this purpose, the government constituted an "Anti-Cartel Laws Study Grouping 1963."[26] The research done by this group further identified the certain issues within Pakistan legal regime such as unfair market hold and strong anti-groups lobbying.[27] On the recommendations of this report, inter alia, which also suggested dire need of "anti-monopoly and anti-cartel laws" in country, The "Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970" ("MRTPO") passed and enforced in August 17, 1971. An organization

[25] Ibid., § 2.

[26] "Prosecution and Law Enforcement - OECD," Www.oecd.org, July 13, 2022, http://www.oecd.org/daf/competition/prosecutionandlawenforcement.

[27] Joseph Wilson, "At the Crossroads: Making Competition Law Effective in Pakistan Symposium on Competition Law and Policy in Developing Countries" (Nw. J. Int'l L & Bus, May 10, 2006).

namely Monopoly Control Authority ("MCA") was also established at the same time to implement this law.

The scope of MRTPO was threefold: to provide measures against unjustifiable deliberation of economic gains by individuals, therefore non-public undertaking along with benefits more than three hundred million rupees was barred by this law. Secondly, to curb the monopoly and thirdly to check the restraint trade practices. The Monopoly was defined geographically, and it was presumed an unreasonable monopoly in the law when competing undertakings. The said monopoly is geographical and characterized as unjustifiable in law where the shared value is twenty percent or above and controlled by people with mutual understanding. The same situation also lies where the company's directors as well as other office bearers carry twenty percent or more shares. In this context, the practices which create barriers in doing the free trade are also considered as illegal and disallowed by the law. The examples of such barriers include less production, price fixation and boycott to the market competitors.[28] This Act could not prove successful to meet the objectives due to various reasons listed below:

I. The scope and jurisdiction of this law and MCA was only to the extent of private enterprises and did not extend to public undertakings.
II. The scope of this Ordinance was severely constrained by the initiation of Economic Reform Order 1972 which started nationalization in the country.

[28]Jaipur Printers P. Ltd. "Competition Regime in Pakistan-Waiting for a Shake Up," 2002.

III. The independence nature of MCA was also eliminated, and it was placed as a subordinate department of the newly formed Corporate Law Authority in 1981.

IV. The Authority was not zipped with the adequate powers to cop up and control the gigantic economic powers and often it seemed helpless in many of the cases including the cement case. In which MCA found evidence of oligopolistic behavior and price fixing and ordered reduction of price of cement along with direction to deposit the undue collected money into Bait-al-Mal but it went all in vain. Instead of supporting the MCA and allowing the matter to go to the courts the government and the cement manufacturers came to a settlement.[29] Because MCA could only make recommendations[30] to the relevant government authority to take action and the nature of order to deposit in bait-al-mal was also moral in.

V. It became out of date due to modernization and a rapidly transforming market economy.

Moreover, this law was neither effective from the beginning nor was it compatible with the arising new economic trends. There was an utmost need to update the competition policy with the liberalized economy to meet the objectives of growth in privatization and innovation. So the government of Pakistan thus launched a program to develop competition policy. Toward this end, the ministry of finance and the MCA worked with the World Bank and the Development for International Development (DFID) UK. As a result of these efforts "Competition Ordinance 2007" replaced the MRTPO.

[29] M Sarwar K & A Hafeez, "Consumer Laws in Pakistan" (Consumer Rights Commission of Pakistan, March 15, 2006).

[30] The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 10(e) § (1970).

After getting approval, the Competition Ordinance finally transformed into "Competition Act 2010"[31].

This new law introduced major changes and averted from prescriptive to reasoned approach. In contrast to the MRTPO the Act does not seek to curb the dominant positions; it prohibits the abuse of dominant positions.[32] The Act also introduced provisions regarding deceptive marketing not only in the interests of consumer's welfare but business interests also to shun false and misleading information or advertising. The Act also considerably strengthened the investigative capacity of Competition Commission of Pakistan (CCP or the Commission) through adding provision of search, inspection and forcible entry and lenience powers.[33] Section 39 allows CCP to impose lesser penalties if an undertaking has made a full, truthful disclosure in respect of the alleged violations. Subsection 2 extends to full exemption. However, CCP may revoke leniency in cases of false evidence or failure to comply with leniency conditions.

The Commission was equipped with more powers of statutory mandate; issuing advisory or policy note and by the way of enhancement of severe penalties[34] than MRTPO. Another very major step was the introduction of the establishment of special independent Competition Appellate Tribunals.[35]

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[31] "Competition Commission of Pakistan - Commission," Www.cc.gov.pk, October 9, 2022, https://www.cc.gov.pk/index.php.

[32] UNCTAD. "Voluntary Peer Review of Competition Law and Policy: Pakistan," 2013.

[33] The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 39 § (1970).

[34] "CCP", Www.cc.gov.pk, October 9, 2022, http://www.cc.gov.pk/images/Downloads.

[35] The Competition Act, 43 § (2010).

4. Importance of Improving Consumer Protection

Consumer is the king. A statement which seems mockery in an underdeveloped country like Pakistan where the consumers are at the mercy of ruthless commercial enterprisers and indifferent and corrupt public organizations who take advantage of the ignorance of consumers and the lax law enforcement to exploit the poor and powerless public.[36] The government can play a role while creating the balance between weak and powerful because it is the primary duty of any government to provide protection to their people. But it seems quite the opposite in underdeveloped countries where the governments also seem cash starved and eager to pile its revenue by joining hands with the manufacturers and producers. We have watched a very glaring example of this association in the Vegetable Ghee Cartel Case.[37] The MCA started a thorough investigation during the year of 1998 when all of sudden the prices of cooking oils got very high unprecedentedly. In this regard, the relevant data was gathered such as the profit margins, prices, the manufacturer's ability of production as well as the costs incurred. It revealed that some of the brands holding more than 30% of market shares were Mujahid oil, Dalda oil, Habib cooking oil company, Tallo oil as well as Gull, Sharma oils. Such companies were deemed to be the market dominating and holding leaders of that time period. However, it was also revealed surprisingly during the same time period that the prices of imported cooking oils and raw materials were dropped and reduced up to 510$ per metric ton and 405$ per metric ton for soybean cooking oil. The regulatory duties were also dropped by the government during such a time period. In this situation as observed by the MCA, the government did not enter into any fruitful negotiations with the dealers and

[36] "Status of Consumer Rights in Pakistan," Dawn, February 3, 2003.

[37] Jaipur Printers P. Ltd. "Competition Regime in Pakistan-Waiting for a Shake Up," 2002.

fixed the market price as Rs. 52/KG. This price fixation went fruitless and caused a huge loss to the consumers as the dealers did not act upon to reduce the prices. One of the main reasons for that failure is that the negotiations were made without the participation of consumers.[38]

It is quite a natural phenomenon that consumers are a weak party, and the situation becomes worse in underdeveloped countries where mostly people are also not educated and well informed. This situation leads toward another worst in the absence of any steps taken by consumers themselves for their rights unlike the consumers of developed nations. We find many examples of consumer awareness even in the beginning of the twentieth century. The US National Consumer League organized consumer boycotts against sweatshops, child labor and other inhuman conditions under which consumer production was made at the turn of the 20th century.[39] Similarly in the UK women's groups and labor organizations began organizing around consumer issues including safety standards in the 1880s.[40] The women organizations were concerned about the price and quality of household items. Contrary situation exists in Pakistan where there is neither consumer's unity nor consumer protection awareness. People of Pakistan seem fully at the mercy of ruthless commercial enterprisers and indifferent and corrupt public organizations who take advantage of the ignorance of consumers and the lack of a law enforcement environment to exploit the poor and powerless public.[41]

This early concern in the advanced nations regarding consumer protection showed the importance of this subject in the way of social and economic justice which is very basic to maintain the balance. Consumer's rights are mainly divided into the different categories which includes basic

[38] Daily Dawn. "Status of Consumer Rights in Pakistan," February 3, 2003.

[39] Asean Australia Development Cooperation Program. "Road mapping Capacity Building Needs in Consumer Protection in Asean: Historical Background," 2015.

[40] Ibid.

[41] Daily Dawn. "Status of Consumer Rights in Pakistan," February 3, 2003.

needs, safety, information, representation, redressal, education as well as environment.

These were set as minimum goals in the UN guidelines, shifting the responsibility of achievement on states by taking necessary steps. Apart from the state's responsibility it is also people's religious and moral duty to be fair. Ensuring they take the involved parties at optimum level of morality which means the widespread flow of truth in the society. To take the steps for consumer protection ultimately means to take the steps for the promotion of truthfulness and positive morality. Ethics, honesty, and veracity are words which are preached in every religion, society, homes and organizations and in countries like Pakistan having Islamic society it becomes our primary concern to follow the principles of fairness. Further on, it is also a worldwide known principle: honesty is the best policy. There is a need to accept this notion rationally rather than to be just spiritually. The people who took it sincerely and acted upon as per true letter and spirit have fated maximum benefits collectively rather individually.

Moreover, it is not only for the consumer welfare but businesses also. Days gone of caveat emptor; it is the time to share accurate information with the consumers for the betterment of both parties. Consumer protection contributes to dynamics and effective markets for businesses to grow.[42] Businesses that are known to treat consumers fairly will gain a good reputation and become more sought after. This increases their profitability and competitiveness, and this will also lead to economic growth in the long run. Consumer protection laws, policies, and regulation guarantee that businesses are kept in check. Now it is the time when the consumer is called

[42]"Empty Post Consumer Protection," Aseanconsumer.org, March 15, 2020, https://aseanconsumer.org/cterms-consumer-protection/why-is-consumer-protection-important.

king because there is no dearth of sellers who want to sell their goods with accurate disclosure.[43]

5. Conclusion

Above all, consumer protection is very important for any society besides all the disagreements. To protect the consumer's rights does not simply mean just consumer protection but it means a lot more. It will promote a sense of honesty among the people. The dishonest elements are booming by exploiting consumers through defective products and faulty services without effective checks. Such unscrupulous elements can also cause threat to the health and security of the society. It is the basic responsibility of all regimes to protect the people from the deep-rooted exploitation in such an unchecked market system. A civilized society believes in the fundamental importance of consumer protection and the consumers are the largest stakeholders in any country, as they have the power to make or break any brand.

Notwithstanding the legislation made by provinces, consumer protection remains a challenge in Pakistan due to various factors. Initially, the legislation started very late compared to other countries and its importance. It was shaping out to be a growing concern worldwide but in Pakistan it remained unattended for a long time. Secondly, it was thrown out as a provincial subject, and moreover the provinces were not under any pressure and direction from the center to make laws and provide mechanisms of protection. The absence of any central policy regarding consumer protection has deteriorated it on a larger scale. Apart from the belated legislations, the provinces have not yet implemented them fully. All the provincial laws require the setting up of consumer protection district councils which are a main part of the consumer protection regime. A major

[43] Ibid.

role of these councils is to create awareness among consumers about their rights and responsibilities of other parties. Their role is also to minimize the incidence of faulty products and unreasonable services in the marketplace. There are yet no consumer protection councils in Sindh and Balochistan and only few in KPK, while Punjab even being at lead has not met its target by spreading them in all districts which are nearly half in this time.

Furthermore, none of Pakistan's existing consumer protection laws specifically provide any remedy to consumers or raise liability for manufacturers committing unfair trade practices online. All over the world including Pakistan it is a growing trend of online shopping and it grows more in special circumstances like in the lock down situation, but our current legal regime is silent about it. Furthermore, the laws define an ordinary consumer as a reasonably diligent person which adds more woes in the plights of consumers in Pakistan. There is also a need to harmonize all provincial laws because the scope of rights and liabilities differ in all of them and the disparity in original and appellate jurisdictions also creates confusion and ultimately results in more violations.

Consumer laws should be constantly updated in order to deal with the new realities arising in the marketplace. The provincial governments after meeting the statutory requirements waiting for a long time also need to take timely steps to ensure that the consumer laws keep pace with the new real and virtual dynamics and also constantly shifting challenges faced by consumers as their economies develop and become more globalized. For example, with the advent of internet related services consumers are facing new forms of threat such as online deception and breaches of personal data and new security concerns and the like.

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An Analysis of Environmental Crisis under Environmental Constitutionalism in Pakistan

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Abstract

Planet Earth has entered new epoch Anthropocene where human activity has caused and continue to spur significant change in fundamental biosphere. Environmentalists have warned that earth systems and processes are approaching critical threshold causing abrupt and surprising changes. Rising temperature, rising sea level, melting glacier, clearing forest are main environmental issues thus experts adhere fallout planet earth in near future. Managing global consumption and conservation of natural resources emerged to mitigate consequences of unpredictable and sudden change. Pollution increasing day by day causing health issues, increasing number of heat islands, and scorching heat after felling trees are issues due to weak environmental governance despite having Ministry of Environment established in 1975 later changed into Ministry of Climate Change and also establishment of Pakistan Environmental Protection Council for policy making. Environmental protection connected with constitutional phenomena such as rights, democracy, separation of powers, and rule of law but the Constitution of Pakistan 1973 does not provide right to clean environment as Supreme Court of Pakistan interpreted right to life includes clean environment in Shehla Zia v Wapda. Right to clean environment is fundamental right of all citizens of Pakistan. Environmental Constitutionalism is understood as having formally descriptive and substantively constitutional characteristics that usually go hand in hand to create an effective system of environmental governance as former has to do with the state architecture establishment, its

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functions in environmental governance, later concerns higher order of apex norms such as rights provide guarantees related to environment. Therefore, this research is intended to explore proper legal means to provide a concept for incorporation of environmental laws and rights in the Constitution of Pakistan 1973 which can ultimately lead to an effective environmental governance by the government to control environmental issues that are been faced by citizens and ultimately having impact on the entire planet.

Keywords: Environmental Constitutionalism; Pakistan; Environment; Constitutionalism; Constitution of Pakistan 1973

1. Introduction

The existence of life on planet earth vitally depends on our Environment. Home to approximately 8.7 million species of plants and animals, the earth is a source of all food, air, water and all other needs of these living organisms. The Environment comprises of all the living and non-living things that occur naturally and also covers all the interactions between living organisms, climate, weather and natural resources. Deriving its descent from the French preposition environ which translates to around, environment may be simply described as that which surrounds and with that definition it is evident that it has an essential role in the functioning of our daily lives.

Human beings receive countless benefits from the environment, also known as biosphere. The Environment is a host and conductor of several natural processes that are necessary for the existence of all life on this planet. A fraction of these processes includes filtration of the air and absorption of harmful gases by plants and trees, purification of water, reduction in the risk of floods and maintenance of natural balance. For thousands of years, the environment has been source of growth and mere existence of human species along with other living things.

Our world has been facing drastic environmental changes from melting glaciers to burning forests and weather extremes. Environmental degradation is worrying problem for the universe. The root cause of the problem is industrial expansion along with rapid growth in population along with needs of population and their demand for only the best quality of resources in life. These factors are added with ignorance, lack of awareness and knowledge and most importantly the parasitic attitudes of people towards the environment degrade nature and its resources.

Environmental law are essential instruments for protecting humans, animals, resources, habitats and our natural ecosystem altogether and if such laws have no implementation, there would be no regulations on pollution, hunting or even disastrous incidents and the planet would be absolutely at the mercy of humans and within a span of few years, the Earth would be turned into an inhabitable planet with conditions not favorable for any kind of life. Environmental law works to preserve land, air, water, and soil and also imposes various penalties such as fines and, in some extreme cases, even imprisonment. These laws are tools used by the government to prevent people who pose harmful threats to the planet by punishing those who are damaging the environment for their personal gain. However, with the increasing threats to the environment, these laws are not sufficient to stop even a fraction of all this destruction. We need laws that have a larger impact and are deeply rooted in all our policies and laws, so environmental protection is ensured, and all human activities are conducted in such a manner that the environment is protected and preserved.

Environmental Constitutionalism is relatively new concept that has been emerging around the world. Recently, the world has been looking at the environmental constitutionalism as a concept. There is a trend towards the addition of environmental care in the Constitution that would enable one to identify the emergence of a specialized focused form of constitutionalism

that is solely concerned with environmental matters. Applying this concept in Pakistan, it can be seen that the Constitution of Pakistan 1973 does not clearly mention any right to clean environment and the Courts have interpreted and amalgamated all environmental rights into the right to life as given under article 9 the Constitution of Pakistan 1973 to bring the right to clean environment into its meaning.

The research methodology used to conduct this research is qualitative which is used to seek answer of issues dealing with environmental protection Internationally and in Pakistan. This research is aimed to explore and analyze existing legal framework dealing with protection and preservation of natural environment in Pakistan and to review constitutional parameters in regard to environment. This research focuses on juristic writings, laws and precedents on environmental issues and propose how the Legislature and Government can play a role in Environmental Constitutionalism. This research is conducted through various primary sources such as books, laws and case laws and secondary sources comprised of various journals, e-books, and reports of various official authorities. This research only limits to discussion dealing with environmental governance, environmental crisis and environmental constitutionalism internationally and in Pakistan. This research is an original piece of writing and have never published anywhere else before.

2. An Overview of Environmental Crisis and Approaches of International Community

Over the past few years, the quality of our environment has been greatly compromised. The quality of our environment has been reducing with every passing day. Although, there are many natural and artificial factors causing such deterioration, human activities are major contributor. In order to raise their standard of living and to make their lives easier human beings perform many activities which might be beneficial for them but on the other hand,

hazardous to the environment.[1] Known as anthropogenic activities, these include economic or social activities that may be industrial or agricultural, for example: mining, releasing untreated industrial waste into water bodies, deforestation, soil erosion, land degradation, release of harmful gases into the biosphere etc. Over the years, these anthropogenic activities may have eased our lives or proved to be exceptional advantageous for the world economy but have led to an environmental crisis.[1]

The end of the 20th century and the dawn of the 21st century witnessed international transformation of environment-related issues. World leaders are concerned about the deteriorating environment and increasing human-related activities that have caused the same. From rising temperatures to rising sea levels to melting glaciers and deforesting forests, environmental issues have become a global concern. Experts are arguing about the loss of anthropocentric and ecological centres.[2]

Various International declarations, conventions and conferences revolve around having global solution to this huge problem. Environmental degradation is such a pressing and drastic issue that cannot be handled by merely small group of people, not even a country can cope with this. However, the problem must be addressed as a whole with an inclusive approach. A specific solution for the entire planet is needed. It is the only way to save and preserve the planet and if we do not fight with this as one, we might be left with nothing to offer to the generations to come.[3]

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[1] Bob Giddings, Bill Hopwood, and Geoff O' Brien. "Environment, Economy and Society: Fitting them Together into Sustainable Development." *Sustainable Development* 10, no. 4 (2002): 187-196.

[1] Swati Tyagi, Neelam Garg, and Rajan Paudel. "Environmental Degradation: Causes and Consequences." *European Researcher* 81, no. 8-2 (2014): 1491.

[2] Klaus Bosselmann. "Losing the Forest for the Trees: Environmental Reductionism in the Law." *Sustainability* 2, no. 8 (2010): 2424-2448.

[3] Elinor Ostrom. "Polycentric Systems for Coping with Collective Action and Global Environmental Change." *Global Environmental Change* 20, no. 4 (2010): 550-557.

From famines to weather extremes, the world has faced a major shift in the quality of its biosphere. With each passing year the standard and quality of our environment depletes, leaving behind several natural disasters and fatal diseases for the population but the most unfortunate thing is that the humankind itself is causing all this. Over the past few years, the earth has seen drastic changes in terms of climate change and global warming. From 2012 to 2021, an average of 61.289 wildfires affecting almost 7.4 million acres of forests was recorded in the United States. As of May 2, 2022, more than 21.200 wildfires have affected more than 1.1 million acres this year.[4]

The extinction rate ranges from a thousand to then thousand times faster due to human activity, today. The main root of modern extinction is the loss of habitat and degradation, hunting by other invasive species and the most of all change in climate. Research has shown that extreme climate change could trigger an extinction domino effect because all species are connected in web of life, even the most tolerant species ultimately succumb to extinction when the less-tolerant species on which they depend disappear. Thus, if we save only one specie, it will ultimately save its habitat and include other species that live there too.[5]

The current heatwave in Pakistan and India is causing serious health crisis, with mercury temperature reaching as high as 51°C in Jacobabad, Sindh province. Numerous cases of acute kidney injury (AKI) caused by heat stroke, acute watery diarrhea and gastroenteritis have been reported across the country, especially in Sindh and Punjab, as extreme hot weather scorched these areas. Pakistan's highest recorded heat in April caused

[4] Ashraf Farahat. "Air Pollution in the Arabian Peninsula (Saudi Arabia, United Arab Emirates, Kuwait, Qatar, Bahrain, and Oman): Causes, Effects, and Aerosol Categorization." *Arabian Journal of Geosciences* 9, no. 3 (2016): 1-17.

[5] Haley Molinaro. "Refortifying the Endangered Species Act: Its Degradation and How to Strengthen the Nation's Most Comprehensive Law for Protecting Endangered Species, 55 UIC L. Rev. 317 (2022)." *UIC Law Review* 55, no. 2 (2022): 4.

glaciers to melt faster than normal, sparking flash floods in the country's northern region, destroying some key bridges and damaging homes and buildings.[6]

In summer 2019-2020, devastating wildfires ravaged eucalyptus forests in southern and eastern Australia which in terms of intensity, were unparalleled to any other wildfires in history. Not only did these burned hectares of forests but they also either killed or relocated an estimated 3 billion animals starting in October 2019 and lasting until January 2020. Plastic trash production more than doubled from 2000 to 2019, reaching 353 million tons. Nearly two-thirds of all garbage produced in the world consists of plastics, with 40 percent coming from packaging, 12 percent from consumer products, and 11 percent from apparel and textiles.[7]

The balance of economic stability and preservation of nature is very difficult task. There has been a major transition in the world's economic policy since the fall of the Soviet Union. Capitalism has grown rapidly as compared to socialism. With this economic order, corporate giants have played a significant role in urbanization and industrialization with their urge to develop and grow their corporate settings. There is no doubt as to the benefits of industrial expansion, the most significant of which is the production of more job opportunities, but it comes with a price, which is the threat of negative environmental repercussions.[8]

Industrialization degrades the environment with untreated industrial wastes being discharged into the environment. Business and industries make pledges of a pollution-free environment, but this is nothing but fiction.

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[6] Waseem Ishaque, Rida Tanvir, and Mudassir Mukhtar. "Climate Change and Water Crises in Pakistan: Implications on Water Quality and Health Risks." *Journal of Environmental and Public Health 1*, no 2022 (2022):1-12.

[7] Juli G. Pausas, and Jon E. Keeley. "Wildfires and Global Change." Frontiers in Ecology and the Environment 19, no. 7 (2021): 387-395.

[8] Kiril Stanilov. *"Taking Stock of Post-Socialist Urban Development: A Recapitulation." The Post-Socialist City: Urban form and Space Transformations in Central and Eastern Europe after Socialism* (The Netherlands: Springer, 2007): 3-17.

Pollution free is just utopic phenomenon which is neither necessary nor required. Fumes and hazardous gas emissions from thermal power plants, coal mines, cement, petroleum, steel and chemicals are all highly polluting factors. Spreading over a vast area, these industries individually inflict permanent damage to our ecosystem and environment, frequently eliminating carrying capacity of the environment. We can only imagine how much clusters of these factories and industries damage the environment. [9]

Expansion of industries is the key to economic success; nonetheless, it also causes increased population, urbanization, and an excessive strain on basic life support systems, while pushing environmental boundaries to the extreme. To curb this issue, various studies have been conducted that have proved that converting current enterprises into ecological industrial networks through effective adoption of eco-friendly methods gives a more realistic answer for protecting our valuable natural resources while also boosting the regional economy and maintaining a balance between the two. It necessitates the need of proper planning and integrated frameworks that are in harmony with preservation of the environment along with a thorough evaluation of previous and current situations with regards to environment, economic growth and development. [10]

Under the UN, the Brundtland Commission, also known as the World Commission on Environment and Development (WCED) also known as UN Special Committee on the Environment was formed to help guide countries around the world in achieving sustainable Development Goals. The Brundtland Commission published its results in the Brundtland report in 1987 which gave the most widely used definition of sustainable

[9] Vijay Kumar, and Binod Mishra. "Environmental Casteism and the Democratisation of Natural Resources: Reimagining Dalit Testimonies." *Journal of South Asian Studies* 45, no. 3 (2022): 577-595.

[10] Rasmi Patnaik, "Impact of Industrialization on Environment and Sustainable Solutions—Reflections from a South Indian Region." *Earth Environmental Sciences Series* 120, no. 1 (2018): 1-8.

development as development which meets needs of current generations without compromising ability of future generations to meet their own needs.[11]

After the Brundtland Report known as Our Common Future, sustainable development became an important concept in the vocabulary of politicians, practitioners, and planners. However, this sustainable development approach did not formulate any strict formula or limits the economic development of any country to meet the control damage to the environment. Therefore, economic activity in the cloak of rapid growth continued to damage in the process of environmental protection. The balance is tilted conducive to economic development and has proved detrimental to environmental protection, overtime.[12]

One of the most prominent steps in the process of preservation of the environment is 2030 agenda for sustainable development. This agenda, presented in September 2015, comprised of seventeen goals known as Sustainable Development Goals (SDGs). These goals are approved by the UN as a call to all the nations of the world to take an action to eradicate poverty, preserve environment, promote peace and prosperity and many other goals which promise more sustainable and inclusive world society for everyone by 2030.[13]

These SDGs are connected to each other in such a manner that actions taken in one area influence results and outcomes in others. The development that comes with these SDGs must also balance social,

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[11] Abbas Poorhashemi. "Opportunities and Challenges Facing the Future Development of International Environmental Law." *Climate Change, Natural Resources and Sustainable Environmental Management*, no. 1 (2022): 41-47.

[12] Erling Holden, Kristin Linnerud, and David Banister. "Sustainable Development: Our Common Future Revisited." Global Environmental Change 26, no.1 (2014): 130-139.

[13] Jeffrey D. Sachs, Guido Schmidt-Traub, Mariana Mazzucato, Dirk Messner, Nebojsa Nakicenovic, and Johan Rockström. "Six Transformations to Achieve the Sustainable Development Goals." *Nature Sustainability* 2, no. 9 (2019): 805-814.

economic, and environmental sustainability. The most important feature of this agenda is its preamble, in which it was affirmed by world leaders that they are determined to protect planet from degradation through production and sustainable consumption, sustainably managing its natural resources and taking urgent action on climate change, so that it can support needs of present and future generations.[14]

Achieving agenda goals lead towards improvement in environmental health, social as well as economic benefits. Aiming to reduce environmental risks and increase in social and environmental resilience as well as actions under these agenda goals contribute towards environmental dimension of sustainable development and to socio-economic development.[15]

Apart from SDGs, the Stockholm Convention ratified by more than 152 countries and came into existence on May 17, 2004, aims to protect human health and the environment from Persistent Organic Pollutants (POPs). Persistent Organic Pollutants are substances that remain intact in the environment for extended periods of time and require time to decompose and are typically hazardous to people and wildlife. This convention binds governments of state parties to take actions to either eliminate or at least minimize the discharge of persistent organic pollutants into the environment. It also aims to eliminate or reduce emissions and uncontrolled waste of persistent organic pollutants and has developed a framework to

[14] Sohaib Mukhtar, Zinatul Ashiqin Zainol, and Sufian Jusoh. "Islamic Law and Sustainable Development Goals." *Tazkia Islamic Finance and Business Review* 12, no. 1 (2018).

[15] Daniel M. Franks, Julia Keenan, and Degol Hailu. "Mineral Security Essential to Achieving the Sustainable Development Goals." *Nature Sustainability* 6, no. 1 (2022): 1-7.

deal with additional compounds that were found to be hazardous to the environment.[16]

The Rio Declaration on Environment and Development reaffirm the Stockholm Declaration and Agenda 21 action plan of the UN as with the passage of time, it became evident that industrialization imposes threat to our biosphere. Along with its aims to provide guidance to governments in their environmental protection activities, two principles of the Rio Declaration deserve special consideration with regards to preservation and protection of the environment (i) precautionary principle laid the foundation of the modern International Environmental Laws and thus it is better to be safe than sorry, and (ii) there is an emphasis on certain rights that related to the environment, these includes right to information, participation and justice.[17]

3. Necessary Steps to Control Environmental Degradation

Rapid industrialization has had its fair share of life altering effects on the ecosystem. All activities contribute to some extent of change in the environment, thus making it is unpredictable to accredit what impact does a certain activity have on the quality of the environment or health of a human or animal, for example, whether a certain level of air pollution leads to an increase in respiratory diseases or whether oil development in an environmentally sensitive area affects local wild animals to what extent.[18]

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[16] Heidelore Fiedler, Roland Kallenborn, Jacob De Boer, and Leiv K. Sydnes. "The Stockholm Convention: A Tool for the Global Regulation of Persistent Organic Pollutants." Chemistry International 41, no. 2 (2019): 4-11.

[17] Katrin Kohl, Charles Hopkins, Matthias Barth, Gerd Michelsen, Jana Dlouhá, Dzulkifli Abdul Razak, Zainal Abidin Bin Sanusi, and Isabel Toman. "A Whole-Institution Approach Towards Sustainability: A Crucial Aspect of Higher Education's Individual and Collective Engagement with the SDGs and Beyond." *International Journal of Sustainability in Higher Education* 23, no. 2 (2022): 218-236.

[18] Alessandro Galli, Justin Kitzes, Valentina Niccolucci, Mathis Wackernagel, Yoshihiko Wada, and Nadia Marchettini. "Assessing the Global Environmental Consequences of Economic Growth Through the Ecological Footprint: A Focus on China and India." *Ecological Indicators* 17, no.1 (2012): 99-107.

Some existing principles to control environmental degradation includes precautionary principle relies on the concept of better safe than sorry. It requires that if there is existence of a strong suspicion that any activity may have harmful consequences for the environment, it is better to control the activity immediately rather than wait for irrefutable scientific evidence.[19]

Furthermore, the precautionary principle directs policymakers to integrate precautions against such hazardous activities in the policy frameworks of their countries when no scientific evidence exists about the nature and extent of the environmental or human health hazards and the risk is high. The precautionary principle, links closely to governance as it guides policy makers to adopt such policies that no activities lead harmful consequences.[20]

With the increasing environmental threats, many environmental laws were created as a response to disasters to curb and minimize their adverse effects, but environmental damage can easily be avoided with methods that are less expensive and easier to implement. Such measures remove the existing destructive elements rather than responding to damage that has already happened environmental protection to begin at an early stage. According to this principle, correcting damage after it has occurred is a way to deal with the problem, but it is better to prevent it from occurring in the first place. This principle deals with the creation, storage and disposal of hazardous wastes.[21]

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[19] Jonathan H. Adler. "More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol." Texas International Law Journal 35, no.1 (2000): 173-205.

[20] Toqeer Ahmed, and Muhammad Zaffar Hashmi, *Hazardous Environmental Micro-Pollutants, Health Impacts and Allied Treatment Technologies,* (Cham, Switzerland, Springer, 2022); 53-73.

[21] Michael A. Berry, and Dennis A. Rondinelli. "Proactive Corporate Environmental Management: A New Industrial Revolution." *Academy of Management Perspectives* 12, no. 2 (1998): 38-50.

Many economists claim that many environmental hazards are caused by producers externalizing costs of their activities as many factories emit unfiltered toxic gas into the atmosphere or release untreated chemicals into water bodies and pay very little to no cost for such disposal of their waste. Instead, the entire community in the surrounding area has to bear the burden whereas no advantage or profit is being given to the community. Industries and factories are set up in less developed areas where the cost of living is less, and thus marginalized communities mostly reside. It is obvious that business tycoons do not reside in these areas, so how is it possible for these giants to bear even a fraction of the price? [22]

The principle is widely accepted all over the world claiming that those who produce pollution should bear the cost of managing it to prevent damage to human health or the environment. The public participation principle states that the general public should be made stakeholders since they are the ones who are impacted directly by these policies have rights to participate in the decision-making process. The adoption of this principle implies that public input has an impact on decision-making and more public friendly policies come into existence.[23]

Environmental standards for certain forms of pollution, licenses for environmental damage activities, and resource protection decisions must only made after a proper notification has been made and the public has had sufficient opportunity to propose and submit amendments to the policies and rules. In many jurisdictions all over the world, citizens have the right to appeal government environmental decisions to a court or administrative agency, so that they can be amended as per needs of society. Environmental protection requires due consideration of the potential consequences of

[22] Joana Setzer, and Catharine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London, UK, Grantham Institute on Climate Change and the Environment, 2022); 1-47.

[23] Lars D. Hylander, and Michael E. Goodsite. "Environmental Costs of Mercury Pollution." *Science of the Total Environment* 368, no. 1 (2006): 352-370.

environmentally decisive decisions. The principle requires that it must be ensured that environmental issues should be considered top priority while making decisions regarding activities of other sectors.[24]

In 1970s, an increasing number of environmental accords were negotiated, many of which included measures aimed at encouraging poor nations to embrace them. Many international environmental treaties have been signed throughout the years to enhance environmental preservation yet, for a variety of reasons, reaching an effective agreement remains challenging. Necessary policies on environment frequently generate social and economic challenges for governments to adopt, particularly emerging countries, and as a result, they have been hesitant to sign environmental accords. Another reason is that environmental concerns transcend political boundaries, they can only be successfully addressed with the participation of many governments, some of which may have severe conflicts over environmental policy goals.[25]

4. An Overview of Environmental Laws of Pakistan

Many laws related to the preservation of forest, wildlife and natural resources existed in the pre-partition era which imposed certain checks upon the industrial pollution and preservation of resources, but it can be said that these laws have had almost none to very little impact in preventing environmental degradation, however, no such law was existed with a sole purpose to preserve and safeguard the natural biosphere. After partition of the United India and the advent of the Stockholm Declaration, Pakistan also showed a great inclination towards the environment and its protection and even added environmental pollution and ecology in the concurrent list of

[24] Hens Runhaar, Peter Driessen, and Caroline Uittenbroek. "Towards a Systematic Framework for the Analysis of Environmental Policy Integration." Environmental Policy and Governance 24, no. 4 (2014): 233-246.

[25] Neil Gunningham, "The New Collaborative Environmental Governance: The Localization of Regulation." *Journal of Law and Society* 36, no. 1 (2009): 145-166.

the Constitution of Pakistan 1973[26] and conferred powers on both, the federation and the province, to legislate environmental laws.[27]

In 1983, the President of Pakistan exercised his legislative powers under article 89 of the Constitution of Pakistan 1973[28] issued an ordinance known as Pakistan Environmental Protection Ordinance 1983 (PEPO). The main aim of PEPO is to provide rules and principles for control of pollution and to preserve living environment. A policy-making body for environmental matters known as Pakistan Environment Protection Council was established to formulate National Environmental Quality Standards to be implemented by Pakistan Environmental Protection Agency. PEPO was the first legislation to be ever passed in respect to environmental protection, its scope and implementation were limited, and it was just a minor effort. Later, after Rio Declaration and Judgment of the Supreme Court of Pakistan in Shela Zia versus Wapda,[29] right to clean environment merged into right to life.[30]

The Parliament of Pakistan made another attempt in 1997 under Pakistan Environmental Protection Act, 1997 (PEPA). The main goal of PEPA is to protect, conservate, rehabilitate and improve environment in Pakistan through prevention and control of pollution and for promotion of sustainable development. PEPA also supplemented and expanded the scope of the already existing PEPO and its ambit of protection of the environment.

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[26] Constitution of Islamic Republic of Pakistan, (Islamic Republic of Pakistan, 1973).

[27] Muhammad Tayyab Sohail, Huang Delin, Muhammad Afnan Talib, Xie Xiaoqing, and Malik Muhammad Akhtar. "An Analysis of Environmental Law in Pakistan-Policy and Conditions of Implementation." *Research Journal of Applied Sciences, Engineering and Technology* 8, no. 5 (2014): 644-653.

[28] Sohaib Mukhtar, "Social Transformation of Pakistan under the Constitution of 1973." *Social Transformations in Contemporary Society. Lithuania. Mykolas Romeris University* 4, no.1 (2016): 47-59.

[29] Shela Zia v Wapda, (Supreme Court of Pakistan, Pakistan Legal Decisions (PLD), 1994); 693

[30] Naila Nazir, "A Critique on Environmental Protection Ordinance (EPO) 1983 and Environmental Protection Act. 1997." *Journal of Law & Society* 30, no.43 (2004): 35.

PEPA also incorporated various aspects from principles laid down by the Rio Declaration.[31]

Environment is defined as air, water, land including all layers of atmosphere, all organic and inorganic matter and living organisms, ecosystem and ecological relationships including buildings, structures, roads, facilities and works, and all social and economic conditions affecting community life.[32] The Environmental governance was in the concurrent list of the Constitution of Pakistan 1973. However, under 18th amendment in 2010, provinces were empowered by repealing the concurrent list and some of the subjects of the concurrent list were added in the Federal Legislative List while all remaining subjects were given to provinces including environmental pollution and ecology. Thenceforth, PEPA seized to be applied on provinces and thereafter all four provinces enacted their own environmental legislation.[33]

Subsequently, Punjab Environmental Protection Act 2012 passed by Punjab Assembly to provincialize PEPA, and to establish Punjab Environmental Protection Council to protect environment in Punjab. Sindh Assembly passed Sindh Environmental Preservation Act 2013 to protect, conservate, rehabilitate, and enhance the environment in Sindh as well as to prevent, control pollution, and to promote sustainable development. Khyber Pakhtunkhwa Assembly passed Khyber Pakhtunkhwa Environmental Protection Act 2014 to protect environment in Khyber Pakhtunkhwa. Baluchistan Assembly passed Baluchistan Environmental Protection Act

[31] Gohar Ali, Ilyas Khan, Mian Mohammad Saleem, and Ashraf Ali. "Comparative Review of Khyber Pakhtunkhwa and Federal Environmental Protection Laws in Pakistan." *Pal Arch's Journal of Archaeology of Egypt/Egyptology* 18, no. 3 (2021): 597-607.

[32] Pakistan Environmental Protection Act, (Islamic Republic of Pakistan, 1997).

[33] Laraib Ehtasham, Sadia H. Sherani, Kiran Younas, Umama Izbel, Amna H. Khan, Anila Bahadur, and Ali Akbar, "A Review of the Status of Environmental Impact Assessment in Pakistan." *Integrated Environmental Assessment and Management* 18, no. 2 (2022): 314-318.

2012 to protect, conservate, rehabilitate, and improve environment in Baluchistan.[34]

Enforcement of environmental legislation in Pakistan is weak since beginning. Thenceforth, 18th amendment opened the door for various ambiguities as enforcement of Multilateral Environmental Agreements (MEA's) according to one point of view is responsibility of Federation under entry no. 3 of Federal Legislative List: treaty and agreement implementation. On the other hand, 18th Amendment's intent would be overturned if Federation continued to pass legislation on devolved areas under guise of executing treaties. 18th amendment clearly lacks in procedure for implementation of MEA's due to which all provinces have differing opinions prevent them from effective implementation of environmental laws. Furthermore, regulatory authorities are required to be independent as it has been observed that structuring of environmental agencies under influence of government and various other associations leads towards hegemony.[35]

The legislature, executive and judiciary of Pakistan have yet not adequately and effectively realized this hard fact. It is also aggravating that the courts are reluctant to take a stand on this hard-core issue of environmental protection and preservation in Pakistan. Industrialization and Pollution in urban cities of Pakistan are constantly increasing and are affecting quality of life significantly as increasing environmental issues forcing legislature, governing bodies, and judiciary to take pragmatic

[34] M. Y. Zahid, and M. K. Qamar. "The Aspects of Legislation in Environmental Management: A Case Study of Punjab Province (Pakistan)." *Pakistan Journal of Science* 72, no. 2 (2020): 138-153.

[35] Ahmad Hussain, and Z. A. Gillani. "Fulfilling Environment Related International Commitments through Implementation of Multilateral Environmental Agreements (MEAs) in Pakistan." *A Scientific Journal of COMSATS–Science Vision 18*, no.1 (2014): 1-2.

actions in the form of expedient environmental laws and policies and their effective implementation throughout Pakistan.[36]

5. An Analysis of Environmental Constitutionalism in Pakistan

After Stockholm Declaration where environmental rights were recognized and principles were engraved to ensure preservation of environment by States for better and sustainable future. Various countries made steps towards attaining its objects, some made governmental bodies for environmental protection including Pakistan while others added environmental rights into their constitution in addition of composing governmental bodies.[37]

Rising sea levels, melting ice caps, dramatic changes in weather patterns, and significant declines in several species due to deforestation, air, water, and land pollution are all signs of an imminent climate crisis and a huge threat not only to Pakistan but to the entire planet. Therefore, just like the rest of the world, Pakistan also has several serious environmental issues that need to be addressed and dealt with urgently.

Pakistan Environmental Protection Act 1997 superseded Pakistan Environmental Protection Ordinance 1983 adopted same provisions. Furthermore, under 18th amendment in the Constitution of Pakistan 1973, environmental law and governance was decentralized and powers regarding environmental legislation and governance were given to provinces. Despite all these developments in environmental law in Pakistan, issues of environment have been increasing to a concerning stage and the environmental laws have formed to be inadequate in providing good

[36] Mehran Idris Khan, and Yen-Chiang Chang. "Love for the Climate in Sino–Pakistan Economic Romance: A Perspective of Environmental Laws." *Clean Technologies and Environmental Policy* 23, no.1 (2021): 387-399.

[37] Michael I. Jeffery, "Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights." *Macquarie Journal of International and Comparative Environmental Law* 2, no. 1 (2005): 105-120.

governance and effectiveness of laws to protect and preserve the environment.[38]

The Constitution of Pakistan 1973 does not talk about protection of environment and its preservation exhaustively. It does not recognize any environmental rights of a person neither place any obligation on the State for the preservation of the environment. The Supreme Court of Pakistan in various judgments interpreted right to clean and healthy environment under the right to life.[39] Constitutional recognition of environmental right imposing duty on the State to provide citizens fundamental rights to approach the Court directly for its enforceability towards the State to ensure the preservation of environment as countries who have adopted environmental constitutionalism have good environmental governance as it provides a roadmap towards it.

Therefore, it is need of the time that the legislature of Pakistan should amend the Constitution of Pakistan 1973 and include environmental right under chapter of Fundamental Rights in the Constitution of Pakistan 1973 as the inclusion of environmental right in the Constitution of Pakistan 1973 and giving it the status of fundamental right will ensure the citizen against its infringement and provide them a direct judicial enforcement under the Constitution of Pakistan 1973. Furthermore, the current environmental legislations should be amended to provide a proper procedure and penalties regarding protection of environment and its violations respectively. Government agencies and research institutions should conduct empirical research collection across the country to collect data related to environmental discrimination in Pakistan and understand its

[38] Rashid Saeed, Ayesha Sattar, Zafar Iqbal, Muhammad Imran, and Raziya Nadeem. "Environmental Impact Assessment (EIA): An Overlooked Instrument for Sustainable Development in Pakistan." Environmental Monitoring and Assessment 184, no.1 (2012): 1909-1919.

[39] Shela Zia v Wapda, (Supreme Court of Pakistan, Pakistan Legal Decisions (PLD), 1994); 693.

actual impact. This question can only be assessed when there is empirical evidence to support the crisis.

The role of civil society is also very important as environmentalists to give awareness to citizens of Pakistan on importance of environment preservation. Awareness of citizens is one of the most important aspects to bring change in societal norms. A proper redressal mechanism should be created where citizens should make complaint about the unhealthy environment and ensure that their problems are solved as a result of such complaint. The government should also set the minimum criteria of healthy environmental surroundings, the residential area and industrial units to help the poor and downtrodden, so that the person standing at the lowest ladder of the society should also be able to enjoy clean and healthy environment.

6. Conclusion and Recommendations

Environmental Constitutionalism is constitutional characteristic to create an effective system of environmental governance by establishing a proper environmental policy and policy implementation authority with full powers and functions in relation to environmental governance. Environmental Crisis and Concerns of International Community are increasing day by day not only in Pakistan but all over the World at large due to rising temperature, melting glacier, rising sea level, cutting forests which are main causes of environmental issues causing health issues which are hazardous to human life come under protection of life fundamental right protected under article 9 of the Constitution of Pakistan 1973 which must be fully protected by the Government of Pakistan. There is no separate article in the Constitution of Pakistan 1973 dealing with protection of environment and giving fundamental right to citizens of Pakistan thus there is a need to add a separate article in the chapter of fundamental rights under the Constitution of Pakistan 1973 for protection and preservation of environment.

Urbanization and Industrialization though boost economy, but it is disadvantageous to environment. Industrialization degrades environment with untreated industrial wastes being discharged into the environment. It is therefore suggested that the Government of Pakistan should take some steps for proper maintenance of industrial wastes and for that purpose laws and rules dealing with industry must be updated to protect the environment. Pakistan Environmental Protection Ordinance passed in 1983, later on Pakistan Environmental Protection Act passed in 1997 and under 18th Amendment powers on environmental legislation transferred from federal legislature to provincial legislature but ambiguity on enforcement of Multilateral Environmental Agreements (MEA's) still need to be resolved amicably for smooth implementation of environmental rules and regulations throughout Pakistan.

SDG No.13 deals with environmental protection. Pakistan is an Islamic Country and Islamic Law emphasizes on protection of forests and animals indirectly encourages environmental protection for better life of human beings in this world and in hereafter. Thus, environmental protection cannot be achieved without full positive participation of the people of Pakistan which is not only duty of citizens of Pakistan under Constitution of Pakistan 1973 but also an obligation as Muslim under verses of the Holy Quran and Traditions of Holy Prophet Muhammadﷺ.

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An Overview of Surrogacy: A Contemporary Legal Discourse from the Perspective of Commodification of the Human Body

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Haleema Sadia**

Abstract

Commercial surrogacy is an even more complex and contentious issue among jurists, economists, and policymakers like other medico-legal issues especially when surrogacy is conducted for wealthy foreigner individuals by local poor women in developing countries. Some researchers strongly condemn the commercialization of surrogacy and amount it to the commodification of women and children. Whereas others defend that payment to surrogates does not commodify her or the child. Some contend that she demeans humanity by renting her womb, on the contrary, some defend that she does not disgrace humanity when she gives the pleasure of a baby to an infertile couple. Legal Position is still not very clear globally. In the U.S, most of the states have permitted it with some conditions whereas English law prohibits it. This article aims at revisiting the current debate about the ethical and legal position of commercial surrogacy.

Keywords: Surrogacy, Commodification, English Law, Renting wombs, Gamete sale.

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1. Introduction

Surrogacy[1] is a complicated and divisive issue with a variety of ethical, scientific, and legal consequences. Commercial surrogacy is an even more complex and contentious issue among jurists, economists, and policymakers like other medico-legal issues especially when surrogacy is conducted for wealthy international individuals by local poor women in developing countries.[2] Surrogates are blessings for infertile couples who can't carry their babies. But volunteers for surrogacy are hard to find and monetary attraction is considered the sought-after solution in this matter. Gametes' availability is also a problem.

Those couples are also facing scarcity that requires gamete donation and living in those countries where gamete sale is impermissible. People travel to those areas where there is no scarcity of gametes due to monetary incentives. Frozen embryos are a challenge from the legal point of view too.[3] Lack of monetary incentives has increased 'medical tourism'. Couples travel to other parts of the world where gametes are easily sold, and commercial surrogacy is not illegal. It has become a very lucrative business where surrogacy experts and professionals do all the labor on the client's behalf to customize according to individual requirements and meet the needs to bring the child into this world. According to the statistics of the

[1]Surrogacy is the "Practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy". The online encyclopedia of Britannica. http://vlib.interchange.at:2078/eb/article-9070470.

[2]Virginie Rozée and others, The Social Paradoxes of Commercial Surrogacy in Developing Countries: India before the New Law of 2018, *BMC Women's Health* (2020): https://doi.org/10.1186/s12905-020-01087-2.

[3] Elizabeth Cason Crosby Cheely, Embryo Adoption and the Law, *The Ethics of Embryo Adoption and Catholic Tradition.* vol. 95: 275-306.

Permanent Bureau of The Hague, the industry of surrogacy grew by 1000 percent internationally between 2006 and 2010.[4]

Broadly defined, surrogacy is a procedure in which a woman agrees to become pregnant for a couple or another woman for altruistic or financial reasons. She abandons her child at birth and agrees to adopt it to a woman who would become a legal mother.[5] Commercial surrogacy refers to any arrangement in which a woman is paid for services, in addition to reimbursement of medical expenses inheriting a friend's pregnancy. There are two forms of surrogacy: traditional surrogacy and gestational surrogacy. The surrogate's egg and body both are used in traditional surrogacy. Whereas embryos made through IVF with eggs from the intended mother or a donor are transferred in gestational surrogacy.[6] In vitro Fertilization (IVF) has significantly contributed to making surrogacy very popular.[7]

2. Debate, Arguments, and Issues

Commercial surrogacy has been in deep waters since the beginning. There are multiple issues related to this issue. One of the issues is regarding the right of the child to know their ancestral details. It is contended that commercial surrogacy infringes on the right of the child to know his hereditary history and biological parentage. Furthermore, it is also questioned if commercial surrogacy commodifies children or if it is similar

[4]PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Preliminary Doc. No. 10, March 2012, at 6, [hereinafter Hague Conference Document 2012] available at < https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3- 61074e9b17fe.pdf>.

[5]Maria Aluas, "Ethical Issues Raised by Multiparents" in *Clinical Ethics at the Crossroads of Genetic and Reproductive Technologies* eds. Sorin Hostiuc (Cambridge: Academic Press, 2018): 81-97.

[6]Tetsuya Ishii, Encyclopedia of Reproduction, Second Edition, 6th vol. S.V "Surrogacy".

[7]Ibid.

to child trafficking. The welfare of the surrogate is another issue. Valid criticism is that commercial surrogacy exploits vulnerable women who are from underprivileged backgrounds. Women's bodies, especially wombs are commoditized and rented. It is a very expensive procedure that benefits the rich only. The average base cost starts from $65,000.00 - $75,000.00 in California alone while a bonus is paid at the signing of the agreement, additional monthly allowance, non-accountable allowances, cesarean section, insurance premium and lost wages if the surrogate for employed and she was advised best rest are exclusive of this base cost.[8] It indicates that commercial surrogacy is sought by those parties who have strong socio-economic conditions. Such an imbalance in power structure amongst the contracting power poses the danger of manipulation by parents, medical personnel and brokers of surrogacy.

However, given the continued popularity of commercial surrogacy in the United States and overseas, it is critical to educate advocates and other interested parties about the ethical, moral, and legal arguments surrounding this practice. Commercial surrogacy is a contentious issue too among scholars and researchers like other medico-legal issues. Researchers are divided into groups in this matter that is supporters and opponents. The arguments of each group are recapitulated in the following lines. Opponents are mentioned earlier.

2.1 Arguments of Opponents

Researchers writing against 'commercial surrogacy' employed various arguments for rationalizing their stance. The soundest among them is the

[8]West Coast Surrogacy, West Coast Surrogacy Costs and Fees, WEST COAST SURROGACY, INC., https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mothercost#targetText=Every%20surrogacy%20case%20is%20unique,depending%20on%20the%20individual %20arrangements (last visited May 10, 2022).

commodification argument. Moreover, other arguments like 'exploitation' and 'neediness of orphans' are often echoed by the critics of commercial surrogacy.

A. Commodification

The Kantian argument of respect for the person is furnished. According to this notion, it is abhorrent to behave toward and treat people as objects of commerce. According to Kantian philosophy, the sale of the human being is not acceptable for the reason that it treats humans as objects instead of persons and thus as means rather than ends. Humans are sold and bought and treated as inferior to those who buy and sell them. An extra wedge will be created between babies and adults if babies are allowed to be bought and sold and there will be inequality between men and women if women are permitted to be sold and rented[9]

This commodification is twofold in nature. Firstly, surrogates are used as tools or machines to manufacture their desired product. Payments to bear a child amount to treating the human body as an object of commerce. In the words of Anderson: "Contrary to popular belief, pregnancy contracts turn women's biological work into a commodity."[10] Their bodies are reduced to a machine. It is like selling their bodies. As Sara Ketchum noted: "Making a person or their body a commodity is the same as treating them as belonging to another person's domain, especially if the selling of A to B grants B rights over the person or their body."[11]

[9]Sara Ann Ketchum, "Selling Babies and Selling Bodies", *Hypatia,* vol. 4. no. 3 (Autumn 1989): 116-127.

[10]Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales," *Health Care Analysis,* no. 8: 19-26.

[11]Sara Ann Ketchum, "Selling Babies and Selling Bodies", 116-27.

Secondly, these contracts of commercial surrogate motherhood treat babies as the object of commerce.[12] Money that transfers hands in such contracts constitutes the buying and selling of the baby. Advocates of a ban on commercial surrogacy consider that baby-selling amounts to selling a human being. Elizabeth S. Anderson says: "commercial surrogacy agreements consider the child's parental rights not as fiduciary rights assigned in the best interest of the child, but as similar property rights assigned at the parent's will, thus making the child inappropriate."[13] The sale of a human being devalues humanity. In the words of Ketchum: "The simplest argument for banning the sale of babies is that the sale of humans should be banned because it is the sale of humans and degrades human life and the value of the individual."[14]

B. Exploitation

The exploitation argument states that if commercial surrogacy is permitted then poor women will feel forced to enter into such contracts when they desire not to do so. This child will be a burden to her instead of nurturing a 'soul' in her belly. Baby will be deprived of love, care and intimacy from the very beginning. She will produce babies even when she can't afford it physically. She will produce more and more babies to meet both ends. Heidi writes in this regard: "The third argument to child-bearing contracts claims that giving impoverished women the chance to be compensated for their labour will lead to gender exploitation. They might feel pressured into making these agreements even though they would prefer not to."[15]

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[12]Heidi Malm, "Paid Surrogacy: Arguments and Responses*", Public Affairs Quarterly*, vol. 3, no.2 (April, 1989): 57-66, www.Jstor.org/stable/40435711 (accessed January 1, 2011).

[13]Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales," 19-26.

[14] Sara Ann Ketchum, "Selling Babies and Selling Bodies", 116-127.

[15]Heidi Malm, "Paid Surrogacy: Arguments and Responses*",* 57-66.

C. Neediness of Orphans

Orphans will find no home if commercial surrogacy is permitted.[16] Money will induce females to enter the contract of surrogacy. Consequently, it will become so easy for infertile couples to have a child if they cannot get it naturally. And no one will turn to orphans. Consequently, it will turn the fate of orphans' evils as they will not have any chance of adoption by families. In the words of Ketchum, "children are residing in institutions in third world states about whom it is hard to believe they would not be better off being adopted by an American couple. It is fair conceivable that they would be more likely to be received on the off chance that contracted parenthood were less accessible."[17]

2.2 Supporter's Arguments

This group has posed counterarguments to the stances of the former group. Hence, in their view the opponents have misconceived the notion on numerous grounds.

A. Payment is not for Child.

Firstly, payment is made not for the child. It is given for the surrogate's services, efforts and risks for bearing a child. She is paid for the loss of earnings due to pregnancy, for the pain she bears, and for the exertion she may make to restore her body to its original position that was before pregnancy. According to Heidi Malm, when a woman is paid against surrogacy, she is being paid for the risks she bears by nurturing the child in her womb and delivering, not drinking coffee or alcohol during pregnancy,

[16] Ibid.
[17] Sara Ann Ketchum, "Selling Babies and Selling Bodies", 116-127.

loss of earnings from other sources, and making her body return to her original condition.[18]

Secondly, reimbursements are not made to the mother for her transferring the right of custody of the child but for giving up that right. Hence it does not amount to a sale in the legal sense. This argument is rejected by the first group on the ground that it does commodify children even if it does not constitute a 'legal sale' in the strict sense. Anderson is of the view that commodification is not a legal concept; instead, it is an ethical and cultural concept. If this transaction does not amount to a sale, even then it may still commodify children where it has replaced the parental norms about custody and rights of the child with market norms. She argues that payment for surrogacy turns the control of parents over the child as a trust into alienable property rights.[19]

B. Commercial Surrogacy does not Commodify Women

According to this group commercial surrogacy does not disrespect or disgrace women as claimed by McLachlan and Swales in their article.

> There's nothing intrinsically off-base with treating a lady as an egg-laying machine for a child but doing so does not avoid treating her with regard. In like manner, in case a given mother is taken care of insolently by the other parties to a pregnancy contract, the issue lies with the particular people

[18]Heidi Malm, "Paid Surrogacy: Arguments and Responses", 57-66,

[19]Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales", 19-26.

> treating her that way instead of with the surrogacy courses of action themselves.[20]

Supporters of commercial surrogacy reply to the argument of women being commodified by commercial surrogacy in another way as well. 'Contracts' show independence and particular perception of parties according to them. Thus, when pregnancy contracts are voluntarily made them, it does not violate the dignity, honor, and respect of human beings. The first group is not convinced by this explanation and refutes the stance on the ground that some rights are so vital for the dignity of 'Humans' that they can't be given up or alienated even if a person consents to transfer them. They are not transferable. The rebuttal is articulated in the following expression:

> The mistake in this contention is its disappointment to recognize that a few rights in one's *individuality* are so basic to respect and independence that they must be held basic. Usually not a paternalistic claim. The claim isn't that people must be ensured from their awful judgment. The claim is or maybe that there are a few ways of treating ethically questionable individuals, indeed in the event that they assent to be treated those ways.[21]

C. No Exploitation of Poor

Surrogacy creates no exploitation of the poor. If commercial surrogacy is utilized by poor ladies for escaping their poverty, then there is no wrong with it. It will bring no good if we completely ban it on the ground that some

[20]Hugh V McLachlan and others, "Babies, Child Bearers and Commodification", *Health Care Analysis*, no. 1: 11-29.

[21]Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: reply to McLachlan and Swales", *Health Care Analysis*, no. 8: 19-26.

poor ladies will employ it for the want of money and use it as a means to evade their poverty.

D. Orphans Rights cannot Bar others from having Children.

It is not the logical ground of banning surrogacy that the orphans in orphanages will lose the chance of having a home. Having too many orphans does not mean that a couple should be refused to have the opportunity to have a child who will be genetically related to them. Heidi writes in this regard:

> If finding homes for difficult-to-place children serves as a justification for forbidding an infertile couple from having and raising a child genetically related to at least one of them, it also serves as a justification and just as a compelling justification for forbidding a fertile couple from having and raising a child genetically related to at least one of them. But few of us would support, much less accept, a government that could honestly tell a fertile couple, I'm sorry, we can't let you have and raise a child who is genetically related to at least one of you because there are too many other children who need homes.[22]

3. Gametes: property or not?

Researchers are divided on the issue of whether the law should treat gametes[23] as property or not like they are on the question of the sale of body

[22]Heidi Malm, "Paid Surrogacy: Arguments and Responses*", Public Affairs Quarterly*, vol. 3, no.2 (April. 1989): 57-66.

[23]"Gamete is sex, or reproductive, cell containing only one set of dissimilar chromosomes, or half of the genetic material necessary to form a complete organism (i.e., haploid). During fertilization, male and female gametes fuse, producing a diploid (i.e.,

parts. Some of the researchers claim that the best explanation of the status of the gametes is considering it as a 'property'[24] whereas others deny on the ground that it leads to the commercialization and commodification of gametes and thereby of persons.

Supporters of the property regime claim that the concept of 'property' is misunderstood by people as absolute dominion over things whereas it should be realized as a series of relationships generating, and generated by claims or rights about objects. Kath O Donnell, a researcher at the law school of the university of Hull propounded in this regard that property is misunderstood most of the time that it has the commodification argument engraved in it and it has not to be unlimited and absolute whereas liberal analysis of property represents autonomy, identity, personhood, and rights to control reproductive material.[25]

This group quotes the long tradition of the relationship of property and self that urges that property enhances essential elements in the development and flourishing of identity or personhood and autonomy. Radin's notion of personal property is reiterated here, who defines it as claims which are so intimately bound up with the person that they are

containing paired chromosomes) zygote." Online Encyclopedia of Britannica. http://vlib.interchange.at:2078/eb/article-9070470.

[24]There is a minority group in this matter as well who supports incomplete commodification. One of its supporters Suzzane Holland writes in her article: incomplete commodification affords us a more accurate reflection of the realities of our human transactions: we value both market efficiency and the fullness of our personhood. In other words, incomplete commodification provides a way of regulating the market and evaluating what reach the market ought to have for a particular entity, in this case non-organ body parts. Furthermore, it allows us to arrive at a mean between the two extremes of complete commodification and complete non-commodification." See Suzanne Holland, "Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues," *Kennedy Institute of Ethics Journal* 11, no. 3 (Sep. 2001): 263-284.

[25]Kath O Donnell, "Legal Conceptions: Regulating Gametes and Gamete Donation", *Health Care Analysis*, no. 2 (2000): 137-54.

constitutive of human freedom, individuality, and personality?[26] From these notions, Donnell concludes: "Once body parts such as gametes, with their particular uniqueness and significance, become severable objects in reality and enter the external world, theories of property for personhood provide a justificatory basis for acknowledging and protecting the individual's continued interest in them".[27]

Regarding the commodification argument, this group replies that gamete donation and assisted reproductive technology are already commercialized and commodified. This is an inevitable truth. It has become a very profitable business for clinics. Only donors are not earning from it. Deprivation of donors from making money isn't preventing gametes from being commercialized and commodified. In the words of Kath O Donnell: "commodification is presented as an inveterate evil, but there is a failure to acknowledge that gamete donation and assisted reproductive technology is the locus of enormous commercial interests and enterprise but not for the originators of the genetic material. Donors are not making money".[28]

4. Laws Related to Commercial Surrogacy and Gametes Sale

4.1 United States of America

There is no uniform code for commercial surrogacy in the United States.[29] Every state has its way of dealing with commercial surrogacy. Rather, commercial surrogacy seems more like a patchwork of competing opinions in different states. The legislation trend is of varying degrees from

[26]Margraet Jane Radin, "Property and Personhood", http://cyber.law.harvard.edu/IPCoop/82radi.html (accessed January 2011).

[27]Kath, Legal Conceptions, 137-54.

[28] Ibid.

[29]Christina Caron, "Surrogacy Is Complicated", *New York Times*, April 18, 2020, https://www.nytimes.com/2020/04/18/parenting/pregnancy/surrogacy-laws-new-york.html(accessed May 10, 2022).

prohibition to permission. This makes the situation even more complex legally and ethically. Despite this, it's a thriving business and a multibillion industry in the US. Three states Nebraska, Michigan, and Louisiana have prohibited commercial surrogacy.[30] Two have made the contracts of commercial surrogacy unenforceable. Ten states have allowed this kind of surrogacy whereas thirty states have forbidden it but with caveats. In five states, commercial surrogacy is practiced with many legal hurdles and the outcomes of such surrogacy are also inconsistent legally. Moreover, these states allow certain stipulations that the couple that needs a child through surrogacy must be married and heterosexual. So much so, that it is also required in some states that they will allow a surrogate to keep the baby at some point in time.[31] California is considered to be the most surrogacy-friendly state in the U.S. and has become a top destination for medical tourism. California is one of the states that permits surrogacy and regulates the contracts of surrogacy as well. Even before the birth of the child, the court assigns the legal parentage status to the intended parents. This parentage takes full legal effect when the child is born. Furthermore, California does not have any specific requirements for who can become a surrogate or where the residence should be. The State of Virginia is one of the states that permits surrogacy but mandates a lot of pre-requisites. For instance, the intended parents must meet the same criteria that adoptive parents require to fulfill. Moreover, the surrogate will not receive any money for her services and there will be a requirement of residency too. As mentioned earlier, some of the states are in vague situations. They neither

[30] https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (accessed May 10, 2022).

[31] Robert Klitzman, "Paying gestational carriers should be legal in all states", Stat, Feb 12, 2020, https://www.statnews.com/2020/02/12/paying-gestational-carriers-should-be-legal-in-all-states/ (accessed May 10, 2022).

regulate it through statute nor address it through any case law. Practices in such states are very different from each other.

4.2 United Kingdom

In the United Kingdom, gamete donation is dealt with by the Human Fertilization and Embryology Authority.[32] It was created by the Human Fertilization and Embryology Act of 1990. It can license the clinics to use the technique and decide the rules for the compensation of gametes donors. According to the Human Fertilization and Embryology Act of 1990 (as amended), it is illegal to trade in sperm and eggs. Section 12(1) of the said Act states that: "No money or other benefit shall be given or received in respect of any supply of gametes, embryos or human mixed embryos unless authorized by directions".[33]

It is an offense in the U.K to give or receive money for the supply of gametes as noted by section 41(8-9) of this Act:

> Where a person to whom a license applies or the holder of the license gives or receives any money or other benefit, not authorized by Directions, in respect of any supply of gametes, embryos or human admixed embryos, he is guilty of an offense. A person guilty of an offense under subsection (8) above is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level five on the standard scale or both.[34]

[32]http://www.hfea.gov.uk.
[33]Section 12 (1), Human Fertilization and Embryology Act, 1990.
[34]Section 41, Payment to donors, Human Fertilization and Embryology Act, 1990.

However, donors can claim reasonable expenses for loss of earnings and travel according to the HFEA guidance:

> Donors may be reimbursed all reasonable expenses incurred in the UK in connection with donating gametes or embryos (for example a standard-class rail ticket by the most direct route), but not excessive expenses if these would be benefits in themselves. Expenses claimed by donors should be directly linked to the process of donation (for example, the cost of travel to the center, or the cost of childcare during donation when the donor would normally be caring for the child). They should not be expenses which the donor would have incurred irrespective of their donation.[35]

Thus, the law disallows the reimbursement of donors but allows them to be compensated for expenses and the inconvenience of donation. It is the HFEA to decide as to how much compensation would be adequate for loss of earnings, expenses, and inconvenience of donation within these legal limits. HFEA last reassessed its rules on donation in 2005. According to the current policy of HFEA, donors are not allowed to sell their gametes, they can only claim reasonable expenses, for example travel costs, and loss of earnings up to £61.28 for each full day (as for jury service), with a limit of £250 for each course of sperm or egg donation.[36]

Apart from this kind of compensation, another option of "egg sharing" is also available in the U.K. Egg sharing is an arrangement where

[35] 13.1 and 13.2 of HFEA Guidance, http://www.hfea.gov.uk.
[36] http://www.hfea.gov.uk/6177.html.

a woman who wants to undergo ART can have it done at a discounted fee or free by donating eggs to another woman.[37]

One very important question which is ambiguous and unsettled in Law is regarding the autonomy and control of gametes. Neither UK law nor U.S Law is clear in this matter. They have not provided any framework for the solution of the disputes that arise regarding gametes controls.

4.3 Pakistan

There is no legislation in Pakistan regarding commercial surrogacy or surrogacy in general. However, it is being practiced undercover in Pakistan. One such case reached the higher judiciary and was decided by the name of Farooq Siddiqui case. It was an important case that shook the judiciary to its core. Farooq Siddiqi who himself was a surrogacy doctor hired a woman to act as a surrogate for him. As it was being practiced in Pakistan, he entered into a fake *nikah* arrangement with that woman. Through in-vitro fertilization, the surrogate gave birth to a baby girl but she refused to hand it over to the couple. The matter went to the court that decided not only on commercial grounds but also discussed altruistic surrogacy from the aspect of Islamic law. It declared that surrogacy is un-Islamic and hence prohibited. Commercial surrogacy was of course banned too. Eventually, the Court refused the custody of the minor to Dr. Farooq but gave him the right to visitation. It was further taken to the Federal Shariat Court which upheld the decision of the Trial Court and cited the dire need for legislation.[38]

[37]Aaron D. Levine, The Oversight and Practice of Oocyte Donation in the United States, United Kingdom and Canada, www.springeronline.com (accessed January 2011).

[38]Farooq Siddqi v. Mst. Farzana Naheed, PLD 2017 FSC 78.

5. Conclusion

In U.K Law, voluntary surrogacy is permissible though unenforceable. She may be entitled to reasonable expenses, but commercial surrogacy is impermissible. Some researchers strongly condemn the commercialization of surrogacy and amount it to the commodification of women and children. Whereas others defend that payment to surrogates does not commodify her or the child. Some contend that she demeans humanity by renting her womb, on the contrary, some defend that she does not disgrace humanity when she gives the pleasure of a baby to an infertile couple. U.K Law is very unequivocal in this regard that only reasonable expenses may be reimbursed to the donors for their expenses, inconvenience, and loss of earnings but no amount above that can be paid. Besides that, egg sharing is also an offer in recognition of altruistic action. The researcher's viewpoint is divided in this regard as well. Some view gametes as property and some do not. However, the U.K. government is facing strong pressure to review this policy. Many newspaper articles can be seen that call for increased payment for gametes donations. There are two reasons for this situation. Firstly, there is a shortage of gametes and couples face difficulty in seeking gametes from donors. On the other hand, there is no uniform federal law for the entire U.S. Rather, the legislative trends are varied throughout the country. There is an active debate about its ethical standing, but the booming business is molding the trend in its favor.

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The Legislative Evolution of Insider Trading Law in Pakistan

Sidra Zulfiqar*

Abstract

Inside information abuse has caused enormous damage to the Pakistani financial market. To curb and curtail different legal instruments have been promulgated. This research aims to provide an overview of the legislative evolution of insider trading laws. It analyzes different enactments and their distinct features. The prime issues for inquiry include, how the insider trading law has evolved in Pakistan? How different enactments contributed to the present legal framework? The main focused laws are SEO 1969 and Securities act 2015 as both these directly dealt with the insider dealing prohibition and sanctions. The qualitative research methodology is adopted for subject study. The main objective of this investigation is to explore the varying approaches and tools utilized by the state to curb market manipulation by inside information abuse. SEO 1969 was enacted in the backdrop of several stock market crashes to control the inside information abuse. While the Securities Act was enacted to streamline the legal regime and bring a restructured code to control market manipulation. The research concludes, both subject legislations lack the international standards and end up being toothless legislative devices to curtail the menace.

Keywords: Insider Trading, SEO 1969, Securities Act 2015, SECP, Information Abuse.

1. Introduction

Controversy and humiliation have always been associated with insider trading and in several incidents, it has damaged the reputations in the

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corporate world. Incidents relating to inside information abuse have always made great stir in electronic and print media.[1] It triggers detriment, as inside information abuse benefits an already fortunate minority partial gain or upper hand as compared to common shareholders in greater numbers. This minority is already privileged to have access to this information which the majority does not have. The use of this privileged information to avoid loss or earn benefit is legally and morally unacceptable.[2]

The most common violation of law in capital markets is inside information abuse. It is one of the most popular doctrines of the corporate regime, among lawyers and economic experts equally. As Bainbridge maintains that inside information abuse tops the list of crime thriller plots, inspired by different legal regimes.[3] For an efficient market to have a good reputation and smooth working, it is compulsory to prevent inside trading altogether. In Pakistan, the growing complexity in the economy led to a situation of inadequacy of the laws regulating insider trading. The financial market in Pakistan needs to eradicate market manipulation of any kind to survive in the global scenario. This study has focused on the legislative measures to deal with inside information abuse. It is a brief case study on the matter and the inadequacies in the existing laws. In the end the most recent legal developments have been discussed.

The exploration of existing literature on insider information abuse particularly in Pakistan reveals that a comprehensive study to observe the

[1] Insider Trading and other Market Abuses (Including the Effective Management of Price Sensitive Information) E-booklet available at https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/Insider%20Trading%20Booklet.pdf

[2] Ibid.

[3] Stephen M. Bainbridge, An Overview of Insider Trading Law and Policy: An Introduction to the Insider Trading Research Handbook, (Edward Elgar Publishing Ltd, 2013), Electronic copy available at: http://ssrn.com/abstract=2141457 (Last Accessed January, 2016).

legislative trends is required. *The Law of Insider Trading in Pakistan*[4] by Samia Maqbool Niazi is a book which deals with the issue in depth. This book deals with the scope of insider trading, the debate of regulating and deregulating, and the law of insider trading in different jurisdictions like the USA, UK, and India in detail. The famous debate on regulation and deregulation has been dealt with sophistication and briefly. The most significant feature of this book is the manner, in which a comparative analysis of different jurisdictions has been presented. This study revealed several technical inconsistencies such as chapter II of guidelines prohibit the associated person from insider trading but not the insider.[5] But this book analyzed the insider trading laws prevailing under SEO 1969 while with the latest developments in anti-insider information abuse legislation (Securities Act, 2015) there is wide scope for feasibility of another in depth study to analyze the present-day legal instruments.

An empirical analysis conducted by Nuno Fernandes and Miguel exhibits an obvious pattern of price fluctuation in the securities market due to market manipulation and insider trading. Though this research by Nuno Fernandes and Miguel in "Insider Trading Laws and Stock Price Informativeness"[6] is technically more from an economic background but it does provide a good understanding of insider information trading laws' impact on stock market. These authors investigated the impact of Insider information laws on the stock market of 48 countries when these laws were enacted for the first time. This study dealt with developed and emerging

[4]Samia Maqbool Niazi, *The Law of Insider Trading in Pakistan* (Federal Law House,2007), 56.

[5] Listed Companies Guidelines (Prohibition of Insider Trading) issued at Islamabad on 27th March 2000. Available http://www.secp.gov.pk/Guides/Guide_Listing_Companies_Initial_Public_Offerings.pdf.

[6]Nuno Fernandes, Miguel A. Ferreira, Insider Trading Laws and Stock Price Informativeness, *The Review of Financial Studies* 22, no. 5, (2009), 1845-1887, https://doi.org/10.1093/rfs/hhn066.

markets separately. This adds another significant aspect which can be helpful to understand the impact of insider information laws on Karachi Stock exchange. Insider trading laws first emerged in the USA and later adopted by the rest of the world. It is of great importance to study Pakistani laws in context of the doctrines coined in the USA. Another study "Unchecked Intermediaries: Price Manipulation in an Emerging Stock Market" conducted by Khwaja and Mian deals with market manipulation in an emerging Stock market[7] with a special perspective of intermediaries' role in market manipulation deals mainly with economic and financial aspects but indeed provided a fair idea of market manipulation practices in Pakistan specially related to price manipulation. This study concludes that more than 44% of brokers' earnings are from manipulative practices and brokers are directly related to private information trading in the stock market. The available data provides insight on the existing legal structure and sets the parameters to evaluate the framework.

1. Pakistan Insider Information Abuse Legislation

Market manipulation control is the most significant aspect of corporate governance. There are a handful of laws and regulations to deal with corporate governance in Pakistan. Some of the major laws are being mentioned here.

a. Companies Ordinance 2016[8] replaced by Companies Act 2017,[9]

[7]Asim Ijaz Khwaja, Atif Mian, "Unchecked Intermediaries: Price Manipulation in an Emerging Stock Market". *Journal Of Financial Economics* 78, no. 1 (2005): 203-241.

[8]Companies Ordinance, (2016) available at https://www.secp.gov.pk/document/companies-ordinance-2016/?wpdmdl=21214- (Last accessed December 2016).

[9]The Companies Act, (2017) available at https://www.secp.gov.pk/document/the-companies-act-2017-updated-18-aug-2022/?wpdmdl=45422&refresh=63fba594770a11677436308 (Last Accessed February, 2022).

b. Securities and Exchange Ordinance, 1969[10]
c. Income Tax Ordinance 2001[11]
d. Listing Regulations
e. Central Depository Act, 1997[12]
f. Code of Corporate Governance, 2002[13].
g. Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008
h. Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008[14]
i. The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance 2002 (Takeovers Ordinance).
j. Listed Companies (Prohibition of Insiders Trading) Guidelines 2001.

In 2015 and 2016 some new regulations have been included to govern the securities market these are as follows:

k. Reporting and Disclosure (of Shareholding by Directors, Executive Officers and
l. Substantial Shareholders in Listed Companies) Regulations, 2015[15]

[10]Securities and Exchange Ordinance, (1969), available at https://www.secp.gov.pk/document/companies-ordinance-2016/?wpdmdl=21214 . (Last accessed May 2016).

[11]Income Tax Ordinance (2001), available at http://download1.fbr.gov.pk/Docs/20141013131026342l6I.T.Ord,2001(updated)AmendedJune2014.pdf (Last accessed May 2016).

[12]Central Depository Act, (1997), available at http://www.na.gov.pk/uploads/documents/Central-Depositories-Act-1997.pdf. (Last accessed April 2016).

[13]Code of Corporate Governance, (2002), available at https://www.secp.gov.pk/document/code-of-corporate-governance-2012-amended-july-2014/?wpdmdl=1472. (Last accessed April 2016).

[14] Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, (2008), available at https://www.secp.gov.pk/document/listed-companies-substantial-acquisition-of-voting-shares-and-takeovers-regulations-2008/ (Last Accessed April 2016).

[15] Reporting and Disclosure (of Shareholding by Directors, Executive Officers and Substantial Shareholders in Listed Companies) Regulations, (2015), available at https://www.secp.gov.pk/document/reporting-and-Disclosure-of-shareholding-by-

m. Central Depositories (Licensing and Operations) Regulations, 2016[16]

n. Securities Brokers (Licensing and Operations) Regulations 2016[17]

Most of these laws directly or indirectly deal with insider information abuse. After the 2000 Stock Exchange crash, the SECP[18] adopted Chapter III-A[19] along with the Listed Companies guidelines[20] in the SEO 1969. The purpose was to curtail insider information abuse by ensuring a flawless information generation and circulation mechanism, to save investors from any deceptive practices. The need to legislate was acute. The most initial step to control this fraudulent practice in securities market was amendment in Finance Act 1995[21] which subsequently became part of Securities and exchange ordinance (SECO 1969). Both of these acts constitute the foundations of Pakistani legal regime on Inside Information abuse. Along with this ordinance, Listed Companies (Prohibition of Insider Trading) Guidelines 2000[22] were also issued.

The SECO 1969 has some major goals to provide market participants data regarding financial status of issuers, and to prohibit deception, falsifications, and other malpractices in the securities market.

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directors-executive-officers-and-substantial-shareholders-in-listed-companies-regulations-2015/?wpdmdl=713 (last accessed June 2016).

[16] Central Depositories (Licensing and Operations) Regulations, (2016), available at https://www.secp.gov.pk/document/central-depositories-licensing-and-operations-regulations-2016/?wpdmdl=699 (Last accessed July 2016).

[17] Securities Brokers (Licensing and Operations) Regulations (2016), available at https://www.secp.gov.pk/document/securities-brokers-licensing-and-operations-regulations-2016/?wpdmdl=14922. (Last accessed July 2016).

[18] Securities and Exchange Commission of Pakistan.

[19]Securities and Exchange Ordinance, (Ordinance No. XVII of 1969) (28 June 1969 as amended up to 2012) available at http://www.secp.gov.pk/laws/ordinances/.

[20]Listed Companies Guidelines (Prohibition of Insider Trading) (2000).

[21]Finance Act (1995), available at http://www.na.gov.pk/uploads/documents/1329725424_374.pdf.

[22] Listed Companies (Prohibition of Insiders Trading) Guidelines, (2001) available at http://www.secp.gov.pk/document/listed-companies-prohibition-of-insider-trading-guidelines/.

Thus, every direct legislation of Pakistan on insider information abuse or Insider Trading with its amendments can be summarized like this:

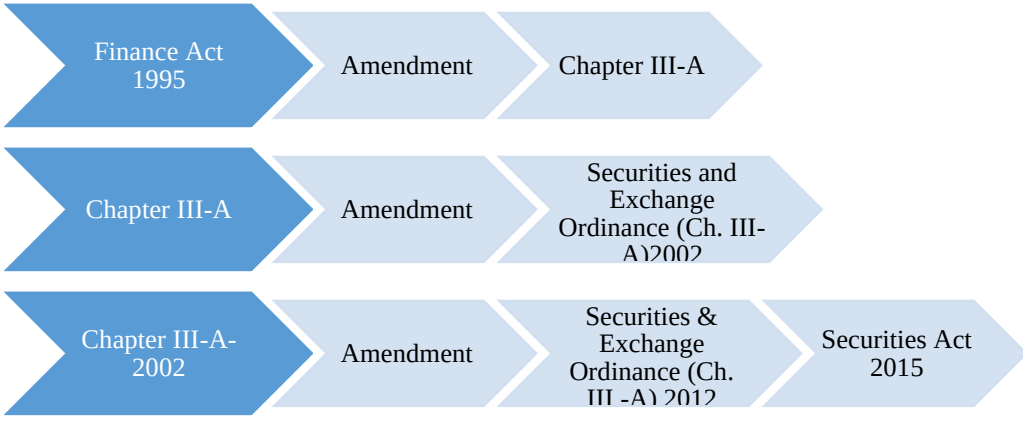

Figure 1 Development of Insider Trading Law in Pakistani Laws.

However, these statutes and guidelines could not serve the purpose effectively. International Monetary Fund published a country report (2004)[23] which maintained that the SECP has initiated the laws dealing with disclosure requirements and inside information abuse. In 2005 a task force[24] was constituted to investigate the causes and factors of the Stock Market crisis. The findings of this report maintain that insider information and deceptive devices are widespread in the securities market. In 2005[25], 2008[26],

[23] International Monetary Fund, IMF Country Report No.04/215 Pakistan: Financial System Stability Assessment, including Reports on the observance of Standards and Codes on the following topics: Monetary and Financial Policy Transparency, Banking Supervision, and Securities Regulation (July 2004).Available at: https://www.imf.org/external/pubs/ft/scr/2004/cr04215.pdf. (Last Accessed January 2016).

[24] SECP, Report of the Taskforce: Review of the Stock Market Situation March 2005, Available at: https://www.secp.gov.pk/document/stock-market-task-force-report-2005/. (Last Accessed January 2016).

[25] Atiya Y. Javed, "Stock Market Reaction to Catastrophic Shock: Evidence from Listed Pakistani Firms, PIDE Working Papers (2007:37) Pakistan Institute of Development Economics, Islamabad.

[26] Stock Market Crash, Press release by SECP available at https://www.secp.gov.pk/wp-content/uploads/2016/05/recommendations-of-study-of-2008-stock-market-crisis.pdf. Last Accessed March 2022.

2009 and 2017[27] and, 2020[28] Karachi Stock Market crashed several times. Meanwhile the watchdog experienced some significant cases of Insider information abuse. This catalyzed the need for new legislation to address this significant issue resulting in Securities Act 2015.

2. The Chronological Order

As insider information has the tendency to directly affect the securities market, legislative measures are being taken around the globe to prevent its illegal use by insiders. In Pakistan the first step towards addressing the issue was amendment in Finance Act 1995 as Chapter III-A was introduced in Securities and Finance Ordinance, 1969.

Along with this ordinance, regulator (SECP) promulgated Listed Companies (Prohibition of Insider Trading) Guidelines 2000. Insider information dissemination prohibition law came into limelight after the Stock Market crashed in 2000 as violation of this law was supposed to be the main cause of this financial crisis. In the backdrop of several stock market crashes SECP started the review of the then existing legal provision to curb market manipulation by inside information abuse; the same was recorded by IMF Report (2004).[29] As stated above after this crisis, Karachi Stock Market crashed in 2008, 2009.[30] All these financial crises and halt in economic growth lit the fire to review the legal provisions in this regard.

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[27] Salman Siddiqui, "Pakistan's Stock Market: From Asia's Best to Asia's Worst", Express *Tribune*, December 19, 2017.

[28]Amir Latif, 'Pakistan Stock Exchange Loses 1,200 Points', *Asia Pacific*, International edition, accessed 2021, https://www.aa.com.tr/en/asia-pacific/pakistan-stock-exchange-loses-1-200-points/1723218.

[29] International Monetary Fund, IMF Country Report No.04/215 Pakistan: Financial System Stability Assessment, including Reports on the observance of Standards and Codes on the following topics: Monetary and Financial Policy Transparency, Banking Supervision, and Securities Regulation (July 2004).

[30] See note 26, 27.

In all these years several cases arose as whistleblowers. Some significant cases include Pakistan Kuwait Investment Company, Jahangir Siddiqui Group (JS Group),[31] Aqeel Karim Dhedhi (AKD) and Dawood Capital Management Company.[32] They were investigated and penalized by the SECP in recent years. These facts and figures compelled an up-gradation in the existing system to cater the issue. In January 2015 a government Bill named Securities Act 2015 was passed by Senate of Pakistan[33] aimed to remove gaps in the previous laws. Securities Act 2015 is one of the most awaited and anticipated legislation, more extensive than its predecessor. It is intended to eliminate inadequacies, lacunas in the 1969 SEO, and to reform the grey areas in the law. It will bring an exhaustive, broad, and ample regulation. Key issues addressed in this law are strict prerequisites of accreditation for all market participants inclusive of the exchanges, the clearing company, the CDC, stock dealers, intermediaries, syndicates, mediators, prevention of Inside Information abuse and deceptive and manipulative techniques.[34]

3. Inadequacy of Legal Provisions SEO 1969

Some major deficiencies in the Securities and Exchange Ordinance, 1969,[35] are lack of duties imposed on securities exchange, no audit of the listing authorities/entities, inadequate authority of powers of regulator for

[31]Press Released by SECP at http://www.secp.gov.pk/news/PDF/News_13/PR2_April24_2013.pdf.

[32] Before the Executive Director (Securities Market Division) in the matter of Show Cause Notice No. SCD-SD (Enf)/khi/dcml/2013/061 dated March22, 2013 issued to M/S Dawood Capital, pdf available at http://www.secp.gov.pk/orders/pdf/Orders_2013/19_Order_SCN-DCML.pdf (Last Accessed May 6th, 2015.)

[33] Act Available at http://www.senate.gov.pk/en/index.php (Last accessed May 6th, 2015).

[34] Ibid.

[35] Securities and Exchange Ordinance, 1969 (Ordinance No. XVII of 1969) (28 June 1969 as amended up to 2012) available at http://www.secp.gov.pk/laws/ordinances.

stakeholder in investment sector, rules regarding clearing houses, admissibility requirements and duties of clearing house, central depository, a deficient arrangement for investor complaints, inadequate rules and regulations for the regulating authority.

Major deficiencies in Securities and Exchange Ordinance, 1969[36] revealed that there are insufficient provisions regarding eligibility criteria of stock exchanges, financial reporting, inquiries, scrutiny, and rules for judicial inquiry, information abuse and entities functional without license[37]. The continuous rise of stock market crisis and crashes give rise to questions about the efficiency of the regulator and concerned laws and regulations as well. Inside information abuse law has several shortcomings. Stockbrokers are indulged in fraudulent sales and in inside dealings as well. A number of incidents brought the issue of insider trading into limelight.

4.1 Civil Liability for Insider Trading

In SEO 1969 only civil liabilities have been imposed on the offender. Section 15 E defines the liabilities for contravention from Section 15 which prohibits insider trading. The section[38] is being reproduced here.

> 15E. *Liability for contravention.* — (1) anyone who infringes 15A (1) shall be liable to fine. This fine may range from 10 million rupees to increasing the magnitude of the profit three times or made loss evaded by said person, or the magnitude of loss incurred by the victim, the amount higher will be imposed on the offender or loss suffered by another person,

[36] Ibid.
[37] Ibid.
[38] Section 15 E, Securities and Exchange Ordinance, 1969 (Ordinance No. XVII of 1969) (28 June 1969 as amended up to 2012), S15. http://www.secp.gov.pk/laws/ordinances.

whichever amount is higher.

(2) Additionally with the fine 15 A (1), the said person, –

a. may be directed by the Regulator,
   (i) to submit to the regulator, equal amount of money to the profit or loss by the said person.
   (ii) to pay the victim or sufferer, the damage beard by that person. and
b. may, if the contravening person is among the executives in management, finance, audit, consultancy of a listed issuer, be dismissed by an order of regulator and embargo of 3 years from auditing any public company will be imposed.
c. may, if said person in an intermediary registered in the securities exchange, his license will be concealed.

(3) if an insider reveals Inside Information to any one not mandated to possess this information, the insider shall be predisposed to fine, levied by the regulator, extending to thirty million rupees.

(4) The Regulator may, through announcement in official Gazette, formulate e regulations for persons who generate or circulate research regarding listed securities or issuers of these securities and persons who control the flow of information endorsing or proposing investment strategy, intended for distribution channels or for the general public.[39]

This section contains civil liabilities for contravention from the law, which include a fine ranging from ten to thirty million rupees, to pay any amount gained through inside dealing or any evaded harm and expulsion from

[39]Ibid.

office. No criminal liabilities have been provided in this ordinance.[40] Insider trading is known as white collar crime worldwide and mostly criminal penalties are included with civil liabilities. Absence of criminal penalties for insider trading is an anomaly.[41] For all persons indulging in Inside Information abuse not only civil rather criminal sanctions must be provided.

4.2 Market Manipulation and Inside Dealing in SEO 1969

In most of the legal regimes market manipulation and insider trading has been linked together. Inside dealing is considered a kind of market manipulation or at least both these fall under market abuse which are linked together. In SEO 1969, Section 15 of Chapter III-A deals with insider trading and section 17 and 18 of chapter IV deals with other market manipulation practices. Like the rest of the world, both relevant provisions must be linked which will enhance the mechanism of their implementation. Moreover, this issue existed in the SEO 1969 amendment in 2002 as well.[42] Now is the time to bring the law in harmony with the rest of the insider trading regimes. This would not become a mere tool to harmonize the national law with the rest of the world, but it will enhance efficiency and understanding. From financial and economic perspective both market manipulation and insider trading are inter linked thus a linkage from legal point of view will bring more coherence in law.

4.3 Liabilities of Intermediaries in SEO 1969

Intermediaries play a vital role in the securities market. With respect to insider trading the most important issue is their indulgence in the deals potentially backed by inside information abuse. The perks of indulging in

[40] Ibid.
[41] Niazi, *The Law of Insider Trading in Pakistan*, 79.
[42] Ibid.,77.

these transactions include associated commission, receipt of good name in the market and addition in clientage. To curtail these practices some regulators have imposed prohibitions on intermediaries to avoid any transaction which seems to include inside information abuse and proper sanctions are imposed in case of violation of these rules.

Danish legislation sets a decent example by maintaining a fair ground for legitimate trade and prohibiting any aiding or abetting the insider trading,[43] it imposes a duty on securities dealers that if the person desirous of any transaction knows or is assumed to know inside information no transaction be carried out. Along with it the securities dealer has been obliged to[44] inform the concerned authority regarding any trading activity which amounts to inside information abuse.

All these factors highlighted the need of a new legal regime to address these issues effectively. Resultantly, the Pakistani legislature passed a new securities law in 2015.[45] Main concern here is "Insider information Abuse" prohibition. This new legislation of prohibition of insider information abuse is not exhaustive. Some of the major flaws and inadequacies are being discussed here.

4.4 Recent Legal Developments

Chapter III-A of Securities ordinance 1969 dealt with Inside Information abuse in the securities market. As cited previously, along with this law SECP issued guidelines for listed companies. But both these enactments did

[43] IOSCO report on Insider Trading legislation" Insider Trading how Jurisdiction regulate it" by International Organization Of Securities Commissions available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf (Last accessed February, 2016).

[44]Securities Trading, etc. Act (2008), sec. 3 (6) of Denmark available at https://www.finanstilsynet.dk/upload/finanstilsynet/mediafiles/newdoc/acts/cact214_020408_new.pdf

[45] Securities Act, (2015) available at http://www.secp.gov.pk/laws/acts/

not serve the purpose. There were several contradictions between the sections of SEO 1969 and the SECP guidelines. Some of which include person associated and person connected inconsistency and insider himself not prohibited from insider dealing. With the passage of time, it was realized that a more efficient, comprehensive, and exhaustive legislation is needed to overcome the inadequacies of existing law. In this scenario the first milestone was 2012 amendments which addressed some of the essential issues. Like any other law it was not perfect so in 2015 national assembly passed the most awaited and anticipated Securities Bill 2015. This is certainly an extensive piece of legislation.

This law deals with several matters about listed securities activities, procedures for issuers, accounting, and assessment; market mediators, prerequisites, accreditation, registration and licenses, authority, and jurisdiction of the commission to issue guidelines, conduct, control and inspect, code of conduct,[46] professional comportment procedures, issuance of contract note, and financial autonomy. This Act has dealt with important issues like subscription offer, take-overs, inside information abuse, disclosure in prospectus and required material, impartiality of expert-statement, criminal and civil sanction and liabilities, disclosure by public companies, market manipulation and legislative authority assigned to the regulator.[47]

Moreover, the legislation deals with malpractices in market, contravention of law, supervision and investigation, intercession powers of commission, whitewash, painting the tape/ runs, artificial heavy trading, improper matched orders: advancing the bid, pumping, and dumping, liability in case of damages, authority to check any information,

[46] Ibid., Part VI.
[47] Ibid., Part X.

examination, assessment, investigation substantive and procedural authority in this regard. This act targets to eliminate the grey areas and lacunas in the 1969 SEO. The new enactment intends to restructure the existing framework and rectify the anomalies in the law. A comprehensive, inclusive, and broad regulation is intended which will address several significant issues by providing provisions for proposing prerequisites of accreditation of market intermediaries including the stock exchanges,[48] the clearing company,[49] the CDC, stockbrokers, agents of stockbrokers, underwriters, balloters, transfer agents etc.

It aims to provide fundamentals and preconditions for all entities credited under this law, rules of business and a strict compliance standard for perpetual financial markets. In a briefing to print and electronic media the SECP Chairman claimed that this new Act will provide a much operative and implementation-oriented regime. It will delegate an increased authority for severe punitive action against any contravention of law, comprising a variety of penalties. The new law also has thorough provisions[50] regarding roles and liability of stock exchanges, CDC, clearing houses, any inside information abuse, market manipulation remedies and penalties, legislative authority to prevent money laundering, regulating business of brokers, securities advisors and analysts and their conduct as well.

4. The Securities Act 2015

The Securities Act 2015 was promulgated at once after being passed from the parliament Except for Part V “Regulated Securities Activities” to be implemented whenever a date was announced by the parliament. A critical

[48] Securities Act (2015), Part II, available at http://www.secp.gov.pk/laws/acts/.
[49] Ibid, part IV.
[50] Ibid.

analysis brings forth the shortcomings as no extension in existing provisions concerning prohibition of insider information disseminating or divulging prevails. If this act is compared with prevailing laws around the globe, it becomes evident that several basic and vital elements are missing. Civil as well as criminal liabilities are imposed[51] on insiders involved in trading private information in most of the jurisdictions, but the imposition of penalties to create deterrence have not been adopted in the mentioned recent legislation.

5.1 A Legitimate Disclosure of information

Legitimate disclosure of information is a necessary evil. Although this can complicate the efforts to curb and curtail the practices of insider information abuse. Section 131 deals with legitimate disclosure of information. Though no specific persons are mentioned, this section directs to the professionals who receive sensitive information in the ordinary business practices. A positive thing to note here is that the law backs any disclosure of information to specific persons, by a mandatory public disclosure of information. There are some exceptions required by the business and market practices worldwide. Same exceptions are provided in this section as well.

Moreover, Section 131(2) and 131(3) impose a duty on listed companies to provide a complete list of persons who have connection to the flow of privileged information to the commission. This data shall be updated regularly. This list is supposed to mention that the persons in the list hereby acknowledge the fact that they are prohibited from using any inside information for personal gains or advising or tipping anyone else.

This is another significant step to prevent Inside Information abuse

[51] Ibid.

as it mitigates the plea of not intended inside information abuse and leaves no room behind for the culprit. As Huge et all[52] describe that when the disclosure per unit time increases the expected profits of an insider decreases as even to half of the expected profits before disclosure. So, disclosure of information not only moderates trading costs but brings market efficiency as well.

5.2 Insider Information

Definition of "Insider information" is the pivotal point of all legislative measures to address insider information abuse. The broad and vivid definition will enhance the efficiency of the control system.[53] To deal with this important pillar of insider trading legislation a section from Pakistani Law is being described here. Insider Information is defined in Section 129 of the Act[54] as,

a. Any information of the nature, which is not publicized, but concerning, in any direct or indirect manner, to public listed company or companies and about their stock, if this information is announced it may have an impact on the value of listed stock or the value of other listed stock in the securities market.
b. Any information about derivatives on commodities, which is nonpublic, concerning one or more derivatives.
c. concerning senior executive officers who decide in lieu of listed stock, any information regarding a communication between these persons and any clients or investors and about any directions about

[52] Steven Huddart, John S. Hughes and Carolyn B. Levine, "Public Disclosure and Dissimulation of Insider Trades", *Econometrica* 69, no. 3 (May,2001):665-681, available at http://www.jstor.org/stable/2692205 (Last accessed 25-03-2016)

[53] Stephen Herne, "Inside Information: Definitions in Australia, Canada, the U.K., and the U.S". *Journal of International Law* 8, no. 1 (1986), available at http://scholarship.law.upenn.edu/jil. Last Accessed March,2016.

[54]Securities Act (2015), sec. 129, (Part XI).

transactions in securities or

d. Any Information concerning future transactions of a person in securities or any decision to trade.[55]

For the occurrence of information abuse, the section provides following elements to be present:

(i) Information, which is not made public,

(ii) Information about listed securities and derivatives on commodities,

(iii) Information about intermediaries and any other person's transactions in future,

(iv) Information which will have an effect on the price of listed securities.

Insider information-definition has a very significant role in legislation to prevent insider trading. There are some points emphasized by the International Organization[56] in a report[57] regarding inside dealing laws in different jurisdictions. The IOSCO report[58] has mentioned that mainly two issues are to be addressed by the regulator while legislating about insider trading. These issues are confidentiality and materiality.[59]

[55] Securities Act (2015), sec. 129, (Part XI).

[56] International Organization of Securities Commissions (IOSCO).

[57] IOSCO report on Insider Trading legislation" Insider Trading how Jurisdiction regulate it".

[58] IOSCO report on Insider Trading legislation" Insider Trading how Jurisdiction regulate it" by International Organization of Securities Commissions available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD145.pdf (Last accessed February, 2016).

[59] Francis J. Burke, Jr, Steptoe & Johnson, "Insider Trading Securities Violations", ABA Section of Litigation 2012 Corporate Counsel, CLE Seminar (2012) available at

Both confidentiality and materiality can be considered as elements of "Inside Information" definition. These have been broken down into more basic points which will be discussed further in detail. A simple categorization is being provided below for better understanding.

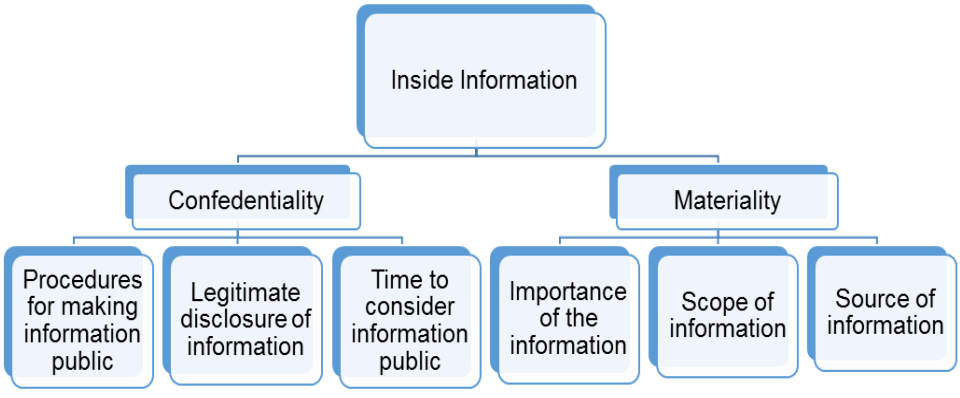

Figure 2 Elements of Inside Information Definition

Both these elements have specific details to be analyzed further. The IESCO standards of legislation and other international jurisdictions' legislative standards go far beyond the securities Act 2015.

5. Comparison of Securities Act 2015 & SEO 1969

Here a brief comparison of SEO 1969[60] and Securities Act[61] 2015 will be done. Along with it the features of insider trading legislation will be described in a manner that exposes the loopholes in Pakistani legislation.

In Securities Ordinance 1969 some of the problems were lack of

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http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_women/written_materials/b4_1_insider_trading_securities_violatons.authcheckdam.pdf

[60] Securities and Exchange Ordinance, (1969) (Ordinance No. XVII of 1969) (28 June 1969 as amended up to 2012) available at http://www.secp.gov.pk/laws/ordinances/.

[61] Securities Act ,2015.

criminal penalties, a lack of linkage between market manipulation and insider trading, no measure to forbid intermediaries from insider trading. All these are still there in Securities Act 2015 except criminal liabilities. This comparison can be best presented in a tabular form hence below is the table to explain this comparison.

Features	SEO 1969	Securities Act 2015
Civil Liabilities	✓	✓
Criminal Liabilities	X	✓
Market manipulation and Insider Trading linked together	X	X
Obligations on Intermediaries	X	X
Tender Offer setting addressed	X	X
Time to consider information public	X	X
Disclosure procedure available	X	X

Table2 A comparison of SEO 1969 and Securities Act 2015.

Interestingly SEO 1969 was enacted in the backdrop of several stock market crashes to control the inside information abuse. While the Securities Act was enacted to streamline the legal regime and bring a restructured code to control market manipulation. Both legislations lack the international standards and end up being toothless legislative devices to curtail the menace.

6. A Critique of Current Pakistani Legal Regime on Insider Trading

Some of the salient features of the new legislation have been discussed already. Now a critique of Securities Act 2015 is being presented in the light

of above discussion. Analysis of Inside Information definition as available in Securities Act 2015 does not even mention some very essential terms. The term 'material' is presumed to be a vital part of inside information definition; however, this is missing from the said law.[62] Along with it any signal towards precise or specific information is not present in the act. Any attribution towards materiality of information with regard to its scope, impact or importance is not available. Other significant issues connected to insider trading are procedures required to consider information public and the essential time to consider information public. Any of these issues are not addressed in the new legal regime.

For identifying insiders, the connected person approach is adopted but it lacks a broad view hence fails to include temporary and accidental insiders. This causes grave difficulty while prosecuting these insiders. The study revealed the insider trading regime is inclined towards a broader approach of defining insiders, inside information and related elements. The Pakistani financial market is at the verge of an online or internet-based revolution in securities trading. For simplification and efficiency, a connection information approach with a blend of connected person approach will be the best possibility.[63] As compared to only a person connection approach a balanced approach with features of both will be more result oriented.[64] In this approach listing of all possible connected persons and providing exemptions wisely will be the core issue.[65] Some jurisdictions have used this approach to deal with this issue. In Singapore

[62] See section 130 of Securities Act 2015.

[63] As in UK and Singapore models.

[64]The Definition Of "Insider" In Section 3 of the *Securities Markets Act 1988*: A Review and Comparison with Other Jurisdictions, Discussion Paper Series 218, Massey University, School of Accountancy (2003). Available At Http://Www-Accountancy.Massey.Ac.Nz/Publications.Htm

[65] Roman Tomasic, James Jackson and Robin Woellner, *Corporations Law: Principles, Policy and Process*, 4th. ed. (Butterworths, Australia :2002) 998.

the connected person list seems very exhaustive. While in UK legislation connected persons' list is not much elaborate moreover, presumption of *mens rea is* not similar as in Singapore.[66]

In terms of prohibited activities, a major lacuna is a very finite and circumscribed scope of legislation. The 2015 legislation is silent on tender offer and intermediaries[67] for dealing in transactions based on inside information. Tender offer[68] is a frequently practiced form of trade and is equally prone to inside information abuse, while Pakistani law is silent on this issue altogether. An addition of tender offers in the covered areas of insider dealing law will yield legal consistency and fairness in the market.

Disclosure requirements are included but not exhaustive. Some core issues like minimum time to disclose, medium of disclosure, delaying disclosure of inside information, equivalent information, Publication of information on internet sites are not addressed appropriately.[69] Additionally, disclosure of trades of BOD members and other insiders are not streamlined to. For defenses, Chinese wall and operations of state must be introduced for fair and just applicability of law.[70] Furthermore, public companies have not been held liable to incorporate codes for disclosure of information and control of its flow.

7. Conclusion

Some significant observations are being summarized here. The new legislation (Securities Act 2015) is quite an inadequate attempt to govern

[66] Ibid.
[67] For details see Securities Act 2015, sec. 130-131.
[68] Ibid., 132-135.
[69] Ibid., Part X- XI.
[70] For details Bradley J. Bondi, Steven D. Lofchie, "The Law of Insider Trading: Legal Theories, Common Defenses, And Best Practices for Ensuring Compliance", *Nyu Journal of Law & Business* 8, (2012), 151. *Available at: http://ssrn.com/abstract=2028459*. (Last Accessed August 2016).

the securities market from inside information abuse. Though long-awaited criminal liabilities have been introduced, still a number of issues are neglected. If provisions of Securities Act are examined in a comparative manner with international practice it becomes evident the law is a mere patch work. Several shortcomings are found with respect to broad approach, enforceability, exhaustive issues to be dealt with. This recent legislation could not answer several crucial questions sufficiently. The gaps existed in SEO 1969-as amended till 2012 are present in the Securities Act 2015. Some of the core issues are a vague definition of inside information and insiders. This definition lacks comprehensiveness in describing the attributes to categorize any information inside information. Inside information definition needs a legislative overhaul.

The criteria to include information within the 'inside information' should be widened, amplified and intensified. It will provide a strong foundation to control inside information abuse. Certain key issues of inside information definition need to be dealt with due care in order to bring a compact, comprehensive and exhaustive law to deal with the issue.

Market manipulation has been linked with inside trading in most jurisdictions to bring harmony, consistency, and simplicity. In Pakistani law the same features can be achieved through connecting both these malpractices together. Another significant observation is that no procedural up gradation took place amid new law. A particular time frame to estimate information to be public after its disclosure for proper dissemination of information in the market is a very imperative aspect in insider trading laws. Nonetheless no time frame has been given for publication of information or its dissemination in the market. While imposing the duty to abstain from any indulgence in prohibited activities intermediaries have not been addressed directly and particularly. The Pakistani financial market is in dire

need of investors for a persistent growth. An enhanced mechanism for investor protection and an efficient market will boost the economy eventually.

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An Emphatic Scrutiny of the Ḥanafī Juristic Approach on the Consent of Guardian in the Adult Muslim Women Marriage

Mariam Hafeez*

Abstract

The marriage of an adult Muslim woman without her guardian's consent, especially of the woman who has no previous experience of marriage (adult Muslim virgin woman), has been an issue of great concern in Pakistan. Commonly discussed under the term of 'court marriage', there is astonishingly no statutory law over this issue. The issue was first highlighted in the family courts in early 1980s and due to lack of any clear statutory ruling on the case, it was settled through precedential laws. The judges in various cases (details would be irrelevant here) have apparently declared such marriages to be absolutely valid, under the Ḥanafī law regarding the issue. The research paper at hand aims to explore the classical Ḥanafī law and its complete juristic approach regarding the issue. The *Sharīʿah* analysis of the rulings regarding the marriage conducted by an adult virgin woman without obtaining her guardian's consent has revealed that the honorable courts of Pakistan have adopted the method of selective interpretation and implementation of Ḥanafī law. They have disregarded two important factors of *kafā'ah* (suitability of spouse) and *mahr al-mithl* (equal dower), which if overlooked, turn the marriages into invalid, that is, irregular ones (*fāsid*). The current research paper strives to explore the classical *fiqhī* rulings concerning the conclusion of marriage contract, its validity conditions, pre-requisites, extent of capacity of adult women in its conduction, legal concepts of *kafā'ah* and *mahr al-mithl*, in order to clarify the ambiguities and misconceptions regarding these concepts and their consequent implementation.

Keywords: Marriage, Adult Muslim Woman, Ḥanafī law, *fiqh*, Guardian, Consent, *Kafā'ah, Mahr al-mithl*

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1. Introduction

The *nikāḥ* or marriage contract has a vital role and significance in Islamic jurisprudence. Almost half of the legal concepts in Islam revolve around the central focal point of family laws, the essence of which is marriage. Thus, marriage being the major constituent of family laws in Islam needs to be free of all ambiguities and irregularities. As per its status, a marriage may be valid or invalid. The later may further be either irregular (*fāsid*) or void (*bāṭil*), and both are prohibited marriages in their essence, with little difference in their legal implications. Accordingly, the *bāṭil* marriage is the one which is invalid ab-initio and can never be validated in any situation whereas the *fāsid* marriage bears some irregularity based on some temporary impediment or unlawful condition, which if removed, validates the marriage contract. The ideal valid marriage is the one which comprises all the requisites and conditions in a complete manner. Some of the fundamental conditions which must be fulfilled are known by the sources of Islamic law to be offer & acceptance, parties, specification of dower, witnesses, and consent of the guardian.[1] There are many other conditions as well which the scholars recommend being met for concluding a perfect marriage contract.

In regard to guardians' consent, there is a controversy among the jurists upon the condition of his consent, for the validity of *nikāḥ*. In this regard, Imām Mālik and Imām Shāfiʿī are of the view that there is no marriage without a guardian[2] and the validity of *nikāḥ* rests on the permission of the guardian.[3] Imām Aḥmad bin Ḥanbal also supports the

[1]Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman Ltd., 1990), 53-54.

[2]Qāḍī Abū'l Walīd Muhammad bin Ahmad ibn Rushd Mālikī Al Qurtabī, *Bidāyatul Mujtahid* (Saudia: Maktabatul Ma'ārif lil Nashar wa Al-tauzī', 1998), 2:6-7.

[3]Imām Nawawī, *Sharaḥ Muslim* (Egypt: Matba' Misriyyah bil Azhar, 1929), 9:205.

same view.[4] Ibn-e-Ḥazam, Ibn-e-Taymīyah, Ibn-e-Qudāmah and many others are also of the same view.[5] On the other hand, Imām Abū Ḥanīfah has a different opinion. According to him, an adult virgin woman has the right to conclude her own marriage contract without the consent of her guardian, who in his view acts only as an advisor to the female and shares in her decision making.[6] But it is pertinent to note that Imām Abū Ḥanīfah restricts this right with two conditions, that is, the chosen husband must be suitable and equivalent (*kufw'*) to the adult virgin woman[7] and the dower must not be less than that appropriate for her (*mahr al mithl*).[8] The guardian under the Ḥanafī law can annul his ward's marriage through the court of law, if she has chosen an ineligible or unsuitable husband unless pregnancy has been established. The Ḥanafī jurists have mentioned a number of verses for authenticating their view.[9]

The Family Laws about the issue of guardians' consent in Pakistan do not explicitly provide any permission to adult women to marry without the consent of the guardian. Nevertheless, the precedential laws have set the rule that if a woman marries without the consent of her guardian, the marriage contract shall be validated.[10] The only source of validating the marriage of adult virgin women without the consent of the guardian in

[4] Susan A. Spectorsky, *Chapters on Marriage and Divorce: The Guardian (Wali)* (Austin: University of Texas Press, 1993), 12.

[5]Islam the Complete System of Life, *There is no Marriage without the Consent of Guardian*, Available at http://www.systemoflife.com/articles/general/142-there-is-no-marriage-without-the-consent-of-guardian#axzz3uqWU0kpH, Accessed 09 Sep, 2016.

[6]'Alā' al-Dīn Abū Bakr bin Mas'ūd al-Kāsāni*, Badā'i' al-Ṣanā'i 'fī Tartīb al-Sharā'i'*, (Karachi: Educational Press, 1979), 2:247-249.

[7] Wahbatu'l Zahīlī, *Al-Aḥwāl al-Shakhsiyyah* (Syria: Dār Al Fikr, 1984), 7:186-192.

[8]Abī Al-Hassan Alī bin Abī Bakar bin Abdul Jalīl Al-Marghinānī, *Al-Hidāyah* (Riyadh: Al-Maktabah Al-Islāmiyyah), 1:202.

[9]Muhammad Tāhir Mansūrī, *Family Law in Islam (Theory and Application)* (Islamabad: Shariah Academy, International Islamic University, Islamabad, 2012), 58-62.

[10]See Muhammad Imtiaz vs. State, PLD 1981 FSC 308; Abdul Waheed vs. Asma Jahangir, PLD 1997 Lahore 301. [There are many other cases as well].

Pakistan is the precedents set by case laws. The judges have apparently set this rule according to the prevailing school of thought in Pakistan, that is, the Ḥanafī school of thought. But they have overlooked the actual and complete rulings of the Ḥanafīs regarding this issue. The requisite of the two specified conditions is entirely ignored. Adult women marriages are absolutely declared valid without scrutinising the presence of equality (*kufw'*) and appropriate dower (*mahr al mithl*).

This research paper, therefore, explores the classical *fiqhī* rulings of the four *sunnī* schools of thoughts, particularly the Ḥanafī school of thought regarding the conditions of marriage, role of guardian in the marriage of those not independently capable of their own marriage and specifically the validity status of the marriage conducted by an adult virgin woman without the consent of her guardian. This analysis and representation of the traditional and authentic *fiqhī* rulings concerning the issue at hand shall not only be helpful in cognizance of the actual classical rulings regarding the status of *sui juris* women's marriage but shall also be beneficial in scrutinizing and identifying the paucities, discrepancies and misconstruing in the application of these rulings in the Pakistan's Courts of law.

2. Pre-requisites and Conditions of Marriage Contract in Islamic Law

Jurists have explained certain prerequisites related to the capacity of contracting parties, form of contract, elements etc. which have to be fulfilled for the conduction of a valid marriage contract. Lack of any of these prerequisites invalidate the marriage contract. Further, having due acquaintance of the conditions relevant to the validation of marriage contract is quite crucial in order to comprehend the concept completely. These are divided into four kinds: conditions of convening/formation (شروط

الإنعقاد**)**, conditions of validity **(**شروط الصحة**),** conditions of efficacy **(** شروط النفاذ**)**, and conditions of irrevocability **(**شروط اللزوم**).**

2.1 The Conditions of Convening or Formation

The conditions of convening or formation are essential for the foundation of the marriage contract. Thus, if the contract lacks or contradicts any such condition of formation, the contract is void (*bāṭil*) according to the consensus of the four major *sunnī* schools of thought.[11] This genera of conditions pertain to the legal capacity of contracting parties, that is, bridegroom and bride (أهلية التصرف), listening to the words of other contracting party, parties not being in any prohibited degree relation (temporary or permanent) with each other, and the conditions of conducting terms, offer and acceptance (الإيجاب و القبول).[12] For instance, same sitting place, concurrence between the offer and acceptance regarding the subject matter of contract, non-revocation of the offer before acceptance and conduction using the past or present tense.

As far as the capacity of contracting parties is concerned, the general necessities for them to enter into a marriage contract in Islam are to be Muslim, of sound mind and must have attained the majority age.[13] Among the mentioned capacity conditions, many jurists also add the condition of

[11]Wahbatu'l Zahīlī, *Al-Fiqh al-Islāmī wa Adillatuhu* (Damascus: Dār al Fikr, 1989), 7:47.

[12]Muhammad Amīn al-Shahīr Ibn Abidīn, *Radd ul Mahtār 'alā al-Durr ul Mukhtār* (Quetta: Al-Maktabah al-Mājidiyyah, 1979), 2:285.

[13]Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 1970), 93.

being free and not a slave.[14] But the marriage contract of a slave or concubine establishes validly with the consent of the lord.[15]

Similarly, the lunatics and the minor persons cannot enter into a marriage contract, but their respective guardians can conduct the contract on their behalf. Moreover, it is very necessary that the parties must be capable of providing their consent because even if the parties have reached the puberty age and are of sound mind but have not given their consent to the contract, the marriage is void.[16]

The jurists show consensus upon presence of 'offer and acceptance' to be the basic element of *nikāḥ* with the condition that the consent of both the parties must be free of any coercion unlike Imām Abū Ḥanīfah. Imām Abū Ḥanīfah considers "offer and acceptance" to be the sole element necessary for the conduction of marriage contract. The dower is not the element of contract conduction as it is misunderstood, but it is a condition or requirement of the contract. It means that it is not a prerequisite without which a contract cannot be formed, but it is a condition incumbent upon the husband to fulfil after the conduction of contract.[17]

2.2 The Conditions of Validity

The conditions of validity are those, the presence of which is necessary to implement the impacts of *sharīʿah* rulings on the contract. For instance, the terms used for the contract formation must not connote temporariness; presence of witnesses, consent of parties and absence of coercion etc. are

[14]Imām Shams al-Dīn Muhammad al-Shirbīnī al-Khāṭib, *Mughnī al-Muḥtāj ilā Maʿrifat al-Maʿānī Alfāẓ Sharḥ al-Minhāj* (Egypt: Maktabah wa Maṭbaʿ Muṣṭafā al-Bābī al-Ḥalabī, 1985), 3:171.

[15]Muhammad Zakī Abdul Barr, *Tuḥfatu'l Fuqahā* (Cairo: Maktabah Dār ul Turāth, 1998), 2:179.

[16]Abdullah bin Mahmood bin Mawdūd Al-Mawṣalī Al-Ḥanafī, *Al-Ikhtayār li Ta'līl Al-Mukhtār* (Istanbul: Dār'l Farās lil Nashar wa Al-Tawzīʿ, 1987), 1:85.

[17]Ibid, 83.

the conditions of the validity of the marriage contract. Thus, if the contract lacks or contradicts any of these conditions of validity, then the contract according to Imām Abū Ḥanīfah is irregular (*fāsid*) and according to the majority jurists (*jumhūr*), that is, Imām Shāfiʿī, Imām Mālik and Imām Aḥmad bin Ḥanbal, it is void (*bāṭil*).[18]

2.3. The Conditions of Efficacy

The conditions of efficacy are those on which the practical execution of the contract is dependent, after its valid formation. For example, the wife and husband must have achieved complete legal capacity to effectuate the implications of the contract; if the contract is conducted by an authorized agent, he should not contradict the principal's directions about the bridegroom, dower etc. and certain other examples. If the contract lacks or contradicts any of these conditions, then the contract remains contingent (*mauqūf*) according to the Ḥanafīs and Mālikis.[19]

2.4 The Conditions of Irrevocability

The conditions of irrevocability are the conditions on which the continuity and the endurance of the contract rely. Thus, if any condition in the contract is contrary to these, the contract becomes "binding" or "non-binding". This situation allows any of the contractors or third authoritative person to waive off the contract.[20] Irrevocability of contract means that the contractors have no right to waive the contract after its formation as the contract no longer remains an option for them. For instance, if the guardian arranged the marriage of the legally incapable person (like mad or minor) was his/her father or grandfather, then according to Imām Abū Ḥanīfah and Imām

[18] Zahīlī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7:47.
[19] Ibid.
[20] Ibid.

Muḥammad, the contract becomes irrevocable. But if the guardian was some other person like the brother or uncle, then upon the dissolution of the incapability, that is, gaining soundness or majority, the ward shall be given the option of waiving the contract. Similarly, according to the Ḥanafīs, if the woman married herself without the consent of her guardians but her husband is equivalent (*kufw'*) to her, the contract becomes irrevocable. But if the husband is not *kufw'*, then the guardian has the right to demand revocation of the contract from the *qāḍī*.

3. Forms of Marriage Contract with regard to their Validity

The jurists have divided the marriage contract into three types with regard to their validity and non-validity. A valid (*ṣaḥīḥ*) contract is the one which fulfils all the elements, intrinsic and extrinsic conditions of marriage, ordained by the jurists. A valid marriage contract, being in accordance with the requirements of *sharīʿah*, will give rise to all the legal effects, that is, the establishment of paternity and legitimacy of the children, mutual inheritance entitlement of the spouses, and maintenance of wife etc.

Invalid (void (*bāṭil*)) contract is the one which does not incur any effects of a valid contract;[21] thus, effectuating no legal consequences of a marriage even if the sexual relationship has been established between the contractors. It will be amounted to nullity and hence spouses will not have permissible physical access to each other, paternity and legitimacy of the children will not be established, the spouses will not inherit from each other, the woman will not be entitled to maintenance, dower and all the other effects of marriage will not be executable in case of a void marriage. The spouses can be accused of adultery in this form of contract. For instance, the marriage contract conducted within the prohibited degree relations like

[21]Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence (Uṣūl al-Fiqh)* (Islamabad: Center for Islamic Law and Legal Heritage, 2002), 191.

with sister or daughter, or marriage contract with a woman who is already in a marital bond of another man is a void (*bāṭil*) marriage.[22]

Irregular (*fāsid*)) contract incurs certain effects of a valid contract according to the Ḥanafīs;[23] hence if a sexual relationship is established in an irregular marriage contract, certain effects of marriage are executed. Thus, the lineage of the children is ascertained, they are entitled to the parents' inheritance and the waiting period becomes incumbent on the woman. The spouses cannot be punished for *zinā'* if they have conducted an irregular marriage. The instances of irregular (*fāsid*) marriages include marriages without witnesses, temporary marriages, marriage with wife's sister during continuity of marital bond with the wife or during her waiting period (*ʿiddah*) etc.[24] On the other hand, an irregular marriage also entails some effects of a void marriage, that is, the spouses do not inherit from each other, the wife is not entitled to maintenance, and separation is incumbent upon them etc.

4. Guardianship in Marriage

Guardianship or *wilāyah* refers to the legal authority consigned to a person who is fully competent to protect and safeguard the rights and interests of another person who is incapable of independently doing so. In the context of marriage, a *walī* or guardian is someone who has been granted the authority to arrange the marriage or consent to it on behalf of another person. Generally, the guardian is essential for the conduction of marriage of minor male and female children. But for adult or major contractors, the presence of a guardian is usually deemed as a necessary condition for an

[22]Abī Muhammad ʻAbdullah bin Aḥmad bin Muhammad bin Qudāmah al Muqdasī, *Al-Mughnī* (Cairo: Maktabah al-Kulīyāt al-Azhariyyah, 1969), 6:456.

[23]Nyazee, *Outlines of Islamic Jurisprudence*, 73.

[24]Ibid, 275.

adult woman only and not for a male. The concept of guardianship has been enunciated in a number of Qurā'nic verses.[25] Guardianship has been divided into different types by the jurists. The nature and essentials of these types are also elaborated.

4.1 Compulsory Guardianship (ولاية ايجاب)

Compulsory guardianship, also referred to as *wilāyah ijbārīyyah*, consigns such an authority by which the guardian can conduct the marriage contract of his ward without his/her consent. The wards on which such guardianship can be exercised might be minor boy, minor girl whether virgin or deflowered (difference of jurists' opinions exists), insane major man, insane major woman, minor slave and virgin concubine.[26] The Ḥanafīs do not extend compulsory guardianship on the *bāligh* (major) virgin woman but the Mālikīs and Shāfiʿīs authorise the father with *wilāyah ijbārīyyah* stating that he can force the *bāligh* virgin woman into a marriage contract. Imām Abū Ḥanīfah and Imām Mālik are of the opinion that the father can force *ghayr-bāligh* deflowered woman to marry whereas the Shāfiʿīs state that the deflowered woman may she be a major or minor cannot be forced by the guardian to marry.[27] But the Shāfiʿīs permit the guardian (only father or grandfather) to marry an insane woman under *jabr*, no matter whether she is a minor or adult, virgin or deflowered, provided that the marriage is in her interest.[28]

However, the basis of compulsory guardianship lies on the concern for the interest of the persons who have limited or no legal capacity. So, the

[25]Al-Qur'ān, 2:25; 4:25; 2:32.

[26] Al-Kāsāni*, Badā'i' al-Ṣanā'i*, 2:241.

[27]Ibn Rushd, *Bidāyat al- Mujtahid wa Nihāyat al- Muqtaṣid*, tr. Imran Ahsan Khan Nyazee, *The Distinguished Jurist's Primer* (United Kingdom: Garnet Publishing Ltd., 2000), 2:5.

[28]Abū Isḥāq Ibrāhīm bin Alī bin Yūsuf Al-Shīrāzī, *Al-Muhdhib fī fiqh Al-Imām Al-Shāf'ī* (Beirut: Dār al-Kutub ul 'Ilmiyyah, 1999), 2:430.

purpose of this authority is no other than the promotion of their welfare. The judge or the *qāḍī* reserves the right to disqualify the guardian who is proved to contract against the welfare of his ward or has harmed his/her interests or causes unjustified prevention to his/her marriage. Moreover, the guardian while exercising compulsory guardianship does not have the right to give his ward in marriage to someone who is not his/her equal (*kufw'*) or with a dower less than the appropriate dower.[29]

Commonly, the right of compulsory guardianship can merely be exercised by the males related to the ward through lineage such as his father, paternal grandfather, paternal uncle, brother or son. However, the jurists differ over the limit and precedence of these guardians. Imām Abū Ḥanīfah and Imām Muḥammad are of the opinion that the ward whose marriage was conducted in minority or insanity under compulsory guardianship has the option of puberty (*khiyār al-bulūgh*) or sanity and can ratify or revoke his/her *nikāḥ* on attaining majority or sanity, if it was conducted by a guardian other than the father and the grandfather. Imām Abū Yūsuf negates the existence of any such option by analogising the guardians of father and grandfather.[30]

4.2 Recommended Guardianship (ولاية ندب و استحباب)

Recommended guardianship is only recognised by Imām Abū Ḥanīfah and Imām Abū Yūsuf, whereas Imām Muḥammad among the Ḥanafīs does not accept this type of guardianship. According to the proponents of this type of guardianship, the guardian is vested with *wilāyah ijbārīyyah* to act as a representative of the ward due to his/her deficient legal capacity to conduct

[29]Dawoud S. El Alami, "Legal Capacity with Specific Reference to the Marriage Contract", *Arab Law Quarterly* 6:2 (1991): 190-204.

[30]Burhān al-Dīn al-Farghānī al-Marghinānī, *Al-Hidāyah: The Guidance*, trans. Imran Ahsan Khan Nyazee, (Rawalpindi: Federal Law House, 2015), 2:753.

a contract. But when this deficiency or inability is removed through sanity or maturity, the reason for *jabr* also ceases to exist. Hence, the inability left with the female ward is only the recommendation that she should not go out to mix in the male occupied areas. The demand of *sharīʿah* from the adult woman regarding avoidance of exit to places where men are in abundance is of recommendable nature and not a legal obligatory prohibition or inability. Hence, according to Imām Abū Ḥanīfah and Imām Abū Yūsuf, the adult virgin woman's guardian possesses recommended guardianship, that is, it is commendable that she must get married with the consent of her guardian, but if she marries herself, the marriage is deemed valid provided that she chooses an equal spouse, paying appropriate dower.[31]

The essence of this type of guardianship is that the guardian must take the consent of an adult virgin woman before conducting her marriage and if he does not do so, the marriage is not considered valid. It is commendable for the adult virgin to delegate her matter to her guardian but if she marries herself without his consent, the marriage still is not invalid (provided that the prerequisites are fulfilled).[32] The deflowered women (widow or divorced) are also dealt under recommended guardianship by the Ḥanafīs. Imām Muḥammad of the Ḥanafī law does not consider the marriage of a virgin woman conducted by herself without her guardian's consent to be concluded; rather he declares it suspended (*mauqūf*) upon the ratification of the guardians' consent.[33] The Mālikīs, Shāfiʿīs and Hanābilah do not recognize this type of guardianship and do not validate the marriage of an adult virgin conducted without her guardian's consent.[34]

[31]Al-Kāsāni, *Badā'i' al-Ṣanā'i,* 2:242.

[32]Ibn 'Abidīn, *Radd al-Mahtār 'alā Ad-Durr al-Makhtār* (Beirut: Dār al-Fikr, 1992), 3:55.

[33]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:746.

[34]Al-Imām Kamāl ul-Dīn Muhammad bin 'Abd al-Wāhid, *Sharaḥ Fataḥ al-Qadīr lil 'Ājiz al-Faqīr* (Beirut: Dār Iḥyā' al-Turāth al- 'Arabī, 1930), 3:157.

4.3 Complementary Guardianship (ولاية شركة)

Complementary guardianship is approved by Mālikī, Shāfiʿī and Ḥanbalī Schools and Imām Muḥammad of the Ḥanafī School also supports this type of guardianship. Complementary guardianship denotes the necessity of mutual consent of both the guardian and the ward. Under this guardianship, neither the guardian can force the ward to marry without her permission nor can the ward marry herself without the guardian's consent.[35] Marriage of a deflowered woman is an instance of this guardianship. The guardian cannot force a deflowered female ward into the marriage contract and if he does so, the contract remains contingent upon her consent, that is, if she agrees, the contract is established and if she refuses to consent, the contract is considered invalid.[36] The consent of the deflowered woman cannot be inferred from her silence; rather she has to speak up words expressing her consent.[37]

Whatever kind of guardianship it may be, the guardian is always bound to hold the marriage contract in the interest of the ward and avoid any harm that might undermine her welfare. Almost all the *sunnī* and *shīʿah* Schools of thought insist that the guardian should preferably marry the ward to her *kufw'*. In some cases, lack of *kafā'ah* is even considered a ground for annulment of *nikāḥ*. The discussion of *kafā'ah*, its elements and its necessity is indispensable in this context.

[35]Aayesha Rafiq, "Role of Guardian in Muslim Woman's Marriage: A Study in the Light of Religious Texts", *IJISET - International Journal of Innovative Science, Engineering & Technology* 2:4 (2015): 1254-1261.

[36]Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:242.

[37]Muhammad bin Ahmad bin Abī Sahal al-Sarakhsī, *Al-Mabsūṭ* (Karachi: Idāratul Qurān wal 'Ulūmul Islāmiyyah, 1987), 5:10.

5. Kafā'ah: Suitability between Spouses

Kafā'ah literally means similarity and equality whereas in the jurists' terminology, it refers to the suitability and compatibility between the spouses that avoids inconvenience in specific matters and is credible from the bridegroom's perspective (in context of the marriage contract).[38] This is because the man has to set up cohabitation and will not be offended by the low status or origin of the woman whereas on the contrary, the status of the man affects the woman's cohabitation.[39] Hence, the marriage is considered unequal or *ghayr-kufw'* if the husband's status is inferior to that of the wife's family in various aspects including certain personal qualifications. The wife's inferior status does not amount to inequality because she acquires the husband's status and hence no injury is caused to his standing. Moreover, the lineage of the children is counted from the husband's side and the inferiority of the wife causes no adverse effects upon either of the families. So, the husband cannot seek relief on the basis of inequality, if his wife had deceived him in this respect.[40] This relief can only be granted to the husband if he was married under *wilāyah ijbārīyyah* in his minority and his guardian had fixed on his behalf a dower much higher than the customary dower of the wife's family.[41]

5.1 Basis of *Ikfā'ah*: The Doctrine of Equality

The doctrine of *kafā'ah* finds its roots in various traditions of the Holy Prophet ﷺ and sayings of the companions. Some of them are mentioned

[38]'Abd al-Rahmān bin Muhammad bin Sulaymān Afandī, *Majma' al-Anhar fī Sharaḥ Multaqī al-Abḥar* (Beirut: Dār'l Iḥyā' al-Turāth al- 'Arabī, n.d.), 1:339.

[39]Zayn ud Dīn bin Ibrāhīm bin Muhammad ibn Najīm al-Misrī, *Al-Baḥr al-Rayq Sharaḥ Kanz al-Daqayq* (Cairo: Dār Kitāb al-Islāmī, 1997), 3:137.

[40] K.N. Ahmed, *The Muslim Law of Divorce* (New Delhi: Kitab Bhavan, 1984), 307.

[41]Ibn 'Abidīn, *Radd al-Muhtār 'alā Ad-Durr al-Mukhtār* (Beirut: Dār'l Iḥyā' al-Turāth al- 'Arabī, 1987), 2:326.

here to authenticate the basis of this doctrine as Ḥaḍrat ʿĀʾisha narrates from the Holy Prophet Muḥammad (PBUH) that:

> عَنْ عَائِشَةَ قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: تَخَيَّرُوا لِنُطَفِكُمْ، وَانْكِحُوا الْأَكْفَاءَ، وَأَنْكِحُوا إِلَيْهِمْ.
>
> Select (fit) woman (in respect of character) for your seed (generation) and marry (your) equals and give (your daughters) in marriage to them.[42]

In another *ḥadīth*, Jabir narrates from the Prophet Muḥammad that he said:

> قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: لَا تُنْكَحُ النِّسَاءُ إِلَّا مِنَ الْأَكْفَاءِ، وَلَا يُزَوِّجُهُنَّ إِلَّا الْأَوْلِيَاءُ، وَلَا مَهْرَ دُونَ عَشَرَةِ دَرَاهِم.
>
> Do not marry the woman except with their equals, and do not marry them except by their guardians, and no dower (is acceptable if less than) ten *dirhams*.[43]

In another place,

> عَنْ مُحَمَّدِ بْنِ عُمَرَ بْنِ عَلِيِّ بْنِ أَبِي طَالِبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ، أَنَّ رَسُولَ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ لَهُ: يَا عَلِيُّ ثَلَاثَةٌ لَا تُؤَخِّرْهَا الصَّلَاةُ إِذَا أَتَتْ، وَالْجِنَازَةُ إِذَا حَضَرَتْ، وَالْأَيِّمُ إِذَا وَجَدَتْ كُفُؤًا.
>
> Muḥammad bin ʿUmar bin ʿAlī bin Abī Ṭālib reports from his father that his grandfather narrated that the Prophet Muḥammad stated: O ʿAlī! Do not procrastinate three things; the prayer when (its time) enters, the funeral when it arrives

[42]Ibn Mājah, *Sunnan*, Hadīth no. 1968.

[43]Abū al-Qāsim al-Ṭibrānī, *Al-Mu'jam al-Awsaṭ* (Cairo: Dār al-Haramayn, 1994), 1:6.

> and the unmarried women (for marrying them) when their equal (spouse) is found.[44]

It has been reported by the narrators that the companions of the Prophet also emphasized on the maintenance of equality and compatibility between the spouses.

5.2 Factors involved in Equality (Kafā'ah)

The jurists of the *sunnī* School of thought differ as to what amounts to inequality between the spouses. The factors which each school of thought has specified to essentially be the constituents of equality are mentioned separately.

The jurists of the Ḥanafī school are found to be more exacting in respect of *kafā'ah* as compared to the jurists of other schools. According to them, *kafā'ah* in marriage appertains to the following factors or matters: *dīn* (religion), *nasab* (lineage), *ḥurriyah* (freedom from slavery)[45], *ḥirfah* (profession), *diyānah* (piety or character)[46] and *māl* (financial condition or property).

The jurists of the Mālikī School differ from the Ḥanafīs with regard to the concept of inequality. The only factors that constitute equality between the spouses, according to them, are Islam, piety and means to maintain the wife. They do not consider the matters of lineage and profession significant in *kafā'ah*.[47] There is a difference in reports about the

[44]Bayhaqī, *Al Sunnan Al-Kubrā*, Hadīth no. 13757.

[45]Al-Sarakhsī, *Al-Mabsūṭ*, 5:24-25.

[46]Burhān ud Dīn Mahmūd bin Ahmad al-Bukhārī al-Marghinānī, Al-*Muḥīṭ al-Burhānī fil Fiqh al-Nu'mānī Fiqh al-Imām Abī Ḥanifā* (Beirut: Dār'l Kutub ul- 'Ilmiyyah, 2004), 3:23.

[47]Muhammad bin Ahmad bin 'Arfah Al-Dasūqī Al-Mālikī, *Ḥāshīyat ul Dasūqī 'alā al-Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, n.d.), 2:250.

opinion of Mālikīs regarding the factor of freedom as to whether it is considered to be an element of equality or not. Some reports do not present it as a condition of equality in the opinion of Mālikīs. But there are narrations which add it as an essential factor[48] along with the condition that the husband must be free of certain defects[49] like leprosy, leukoderma and insanity.

Shāfiʿīs put forth almost the same factors for equality between spouses as those stipulated by Imām Abū Ḥanīfah. There is only one difference, that they do not specify *māl* or property as a condition for equality.[50] However, the Shāfiʿīs add that the existence of certain defects in the husband would count as a ground for inequality.[51] Hence, the conditions set by the Shāfiʿīs for equality in marriage can be summarised as *Islām*, *nasab*, piety, *ḥurriyah*, *ḥirfah* (profession) and being free from certain physical defects.[52]

It is also reported in some narrations that the Shāfiʿīs consider the factor of the age also as a condition for equality, that is, there should not be very extensive age difference between the spouses such that one of them is in old age and the other in childhood or so. This unusual difference defeats the purpose of marriage and reduces the attraction between the spouses. So,

[48]Ibid, 249.

[49]Abū al-Walīd Muhammad bin Ahmad bin Muhammad ibn Ahmad bin Rashd al-Qurtabī al-Undlasī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Dār al-Ḥadith, 2004), 3:3.

[50]Abū al-Hassan ibn al-Maḥāmalī al-Shāf'ī, *Al-Lubāb fi Fiqh al-Shāf'ī* (Madīnah: Dār ul Bukhārī, 1995), 1:303.

[51]Abū al-Ḥussain Yahyā bin Abī al-Khayr bin Sālim al-Imrānī al-Shāf'ī, *Al-Bayān fi Madhab Al-Imām Al-Shafi'ī* (Jaddah: Dār ul Minhāj, 2000), 9:203.

[52]Abdul Malik bin Abdullah bin Yusūf bin Muhammad Al-Juwaynī, *Nihāyat al-Maṭlab fi Dirāyat'l Mudhib* (Jaddah: Dār ul Minhāj, 2007), 12:153.

it becomes a factor of inequality if the age difference is of such an uncharacteristic nature.[53]

The opinions expressed by Imām Aḥmad bin Ḥanbal regarding equality in marriage are various. One of the opinions of Imām Aḥmad bin Ḥanbal is reported to have prescribed only two conditions for *kafā'ah*; *dīn* or religion and *nasab* or lineage.[54] In another opinion, Imām Aḥmad bin Ḥanbal is reported to have stipulated five conditions for equality in marriage. Two of the conditions mentioned are the same as that of the first opinion, that is, religion and lineage; and the other three being freedom from slavery, profession and wealth. According to this opinion, it is not allowed to marry a free woman to a slave, a daughter of a merchant to a barber and a rich woman to a poor man.[55]

In this opinion, they added that the absence of other factors like freedom, profession and wealth do not invalidate the marriage contract. The two factors religion and lineage create the actual harm in marital perspective. But the equality in lineage is relevant from the woman's aspect only and does not apply to the man, that is, if the wife is of lower status in lineage than the husband, it does not make any difference in the validity of marriage with regard to *kafā'ah*.[56] A third report on his opinion reveals that Imām Aḥmad bin Ḥanbal also specified *salāmā min al 'uyūb*, that is, freedom from certain defects to be an element for *kafā'ah*.[57]

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[53]Abū al-Hassan Alī bin Muhammad bin Muhammad bin Ḥabīb al-Baṣrī al-Baghdādī, *Al-Ḥāwī Al-Kabīr fi Fiqh Madhab al-Imām al-Shāf'ī wa huā Sharaḥ Mukhtāṣir al-Muznī* (Beirut: Dār Kutub ul- 'Ilmīyyah, 1999), 9:106.

[54]Ibn-i-Qudāmah, *Al-Mughnī*, 7:35.

[55]Abdul Rahmān bin Muhammad bin Aḥmad bin Qadāmah Al-Muqdasī, *Al-Sharḥ Al-Kabīr 'alā Matan Al-Muqanna'* (Beirut: Dār ul Kitāb al- 'Arabī lil Nashar wa Al-Tawzī', n.d.), 7:468.

[56]Ibn-e-Qudāmah, *Al-Mughnī*, 7:35.

[57]Ibid.

5.3 Elaboration of the factors of Equality According to the Ḥanafīs

The jurists of the *sunnī* Schools of thought have elaborated each of the factors of equality in various ways. Each of them has given different descriptions about the mentioned factors. As the research is more concerned and emphatic over the Ḥanafī opinion, the factors shall only be explained in the light of the Ḥanafī view.

A. *Dīn* (Religion)

All the Muslim jurists, both the *sunnī* and *shīʿah*, stipulate Islam to be a necessary condition for equality in marriage. It means that a Muslim woman can never be married to a non-Muslim. But there is a difference in their opinions regarding the notion of the condition of being Muslim. The Ḥanafīs like the other jurists are of the view that the Muslim by birth is preferred in equality to the one who embraced Islam later. The one who has converted into Islam is not equal to the one whose father was Muslim, as the honor among the clients is assessed on the basis of Islam.[58] They declare that the one whose father was/is not a Muslim is not equal to the one whose father was/is a Muslim. Similarly, if the grandfather of one was non-Muslim and the grandfather of the other was Muslim, the equality in religion does not establish. Imām Abū Yūsuf does not consider the difference of religion of the spouses' grandfathers as an element of inequality in religion. He is of the view that if the fathers of both spouses are Muslim, it is enough to establish equality of religion between them.[59]

[58]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:761.
[59]Ibn ʻAbidīn, *Radd al-Mahtār*, 2:319.

B. *Nasab* (Lineage)

Equality in *nasab* or lineage is stipulated as an essential factor for equality in marriage by some jurists. The notion that the people of a certain lineage, area or tribe are superior to others is alien to Islam as the sayings of the Prophet have upheld the belief of equality of mankind and removed all discriminations of color, caste and creed. But the doctrine of equality in lineage is asserted due to the difference in behavior, culture and habits of the inhabitants of various areas and tribes, which would lead to incompatibility and difficulty between the spouses.

The Ḥanafīs insist on the presence of equality in lineage in the marriage as honor is linked to it. They proclaim that the *Quraysh* tribe is equal in status to the *Quraysh* and the Arabs are equal in status to the ʿArab. The *Quraysh* are superior to the other ʿArabs whereas all the other ʿArabs are superior to the *mawālī* (those descending from the non-ʿArab family of new converts to the Islam) and all the non-ʿArabs.[60] They take the following *ḥadīth* of the Prophet ﷺ as a source for this ruling:

> The *Quraysh* are equal in status sub-tribe by sub-tribe, the ʿArabs are equal in status tribe by tribe, and the clients are equal in status man for man.[61]

There is no preference of lineage within the *Quraysh* until the lineage is very honorable like that of the families of the Caliphs. With regard to such worthy families, lineage and tribe preference shall even be considered within the *Quraysh* to suppress the risk of *fitnah*. Wherever there would be any exposure to any kind of dishonor to the family, the equality of lineage would not establish. The *banū Bāhilah* tribe despite being ʿArabs

[60]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[61]Bayhaqī, *Al Sunnan Al-Kubrā*, Hadīth no. 13769.

are not considered equal in lineage to the ʿArabs in general for being well known for their notorious character and lower origin.[62]

This equality of lineage is required to procure the identity and honor attached to the certain tribe and family. As the woman incurs the name of the husband and her children would also carry the father's caste and lineage, so if she is married to a person of lower tribe or family, her identity would automatically be devolved to her husband's lineage, and this would be an ignominy to the higher status of the woman's family. However, if the woman is married to a man belonging to a tribe of higher status than her, the equality in lineage is not disturbed as the fear of disgrace to the woman's family is eradicated.

C. *Ḥurriyah* (Freedom from Slavery)

Being free from slavery is also an essential factor of equality in marriage. A slave is not considered equal (*kufw'*) of a free woman. Even a freed slave is not considered equal to the originally free woman, as the honor of freedom by birth is not similar to that of subsequent freedom.[63] According to Imām Abū Ḥanīfah and Imām Muḥammad, the person whose one father was free is not equal in status to the one whose two fathers, that is, father and grandfather were free; and the one whose two fathers were free is not equal to the one whose more fathers (father, grandfather, great grandfather and higher so over) were free of slavery. But Imām Abū Yūsuf does not consider the grandfather's slavery as a factor of inequality.[64] The jurists have discussed many other aspects of slavery and freedom in equality of marriage like that of mother's freedom, minor's marriage with slaves etc.,

[62]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:760.
[63]Al-Kāsāni*, Badā'i' al-Ṣanā'i*, 2:319.
[64]Al-Marghinānī, *Al-Muḥīṭ al-Burhānī*, 3:22.

but as the concept of slavery does neither prevail in the current era and nor shall exist in the future, so it is not necessary to be discussed at length.

D. *Ḥirfah* (Profession)

Profession (also referred to as skills and craftsmanship) is also considered as a vital factor of equality by the Ḥanafīs. They assert that the profession of the husband should not be inferior to the profession, which the members of the wife's family carry.[65] The views of Imām Abū Yūsuf and Imām Muḥammad clearly declare equality of professional status as an essential factor of *kafā'ah* but it is reported that Imām Abū Yūsuf added that the equality in profession is not to be regarded unless the profession of the husband is too lower than that of the wife's family; like that of a tanner, weaver or cupper.[66] However, contradictory opinions are attributed to Imām Abū Ḥanīfah in this regard.[67] According to one opinion, he does not consider profession as an element of *kafā'ah*, arguing that profession is not a compulsion and a person can elevate his profession from a lower to a higher type at any time he wishes.[68] According to another opinion, he considers it an essentiality of equality.[69] The argument given to support the equality in profession is that people hold pride due to the nobility of their professions and those holding lower professions are usually looked upon. Hence, a barber is not equal to the daughter of a tailor and a tailor is not equal to the daughter of a mercer or a merchant even if the barber is richer than the tailor's daughter or the tailor is richer than the merchant's daughter.[70] This is because the man would be famous in the community due

[65]Ibn 'Abidīn, *Radd al-Mahtār*, 2:321.
[66]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:762.
[67]Al-Marghinānī, *Al-Hidāyah*, 1:196.
[68]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[69]Al-Kāsāni, *Badā'i' al-Ṣanā'i*, 2:320.
[70]Ibn 'Abidīn, *Radd al-Mahtār*, 2:322.

to his profession and a lower profession of the man is likely to bring discredit to the wife's family and would lower their prestige.

E. *Diyānah* (Piety or Character)

Diyānah, that is, piety or character of the husband is specified as a separate condition of equality in some reports by the Ḥanafīs, whereas according to other reports, it has been dealt under the factor of *dīn* because it is also an indication of fear of Allah, commitment to the *dīn* and moral uprightness. Imām Abū Ḥanīfah and Imām Abū Yūsuf hold that if a pious woman marries herself to a *fāsiq* (disobedient) person, her guardians have the right to raise objection against the marriage contract because the pride of *dīn* and *diyānah* are higher than that of the lineage, wealth, and freedom. The standardization of piousness is a very important feature for establishing equality in marriage.[71] While Imām Muḥammad among the Ḥanafīs does not recognize *diyānah* as a condition for *kafā'ah*. He emphasizes that piety or character pertains to be a matter of the hereafter and the rules of the worldly affairs must not be imposed on it; unless he is *fāsiq* to such an extent that people and children make fun of him, or he gets slapped around or he goes out in the markets while being drunk. In this case, he cannot be considered a '*kufw'* of a woman belonging to a pious family because he is despised for his *fisq*.[72]

The Ḥanafī School agrees that if the father of a virgin woman marries her to a *fāsiq* or a drunkard or to one who earns *ḥarām*, she has the right to refuse acquiescence. She can approach the *qāḍī* and get her marriage contract annulled on his cognizance.[73] The *fāsiq* is not even equal to a woman who herself is not pious but her father is a pious man, and she belongs to a pious family. Some of the Ḥanafī scholars state that if the *fāsiq*

[71]Al-Kāsāni*, Badā'i' al-Ṣanā'i*, 2:320.

[72]Al-Imām Kamāl ul-Dīn Muhammad bin 'Abdul Wāhid, *Sharaḥ Fataḥ ul Qadīr lil 'Ājiz al-Faqīr* (Beirut: Dār Aḥyā' al-Turāth al- 'Arabī, 1930), 3:192.

[73]Ibn Rushd, *The Distinguished Jurist's Primer*, 2:18.

is respectable and honored among people, then he can be considered equal to a woman of pious family.[74]

F. *Māl* (Financial Condition or Property)

The financial condition of the husband or the wealth he possesses is another factor which is regarded in *kafā'ah* by the Ḥanafīs. A poor man is not equivalent in status to a rich woman because the prestige of wealth is commonly higher than other prestige. According to certain opinions of Imām Abū Ḥanīfah, Imām Abū Yūsuf and Imām Muḥammad, if he can afford to pay her the appropriate dower and can maintain her, then he is considered to be her equal; though, he might not possess wealth equivalent to that of her. But other reports show that Imām Abū Ḥanīfah and Imām Muḥammad inclined towards presence of equality in wealth stating that the people hold pride on the basis of wealth and are looked upon due to poverty. But Imām Abū Yūsuf does not take equivalence of wealth into account for its non-permanence.[75]

It is stated that the one who cannot afford to pay his wife's *mahr* and maintenance is not her *kufw'*. The *mahr* is considered to be the counter value or consideration of her physical submission and maintenance is necessary to fulfil her needs, so both must be paid essentially.[76] In reports, it is narrated that Imām Abū Yūsuf emphasizes on the capability of the man to maintain his wife and does not insist on his ability to pay the *mahr* because it can be paid in the times of ease. Moreover, a man may pay his wife's *mahr* from his father's wealth as well.[77] But the maintenance can neither be delayed, nor can the times of ease be waited for it, so its payment is crucial.

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[74]Ibn 'Abidīn, *Radd al-Mahtār*, 2:320.
[75]Al-Kāsāni*, Badā'i' al-Ṣanā'i*, 2:319.
[76]Al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Mā'rifā, 1993), 5:25.
[77]Al-Marghinānī, *Al-Hidāyah,* 1:196.

However, the prominent opinion of Imām Abū Ḥanīfah declares that the husband must be capable of paying prompt dower, must be able of conveniently maintaining his wife and must possess wealth equal to that of her or her father. If any one of these elements lacks, the husband is not considered *kufw'* to the wife.[78]

The condition of equivalence in wealth is stipulated to avoid the miserable marriages and unpleasant effects which are caused due to the inability of a girl brought up in luxury and comfort to adjust in limited means, insufficient facilities and financial hardships.

These are the factors, which must be essentially regarded for equivalence between the man and his wife to establish *kafā'ah* between them. The consequences of absence of *kafā'ah* are briefly discussed and the factors of *kafā'ah* are elaborated in the light of Ḥanafī school of thought. The other essential element which the Ḥanafīs prescribe and require for validating the marriage of a virgin woman without her guardian's consent is the stipulation of *mahr al-mithl*.

6. *Mahr al-Mithl*: The Appropriate or Reasonable Dower

Mahr al-mithl also known as appropriate dower, reasonable dower or proper dower is the amount of the customary dower, which is prevalent in the girl's family. It is specified according to the status and circumstances of the woman and is estimated according to the dower that has been paid to the woman's sisters, her paternal aunts or the daughters of her paternal uncles. If the mother and maternal aunts of the woman do not belong to her family tribe, her *mahr* cannot be estimated in the light of their *mahr*.[79] The woman's age, beauty, property, intelligence and religion also affect the

[78]Al-Ḥanafī, *Al-Ikhtayār*, 1:99.
[79]Al-Marghinānī, *Al-Hidāyah*, 1:216.

determination of reasonable dower for her. The woman possessing more property, intelligence, beauty and younger age deserves increased reasonable dower.[80]

If the dower fixed for the woman is less than the reasonable dower, the husband is not considered to be her equal. The matter of stipulation of dower less than that of appropriate dower can be discussed in two aspects in this context:

6.1 Marriage Contracted with Inadequate Dower by the Woman's Guardian

According to Imām Abū Ḥanīfah, if the father or paternal grandfather of a minor girl conducts her marriage contract for a dower too less than that of appropriate dower or too higher than it, the contract is binding on her. But if any other person has conducted such a contract for her, it can be set aside by the *qāḍī* on her objection.[81] But Imām Abū Yūsuf and Imām Muḥammad state that such a contract is not permitted and is invalid if the intensity of the increase or decrease is too high.[82] They argue that the basis of compulsion in the marriage conducted by the father or grandfather is the presumption that their acts are qualified to be in the best interest of the child; so if the contract depicts that it violates the best interests of the child, it loses its binding force and is void.[83] But Imām Abū Ḥanīfah disagrees to this by stating that the closeness of the father and grandfather establish the *dalīl* of their service in the betterment of the child. They might lower the dower for building up other objectives of the contract. However, the guardians other

[80]Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Rawalpindi: Federal Law House, 2012), 48.

[81]Al-Marghinānī, *Al-Muḥīṭ al-Burhānī*, 3:45.

[82]Al-Marghinānī, *Al-Hidāyah: The Guidance*, 2:764.

[83]Muhammad bin Muhammad bin Mahmood, *Al- 'Ināyah Sharḥ al-Ḥidayah* (Damascus: Dār al Fikr, n.d.), 3:303.

than these two do not carry the *dalīl* of welfare.[84] So, the girl can get her marriage dissolved on attaining puberty, if some other guardian has concluded her marriage contract with an inappropriate dower.

As far as the adult virgin woman is concerned, the Mālikīs and Shāfiʿīs not regarding *mahr al-mithl* as a part of *kafā'ah*, allow the father to contract his daughter's marriage for an amount less than it. Conversely, Imām Abū Ḥanīfah holds the view that the adult virgin woman has right to refuse to marry if her father wants to marry her with an amount less than the *mahr al-mithl* because he considers it an essential ingredient for proportionality of status or *kafā'ah*.[85]

6.2 Marriage Contracted by an Adult Virgin by Agreeing upon Inadequate Dower

When an adult virgin woman conducts her marriage without her guardian's consent for an unreasonable dower, then according to Imām Abū Ḥanīfah, the guardians have a right of objection. They may either get the dower raised up to the amount of *mahr al-mithl* or they might get the contract dissolved on this ground.[86] The logic behind this right of objection is that this act of the woman might adversely affect the other women of the family because the fixation of lower dower might be quoted as a standard for the women who have to marry after her. This shall also affect the prestige of the woman's family.[87]

Imām Abū Ḥanīfah argues that the guardians possess pride of higher dower, and the elements of importance and respectability are attached to

[84]Abu Muhammad Mahmood bin Ahmad bin Mūsā bin Ahmad bin Hussayn al-Ghītābī al-Ḥanafī, *Al-Bināyah Sharḥ al-Hidāyah* ((Beirut: Dār Kutub ul- 'Ilmiyyah, 2000), 5:120.

[85]Ibn Rushd, *The Distinguished Jurist's Primer*, 2:19.

[86]Al-Sarakhsī, *Al-Mabsūṭ*, 5:13.

[87]Ibid, 5:14.

higher amount of dower and its reduction may bring disgrace to the family. He adds that low dower also constitutes inequality, rather it is more objectionable because her dower would be standardized for the subsequent marriages of her family's women. Thus, it would cause harm to the whole tribe by lowering its standards of dower. This is contrary to the relinquishment after marriage, which causes no harm to the family's standards; rather the later relinquishment is considered an act of graciousness and morality. Conversely, stipulating low dower at the time of conducting the contract is witnessed by many people, hence, deeming it as the standard dower of the woman's family.[88]

7. Analysis of the Case Law

In Pakistani legal framework the Hanafi school seems to have a predominant position and the same is evident in the family law matters particularly the case law till date. As it is being contended that Pakistani courts have adopted selective interpretation of the Islamic legal rulings, here some of the leading cases are being mentioned. The first judgement being mentioned here is Hafiz Abdul Waheed *versus* Asma Jehangir or as commonly known Saima Waheed case.[89] This is the leading case of Pakistani legal history and may be termed as the landmark judgement which changed the course of judicial history on the matter of consent of walī in Pakistan. This case disposed-off two petitions. In the first case, Saima Waheed contracted marriage and took refuge in a shelter called *Dastak* which was being administered by Asma Jahangir, the leading human rights activist. Saima Waheed married without her father's will. She was forced to marry an older man, but she eloped with the tutor of her younger brother.

[88]Fakhr ud Dīn al-Zaylī'ī Al-Ḥanafī, *Tabyīn al-Ḥaqāyq Sharaḥ Kanz al-Daqāyq wa Ḥāshīyat al-Shilbī*, (Cairo: Al-Matba'ah Al-Kubrā Al-Amīriyyah, 1895), 2:130.

[89] Hafiz Abdul Waheed vs. Asma Jehangir, PLD 2004 SC 219.

Afterwards she remained in the *Dastak* while the petition was filed for her custody to be granted to her father.

Second appellant was Muhammad Iqbal who married Shabina Zafar. Shabina's father lodged an FIR against Muhammad Iqbal that he had illicit relations with his daughter. While Shabina maintained she contracted marriage with her own free will. The court joined these petitions as the question of law was the same. It was held that no habeas corpus writ is applicable. The court was of the view that an adult Muslim female can enter marriage and consent of *walī* is not required. It is to be noted here that this opinion is based on the Hanafi school but the requirement of doctrine of *kafā'ah as* described in detail above have been neglected altogether. Whereas in both petitions the inequality in terms of profession, financial and social status is evident and the right of objection to the *walī* has been eroded altogether.

Another significant case is *Mauj Ali versus Safdar Hussain Shah.*[90] Here the supreme court held that if an adult Muslim girl solemnized her marriage by her own free will she is competent to do so. The status of her marriage is valid and does not depend on the consent of the *walī*. In this case the father of the girl filed the petition for the custody of the girl which was declined by the apex court.

In Gul Khatoon versus Haji Muhammad Aslam[91] the same issue of validity of marriage of *sui juris* woman was addressed. The petitioner registered an FIR on the pretext that his daughter has been abducted by the respondent. Whereas it was later revealed that the girl eloped with the respondent who was her fiancé as well. The girl was an adult and married with her free will and consent. It was held that the contract of marriage by

[90] Mauj Ali vs. Safdar Hussain Shah, 1970 SCMR 437.
[91] Gul Khatoon vs. Haji Muhammad Aslam, 2015 PCrLJ 193.

a *sui juris* Muslim woman without the consent of her *walī* has no effect on the validity. Another significant case to be mentioned here is judgement of Federal Shariat Court, commonly known as the Imtiaz case.[92] In this case the same matter was addressed by the court. The apex court's remarks while deciding the case are very interesting as an analogy between the contract of marriage and contract of sale by an adult woman in the Islamic law was conducted. It was held that marriage conducted by an adult woman with free will has no effect of consent of *walī* nor objections by *walī* can have any impact.

While interpreting the law the court did focus on the issue of consent of adult women and the liberty as granted by Hanafi law to the female as a subject but the details of stipulation of marriage contract have been neglected. Moreover, the Islamic law treats the contract of marriage as a special contract which is not a counterpart to any commercial contract though it is not a mere sacred pact devoid of any legal essence, but it is not an ordinary sale deed as well. Further, if the liberty of Hanafi school for granting the validity to marriage by an adult woman is being appreciated then on what grounds the essentials for that validity have been ignored.

A close look makes it clear that Pakistan courts have never addressed the issue that the doctrine of *kafā'ah* has relevance, rather it is a key element in deciding the matter of consent of *walī*. It can be rightly said that the judicial authorities have interpreted and utilized the traditional legal ruling in a piecemeal manner. All the cases raising the questions of consent of *walī* have been decided on the same principles but not a single judgement addressed the essentials and jurisprudence of this very sensitive issue. This seems an anomaly of the law and a failure of the jurisprudential skills of the Pakistani judiciary. For a marriage to be valid all the requirements are to

[92] Muhammad Imtiaz and Another vs. the State, PLD 1981 FSC 308.

be completed which includes the requirements of *kafā'ah*. It is worth mentioning that this doctrine should not be considered as a bar on individual liberty rather it is a tool for social protection and a shield to ensure her steady transition via bond of marriage. The methodology of Pakistan courts seems random and a mere pick and choose from the legal tradition.

8. Conclusion

The exhaustive analysis of the traditional *fiqhī* rulings relevant to the issue of *sui juris* woman marrying herself without her guardian's consent depicts that there are many apertures, inadequacies, and discrepancies between the actual classical *fiqhī* rulings and the contemporarily applied practices in the courts of Pakistan. As the current court practices regarding the issue of adult virgin women's marriages have been based on and are in accordance with the state's established precedential laws, thus, it is assertively proposed that a thoroughly unambiguous and coherent statutory law shall be passed by the parliament in this regard. As the prevailing Muslim Personal law in Pakistan is mostly based on the Ḥanafī law, and same was claimed by the courts while declaring such marriages valid, so, it is indispensable that a uniform statutory law must be enacted in this regard, which must necessarily be in true and complete accordance with the Ḥanafī law, incorporating all of its conditions and prerequisites. The Pakistani courts have utterly ignored the compliance of prerequisites to validate such marriages. Hence, declaring and issuing absolute validity to the marriages conducted by adult women without guardian's consent through the trend of 'pick and choose' in the *fiqhī* rulings by our honorable courts has not only deteriorated the whole spirit of this law, but has also opened an extensive gateway for irregular marriages. The in-depth scrutiny of the actual Ḥanafī law regarding guardian's role, status of such marriages, the notion of *kafā'ah* and *mahr al-mithl* shall prospectively be quite beneficial for the legislative bodies to

incorporate the true essence of rulings in statutory law (which can be unvaryingly followed) and consequently in its acquiescent implementation.

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Qualifications of a *Qāḍī*: A *Sharī'ah* Appraisal and Pakistan

Rabia Tus Saleha*

Abstract

This research explains Islamic principles of the qualifications of a *qāḍī* and the basis of such principles as quoted by different schools of thought. Further, the analysis of the qualifications of a judge under the Pakistani law is compared with Islamic law. The office of a *qāḍī* is a significant institution according to the classical Islamic era that establishes a strong and magnificent structure to protect the rights of the public under one Islamic state. In *Sharī'ah*, a *qāḍī* holds the status of *walī* (guardian) to empower and protect the interest of vulnerable segments of the society in accordance with Islamic law. This status requires that a *qāḍī* should be qualified as per the essential conditions prescribed by the distinct schools of Islamic thought, in the light of religious teachings. It is also essential because he is entrusted with the crucial responsibility to interpret and implement the law within the bounds of *Sharī'ah.* Pakistan being an Islamic state, as it is recognized by the Article 2A of the Constitution of the Islamic Republic of Pakistan of 1973, and Article 227(1) of the Constitution requires that all laws should be in conformity with the injunctions of Islam as laid down in the Holy Qur'ān and *Sunnah*. Moreover, the Enforcement of Shariat Act of 1991 clearly articulates that wherever more than one interpretation of the statute law of the country are possible, the interpretation contemplated under the Islamic principles and jurisprudence shall be followed. However, the statutory law related to qualifications of a judge in Pakistan and the relevant case laws do not fulfill the conditions provided by the Jurists and the requirements endorsed by the Constitution of Pakistan of 1973.

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1. Introduction

Pakistan being an Islamic state, as it is recognized by the Article 2A of the Constitution of the Islamic Republic of Pakistan of 1973, and Article 227(1) of the Constitution requires that all laws should be in conformity with the injunctions of Islam as laid down in the Holy Qur'ān and *Sunnah*. Moreover, the Enforcement of Shariat Act of 1991 clearly articulates that wherever more than one interpretation of the statute law of the country are possible, the interpretation contemplated under the Islamic principles and jurisprudence shall be followed.[1] However, the statutory law related to qualifications of a judge in Pakistan[2] and the relevant case laws[3] do not fulfill the conditions provided by the Jurists and the requirements endorsed by the Constitution of Pakistan of 1973.[4]

The Holy Qur'ān and the traditions of the Holy Prophet Muḥammad do not specify the inclusive qualifications for the appointment of a *qāḍī*. The requisite qualifications are quoted by the jurists who mostly grounded on their inferences and deductions. Certain conditions have been laid down for the appointment of a judge by the Islamic jurists. They are agreed upon

[1]The Enforcement of Shariat Act, (1991), sec. 4(a). Available at: https://na.gov.pk/uploads/documents/1335242059_665.pdf (accessed on 21 March 2022).

[2]See The Family Courts Act', Pub. L. No. W.P. Act XXXV (1964), sec. 4. Available at http://punjablaws.gov.pk/laws/177.html#_ftn14 (accessed on March 20, 2022).

[3]Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73. Available at: https://www.federalshariatcourt.gov.pk/Judgments/Sh.Pet.No.K-4%20of%201982.pdf (accessed on March 20, 2022). See also: Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010). Available at: https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%20No.%201%20-%20L%20-%20of%202010.pdf (accessed on March 20, 2022).

[4]Justice Rustam S. Sidhwa provided verdict in the Muḥammad Latif vs. Mst. Hanifan Bibi, 1980 PCr.LJ 122. Distinct types of talaq under Ḥanafī law were discussed in this case and the petition was dismissed for having no merit.

some conditions as he must be a Muslim, sane, major and a free person while disagreed upon certain conditions. Further, these conditions are acknowledged to be fulfilled in a person for the eligibility of the office of a *qāḍī*.

2. A Muslim/ Islam

Islam considers the faith as an important element for the establishment of distinct institutions under Islamic state. A verse of *Surah al-Nisā'* defines this ruling:

وَلَن يَجۡعَلَ ٱللَّهُ لِلۡكَٰفِرِينَ عَلَى ٱلۡمُؤۡمِنِينَ سَبِيلًا.

> And never will Allāh give the disbelievers over the believers a way (to overcome them).[5]

A non-believer must not be appointed over a believer according to this verse. Jurists have recognized this ruling for the appointments of non-Muslims in many institutions of the government.

Qāḍī is considered as a legal guardian while a non-Muslim cannot not be accepted as a guardian of a Muslim according to the above-mentioned verse. The crucial duty of a *qāḍī* is to enforce the order of *Sharī'ah*, and a non-Muslim can be biased in implementing the rulings of *Sharī'ah* due to his prejudice or biasedness. Hence, he will go into conflict with *Sharī'ah*. So, the majority of the jurists are agreed that the judge should be a Muslim person[6] because it is not permissible for a non-Muslim to rule among Muslims or in the lawsuit of one of the Muslims. This leads to

[5]Al-Qur'ān, 4:141.

[6]Alauddīn Abi Bakr Bin Mas'ud Al-Kasani, *Bada'i al-Sana'i fi Tartib al-Shara'i* (Kairo: Dar al-Kutub al-Ilmiya, 1986), 3:7.

disqualify him for the status of being guardian (*walī*) of a Muslim. Therefore, it is not valid to make him judge among Muslims.[7]

Further, there is disagreement of jurists on the appointment of a non-Muslim over other non-Muslims. According to the unanimous opinion of the majority of Muslim Jurists, a non-Muslim cannot be a *qāḍī* upon any matter of other non-Muslim. They have considered Islam as a basic condition in *qāḍī* without looking into the matter or the parties in dispute. In addition to this, there are numerous *āṯhār* which prohibit the appointment of a *dhimmī* (non-Muslim citizen) on the seat of a judge. Besides this, it is also prohibited to grant a position of a typist or a writer of the judge to a non-Muslim due to their appearance of betrayal and disloyalty in religious matters as well as their struggle to deteriorate Muslims.[8] However, distinct opinions of the jurists are also present on a matter that allow the state to appoint a non-Muslim as a judge in all or certain matters. But his decision will not be enforced till he enters into Islam.[9] Though, the verdicts of a non-Muslim *qāḍī* are correct and legal for his religious fellows according to the Ḥanafī Jurists.[10] The condition for the eligibility of a *qāḍī* is his eligibility of being a witness according to the Ḥanafī opinion, and a non-Muslim is qualified to be a witness of his religious fellows.[11] So, he can be a *qāḍī* upon them and it is neither injurious nor any appearance of betrayal or disloyalty

[7]Abu al-Ḥasan Burhān al-Dīn Al-Marghīnānī, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ahya'al-Turath al-Arabi, 1970), 3:108; Al-Kasani, *Bada'i al-Sana'i*, 7:7-17.

[8]Muḥammad bin Aḥmad Al-Sarakhsi, *Al-Mabsut* (Beirut: Dar al-Marifa, 1993), 16:110.

[9]Muḥammad Amin Ibn 'Abidin, *Radd al-Muḥtār 'ala al-Durr al-Mukhtār* (Beirut: Dar al-Fikr, 1992), 5:355; Maḥmood Muḥammad Nasir Barkat, *al-Sultah al-Taqdiriya lil-Qāḍi fi al-Fiqh al-Islami* (Urdan: Dar al-Nafais lil-Nashar wa al-Tozee', 2008), 32-35.

[10]Muḥammad 'Ala ud-Din Ḥaskafi, *Durr al Mukhtar Sharh Tanvir al-Absar* (Dar al-Kutub al-Ilmiya, 2002), 463. Ibn 'Abidin, *Radd al-Muḥtār,* 5:355 & 428.

[11]Ibn 'Abidin, *Radd al-Muḥtār,* 5:355.

can be expected by him for his religious fellows in any matter. Ḥanafī jurist have quoted the following verse of Holy Qur'ān in this perspective:[12]

"وَٱلَّذِينَ كَفَرُواْ بَعۡضُهُمۡ أَوۡلِيَآءُ بَعۡضٖۚ."[13]

As for the disbelievers, they are guardians of one another.

The opinion of majority of the jurists have conditioned that the dispensation of justice must be by a Muslim judge in the Islamic state. This enlarges the scope of a Muslim judge to decide the matters among the Muslims and non-Muslims. They drive the ruling from the text of the *ḥadīth*:[14]

الْإِسْلَامُ يَعْلُو وَلَا يُعْلَى عَلَيْهِ.[15]

Islam dominates and is not dominated.

According to this *ḥadīth*, a non-Muslim cannot be a guardian or superior to Muslim in a Muslim State. Al-Mauwardī, a renowned Shāfiʿī scholar, has also explicitly prohibited the appointment of a non-Muslim on the place of *qāḍī* for the decree in matters of Muslims and non-Muslims.[16]

Nevertheless, it is sometimes considered that the qualifications of a judge depend upon merit and education of a person rather than religion as it is also considered in *Al-Majallah al-Ahkam al-Adaliyyah* where Islam has not been mentioned as an element of qualifications.[17] In addition to it, unfortunately, Pakistani law is not in consonance with Islamic principles that are prescribed by Ḥanafī jurists in this category. The Family Courts Act, 1964 elaborates the qualifications of a Judge of a Family Court without any such condition as above mentioned.[18] Professional qualification with

[12]Al-Kasani, *Bada'i al-Sana'i*, 2:239; Al-Sarakhsi, *Al-Mabsut*, 16:135.
[13]Al-Qur'ān, 8:73.
[14]Al-Sarakhsi, *Al-Mabsut*, 30:30.
[15]Al-Bukhari, *Saḥiḥ*, 2:93, Chapter: When child die whether to pray on him.
[16]Abu al-Hasan 'Ali bin Muḥammad bin Habib Al-Mawardi, *al-Ahkam al-Sultaniyyah wa al-Wilayat al-Diniyya* (Kuwait: Maktaba Dar ibn e Qutaiba, 1989), 89.
[17]*Al-Majallah al-Ahkam al-Adaliyyah 1876*, Clause 1792, 1793 & 1794.
[18] 'The Family Courts Act', Pub. L. No. W.P. Act XXXV (1964), sec. 4.

certain experience is required in all courts irrespective of any other qualifications. As the Punjab Judicial Service Rules of 1994 elaborates that civil judge-cum-Magistrate in the province of Punjab must possess a degree in law from a recognized university as well as must have practiced for at least two years in the profession of law.[19] For instance, family matters related to kinds of *ṭalāq*[20] and *khulʿ*[21] were discussed in distinct case laws by non-Muslim judges.

3. A Sane/ Sanity and Maturity

A *qāḍī* must be an adult and prudent person to fulfill the requirement of his job as well as to practice his wisdom for deciding the lawsuits.[22] He must not be stubborn and clamorous.[23] He must have ability to differentiate between right and wrong. While an insane and minor person are not able to distinguish between right and wrong. So, they do not qualify for the status of least guardianship and are not eligible to decide their own matters, how can they be appointed as guardians of others?

The jurists have unanimous opinion regarding the disqualification of an insane or a minor person for guardianship or *qāḍā* due to their incompetency in controlling their own matters and non-realization of one's interest correspondingly. They are not legally bound by their words and actions and further these words and actions are not enforceable except their

[19]The Punjab Judicial Service Rules (1994), rule 7. Available at: https://regulationswing.punjab.gov.pk/system/files/PbJudicial_SR_1994_19940331.pdf (accessed on 24 March 2022).

[20] Justice Rustam S. Sidhwa provided verdict in the Muḥammad Latif vs. Mst. Hanifan Bibi, 1980 P Cr. L J 122. Distinct types of *Talaq* under Ḥanafī law were discussed in this case and the petition was dismissed for having no merit.

[21]Justice Dorab Patel and Justice Ghulam Safdar Shah provided verdict in the Muḥammad Sadiq Hussain vs. Khurshid Fatima,1978 SCMR 130. Petition was dismissed for having no merit.

[22]Al-Kasani, *Bada'i al-Sana'i*, 3:7; Ibn ʻAbidin, *Radd al-Muḥtār*, 5:354.

[23]Al-Sarakhsi, *Al-Mabsut*, 16:109.

guardian will be liable for any destruction occurred due to their actions. The *ḥadīth* of Prophet Muḥammad elaborates that:

> رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنْ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنْ الصَّغِيرِ حَتَّى يَكْبَرَ، وَعَنْ الْمَجْنُونِ حَتَّى يَعْقِلَ، أَوْ يُفِيقَ[24].
>
> The Pen has been lifted up from three: from the sleeper until he wakes up, from the child until he reaches puberty and from the insane until he regains his sanity.

However, there is one contradictory opinion of Abdul Waḥid Al-Shayrāzī, a Ḥanbalī jurist, who has not mentioned maturity as a condition in his book for *qāḍī*.[25] But it is not preferred opinion according to the consensus of all schools of thought. Some jurists have added supplementary requisites to enhance the criteria of the eligibility of a *qāḍī*. These requisites include a good decision maker, a great intellect, a person who remains away from sin/*maḥārim* as well as from negligence and forgetfulness, and he should have clarity of mind and deep understanding regarding the problems and their solutions.[26]

4. Perfection of Senses

A *qāḍī* must be perfect in creation because he is responsible for accurate dispensing of rights between parties. Perfection in creation includes sanity as well as perfection of hearing, seeing, and speaking.[27] A renowned Ḥanafī Jurist, Imām al-Kāsānī stated that all the three senses must be present in

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[24]Abu Abdullah Muhammad bin Yazid bin Maja, *Sunan* (Dar al-Risalah al-'almiyah, 2009), 3:198, Ḥadīth no 2041; Ahmad bin Muhammad bin Hanbal, *Musnad* (Cairo: Dar al- Ḥadīth, 1995), 2:11, Ḥadīth no 940; Abu Daud Suleman bin al-Ash'ath, *Sunan* (Dar al-Risalah al- 'ilmiyah, 2009), 6:452, Ḥadīth no 4398. Ḥadīth is Saḥiḥ because of corroborating evidence.

[25]Alauddīn Abu Al-Ḥassan Al-Mardavi al-Hanbali, *Al-Inṣāf Fī Ma'rifat al-Rājiḥ Min al-Khilāf* (Dar al-Ahya' al-Turath al-Arabi), 11:176.

[26] Ibn 'Abidin, *Radd al-Muḥtār*, 5:364.

[27]Abdullah bin Aḥmad ibn Qudamah, *Al-Mughni* (Egypt: Maktabah al-Qaherah, 1968), 10:36.

qāḍī.[28] A deaf, dumb, or blind person should not be appointed as a *qāḍī*, and if he is so, he would not be able to hear the litigants or see them. Imām al-Kāsānī also stated in his book *Badai Al-Sanai* that Imām Abū Ḥanīfah and Imam Muḥammad have made a condition of perfect seeing and hearing for a witness.[29] So, a *qāḍī* must not be a blind person or having a problem in seeing according to the rulings[30] as defined and cited by them as the qualifications of a witness and afterwards applied for the *qāḍī*. However, Imām Sarakhsī has also conditioned and highlighted this point that a *qāḍī* should not be a blind person.[31] If he becomes deaf, dumb, or blind as well as insane, he will cease to have an office of *qāḍī* till he gains his senses back.[32] While, a blind person can be qualified to be a *qāḍī* according to some Shāfiʿī jurists.[33]

5. Free/ Not Slave

An important condition for the appointment of *qāḍī* is a freedom. Nowadays, the world has agreed to eliminate all forms of slavery and it is significant that the term "freedom" is itself prevalent. But the jurists have also discussed the topic related to the appointment of a slave as a *qāḍī* to unveil the ambiguity. The majority of the Jurists have determined freedom as an essential condition for a *qāḍī*[34] because a slave does not possess discretion in his own matters. His profits, wages and gains are in the ownership of his master. He himself is just like a commodity which can be purchased or sold. Therefore, it is not possible for him to decide the disputes

[28]Al-Kasani, *Bada'i al-Sana'i*, 3:7.
[29] Al-Kasani, *Bada'i al-Sana'i*, 6:268.
[30] Quality of being a witness of the parties as defined previously under Islam.
[31] Al-Sarakhsi, *Al-Mabsut*, 16:109.
[32] Ibn ʻAbidin, *Radd al-Muḥtār*, 5: 354 & 364.
[33] Ibn Qudamah, *Al-Mughni*, 10:37.
[34]Aḥmad Bin Muḥammad bin Ali Bin Hajar al-Haitami al-Shafi'i, *Tohfa ul-Mohtaj fi Sharh al-Minhaj* (Beirut: Dar al-Ahya' al-Turath al-Arabi, 1983), 10:106; Ibn Farḥūn al-Mālikī, *Tabsarah al-Hukkam fi Usool al-Aqdiya wa Minhaj al-Ahkam* (Maktabah al-Kuliyat al-Azhariyya, 1986), 1:26; Al-Kasani, *Bada'i al-Sana'i*, 3:7.

of others with freedom and without coercion. While making a condition of free person, Imām Sarakhsī stated that he is not accepted as a witness in matters and *qaḍā'* is more dignified and prestigious than *šahādah* (*shahādah*).[35] According to the majority of jurists, if a slave passes his orders or gives verdict as a *qāḍī* to the Muslims, these orders or verdict are not enforceable because the freedom is the foremost condition for his appointment. Nevertheless, A Zāhirī jurist, Ibn Ḥazm has not defined any such condition. He mentioned that the *qāḍī* has to render services for the promotion of virtue and the prevention of wrong deeds, hence it does not conflict with the status of a slave.[36] He quotes the tradition of Holy Prophet, narrated by one of the companions, Abū Zar, that:

أَنْ أَسْمَعَ وَأُطِيعَ وَإِنْ كَانَ عَبْدًا مُجَدَّعَ الأَطْرَافِ.[37]

> Listen and follow the master even he is a slave, and his limbs are severed.[38]

Another tradition that is narrated by Anas bin Mālik that Prophet Muḥammad said:

اسْمَعُوا وَأَطِيعُوا، وَإِنِ اسْتُعْمِلَ عَلَيْكُمْ عَبْدٌ حَبَشِيٌّ، كَأَنَّ رَأْسَهُ زَبِيبَةٌ.[39]

> You should listen to and obey your ruler even if he was a black slave (Ethiopian) whose head looks like a raisin.

Some jurists have accepted the authority of a slave and alleged that he is qualified to be a *qāḍī* with the permission of his master.[40] But many jurists

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[35]Al-Sarakhsi, *Al-Mabsut*, 16:110; Al-Kasani, *Bada'i al-Sana'i*, 7:3; Al-Mardavi, *Al-Inṣāf Fī Ma'rifat al-Rājiḥ Min al-Khilāf,* 11:176.

[36]Abu Muḥammad Ali Bin Aḥmad bin Saeed Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār* (Beirut: Dar al-Fikr), 8:528.

[37]Abu al-Hussain Muslim bin Hajjaj al-Qushairi, *Saḥiḥ* (Cairo: Matba't al- 'Isa al-Babi al-Halbi, 1955), 3:1467, Ḥadīth number 1837.

[38] Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:528.

[39]Muḥammad Bin Isma'eel Abu Abdullah Al-Bukhari, *Al-Jama' al- Saḥiḥ* (Jaddah: Dar Tauq al-Naja, 2000), 9:62, Ḥadīth no: 7142.

[40] Al-Mardavi, *Al-Inṣāf Fī Ma'rifat al-Rājiḥ Min al-Khilāf*, 11:176.

have negated his appointment and considered this argument on the level of an analogy with dissimilarity while elaborating that *qaḍā'* has a binding force, while Fatwa does not have a binding power.

Further, some Ḥanafī scholars have elaborated a different opinion regarding the appointment of a slave on the seat of the *qāḍī*. According to them, if his judgement is in consonance with the judgement of another *qāḍī*, it will be enforced because he is accepted as a witness by Imām Mālik and *Qāḍī* al-Shurayḥ.[41]

6. Righteousness and Knowledge about Aḥkām al-Sharīʿah

Generally, righteousness includes justice, trustworthiness, nobility, honesty, and patience during anger and in the difficulties, abstinence from major sins and infrequence upon minor sins. According to Imām Abū Yūsuf, righteousness in evidence (*al- 'adl fi shahādah*) means being away from major sins and being infrequent upon minor sins, and the honesty of a person should be more than of his corruption, and his accurateness should be more than of his errors.[42] There are distinct opinions regarding the appointment of a *fāsiq* judge and the status of his decision. However, a strong opinion of Ḥanafī scholar, Imām al-Kāsānī, enumerates that the righteous person is not a primary condition for the validity of the decision of a *qāḍī* but it is a condition that leads to perfection. So, it is allowed to appoint a *fāsiq* judge and his decision is considered a legitimate one as long as it does not conflict with the religious rulings.[43] While, it is explained in *al-'Inayah* that a *fāsiq* is among the people of disrepute but he is still considered from the group of people who have authority (*wilāyah*) upon

[41]Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah* (Dar al-fikr, 1320H), 3:361.

[42] Ibid, 3:450.

[43] Al-Kasani, *Bada'i al-Sana'i*, 7:3.

themselves and others.[44] Further, some Ḥanafī jurists have mentioned a situation that if a *fāsiq* has given a verdict, which then has been referred or appealed to another *qāḍī* and he had annulled it, hence the third *qāḍī* cannot make this verdict enforceable.[45]

Apart from this, majority of the jurists from distinct schools of thought except a group of Mālikī, do not validate the decision of a *fāsiq* judge because they do not accept him as a witness. Imām Shāfiʿī has stated that *qaḍa'* is a great fidelity, while *fāsiq* is not accepted as a witness.[46] They derive the ruling from the verse of Holy Qur'ān that a wicked person must be ascertained to discover the truth.

إِن جَآءَكُمۡ فَاسِقُۢ بِنَبَإٖ فَتَبَيَّنُوٓاْ.[47]

If a wicked person came to you, he must be ascertained.

Ibn Qudāmah al-Maqdisī has also elaborated the opinion of Ḥanbalī School of Thought in his book.[48] In this era of globalization, a fair and truthful person, as required by the Islamic law, may not be available. In this case, a person most worthy among those who are less worthy, shall be appointed as a judge, considering all other necessary requirements, to maintain a balanced society.

Moreover, Imām Shāfiʿī, Imām Mālik, Imām Aḥmad bin Ḥanbal and some of the Ḥanafī jurists have also extended the qualifications of a judge and obligated that the judge should be a skilled and knowledgeable in the field of Islamic law. Moreover, he must be a mujtahid.[49] Therefore, it is not legitimate to appoint judges from ignorant people. However, if a *muqallad*, *mujtahid fil madhhab* or *mujtahid fil fatwā*, is appointed by the authority of the state due to any necessity, his decisions are enforceable

[44] Muḥammad bin Mahammad bin Mahmood al-Roomi, *al-'Inayah Sharh al-Hidayah* (Dar al-fikr), 3:201.

[45] Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah*, 3:361.

[46] Ibn Qudamah, *Al-Mughni*, 10:37; Al-Kasani, *Bada'i al-Sana'i*, 7:3.

[47] Al-Qur'ān, 49:6.

[48] Ibn Qudamah, *Al-Mughni*, 10:37.

[49] Ibn Qudamah, *Al-Mughni*, 10:37.

according to all jurists. The preferred opinion of Ḥanafī School of Thought permits the appointment of a judge who may be a follower of one of the schools of thought.[50] In this case, the judge will take *fatwā* from the *mufti* or *faqih* to conclude the verdict. According to Mālikī jurist, Muḥammad bin Aḥmad ad-Dusūqī, it is legitimate to appoint a *muqallad* judge as he explained that the condition of being mujtahid is considered under the category of recommended qualities according to Ibn Rushd.[51] Today, a qualified persons to the level of absolute mujtahid is not available. Further, it is very hard to find out a person who has some knowledge to the level of *mujtahid muqayyad*.

7. Other Qualities

Jurists have recommended certain supplementary conditions with the above-mentioned principal conditions. While some of the statements consider them as obligatory. These may be divided into two categories such as positive and negative aspects of abilities and qualities. Such as negative aspects of qualities like he must not be a person who is generally slandered in linage[52] or is vulnerable or poor[53], impolite or offensive, arrogant, rigid or stubborn even to understand the truth.[54] While, positive aspects of qualities are being sagacious, honest, God-fearing, pious, honorable, respected, lenient,[55] who take opinions and suggestions and having good inside.[56]

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[50] Al-Kasani, *Bada'i al-Sana'i*, 3:7.

[51] Muḥammad bin Aḥmad bin Urfah Ad-Dasuki Al-Mālikī, *Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir* (Dar al-Fikr), 4:129.

[52] Al-Kasani, *Bada'i al-Sana'i*, 7:3.

[53] Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah*, 3:308.

[54] Al-Sarakhsi, *Al-Mabsut*, 16:108.

[55] Al-Sarakhsi, *Al-Mabsut*, 16:108.

[56] Al-Kasani, *Bada'i al-Sana'i*, 7:3&5.

8. Male and Female

All the jurists are agreed on the issue that a male, having all other requisites, is qualified to be appointed on the post of a judge. But they disagreed and differentiated upon the ruling of an appointment of a female judge even if she possesses all the requisites of the qualification of a judge. This disagreement can be divided and elaborated into three perspectives.

A first group, majority of the jurists (*jamhūr*) have inflicted a principal condition of being a male person to fulfill the qualification of a judge and if the woman is appointed as a judge, her appointment and decisions will be considered void ab initio in all of the matters and, her judgements will never be enforced. This is the *maḏhhab* of Mālikī[57], Shāfiʿī[58] and Ḥanbalī[59] School of thought.[60] Imām Zufar has also agreed with *jamhūr* in this ruling.

However, the second group, Imām Abū Ḥanīfah and Ḥanafī jurists have elaborated a distinct opinion and permitted the appointment of a female judge.[61] Muḥammad Amīn Ibn 'Abidīn has stated that the woman is qualified to be a judge in all matters except *ḥudūd* and *qiṣāṣ* according to Imām Abū Ḥanīfah.[62] He derived this qualification from the rule of *shahādah* (being a witness) and quoted that the woman can be a judge in all matters except the matters linked with *ḥudūd* or *qiṣāṣ* issues as she can become a witness in all these matters according to Islamic rulings.

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[57]Abū al-Walīd Muḥammad bin ʾAḥmad bin Muḥammad Ibn Rushd, *Bidayatul Mujtahid wa Nihayatul Muqtashid* (Kairo: Dar al-Kutub al-Ilmiya, 2004), 4:243.

[58]Abū Zakariyyā Mohiyuddin Yaḥyā Bin Sharaf Al-Nawawī, *Al-Majmoo' Sharh al-Muhadhib* (Beirut: Daar al-Fikr, 1997), 20:127.

[59] Ibn Qudamah, *Al-Mughni*, 10:36.

[60] Ibn Rushd, *Bidayatul Mujtahid,* 4:243.

[61]Abdullah Bin Maḥmood Bin Modood al-Mosalī, *Al-Ikhtiyār li Tāleel Al-Mukhtar* (Kairo: Matba'a al-Ḥalbī, 1951), 2:84.

[62] Ibn ʻAbidin, *Radd al-Muḥtār*, 5:353.

Furthermore, the third group, Imām Ibn Ḥazm has not inflicted any condition for a *qāḍī* to be a male person and exclusively permitted a woman to be qualified as a *qāḍī* in all matters.[63] He has referenced his opinion while quoting the opinion of Imām Abū Ḥanīfah and the narration of ʿUmar ibn al-Khaṭṭāb regarding placement of *al-Shafā'* from his tribe to control the marketplace. He elaborated that the tradition of Prophet which prohibits the entrustment of affairs to a woman is specifically applicable in one matter and that is the caliphate. He further grounded his opinion on another tradition of Prophet Muḥammad which states that:

وَالْمَرْأَةُ رَاعِيَةٌ عَلَى بَيْتِ زَوْجِهَا وَوَلَدِهِ.[64]

> a woman is the shepherd of her husband's wealth, and she is responsible for her flock.

He argued that the textual sources do not prevent woman from being appointed in different authoritative areas including judiciary.[65] Ibn Ḥazm has also cited the appointment of woman, named Thumal al-Qahramana, in the office of *maẓālim* court in the year 306 A.H. She was appointed by the mother of the caliph al-Muqtadir.[66] He said that she sat as a judge between people as well as judges and, the jurist have also attended her sessions.[67] Al-Dhahabī[68] and Ibn al-Jawzī[69] have also quoted this historical account. Al-Dhahabī further had added that she put the rescripts on the petitions. Ibn

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[63] Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:527.

[64] Al-Bukhari, *Saḥiḥ* (Damascus: Dar Ibn e Kathir, 1993), 5:1996, Ḥadīth no: 4904.

[65] Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:527-528.

[66] Jamal al-Din Abū al-Maḥāsin Yūsuf ibn Taghrī-Birdī, *al-Nujūm al-Zāhira* (Beirut: Dar al-Kutub al-Ilmiya, 1992), 216-217.

[67] Abu Muḥammad Ali Bin Aḥmad bin Saeed Ibn e Ḥazm al-Zahiri, *Rasā'il Ibn Ḥazm al-Andalusī* (Beirut: Arab Institute for Research & Publishing, 1987), 2:98.

[68] Shams ad-Dīn adh-Dhahabī, *Siyar a'lam al-Nubalā'* (Moasas al- Rasalah, 1985), 15:49.

[69] Jamal ud Din ʿAbd al-Raḥmān bin ʿAlī bin Muḥammad al-Hanbali Ibn al-Jawzī, *Al-Muntaẓam fī Tārīkh al-Umam wa al-Mulūk* (Beirut: Dar al-Kutub al-Ilmiya, 1992), 13:181.

Taghrī-Birdī holds that she issued the rescripts and upon these rescripts was her writing.[70] Ibn e Jarīr al-Ṭabarī has also narrated the similar opinion to the opinion of Ibn e Ḥazm.[71] But some of the jurists have rejected the authenticity of the opinion of Imām al-Ṭabarī. Imam Qurṭabī has quoted the dialogue between *qāḍī* Abū Bakr bin al-Ṭayyab al-Mālikī al-Ashʿarī known as Ibn al-Baqilāni and Abū al-Faraj, a renowned Sheikh of Shāfiʿī *madhhab*. He has written the statement of Imām Abū al-Faraj that the woman is qualified to decide any matter and the basis of this rule is the enforcement of *aḥkām* by the *qāḍī* through listening the witnesses and deciding the issues and disputes between the parties and, this can be done by a woman in the same sense as by a man. *qāḍī* Abū Bakr has criticized this point of view and highlighted the problem while associating it with the greatest imamate which regulates the protection and defense on boarders, manages the international policies, accumulates the *kharāj* and delivers it to the needy. These obligations can be fulfilled more accurately by a man than a woman.[72]

Moreover, majority of jurists (*jamhūr*) have derived their ruling to elaborate the disqualification of woman in this matter from the verse of the Holy Qur'ān and the tradition of the Holy Prophet Muḥammad and disagreed with Ḥanafī scholars. The verse elaborates that:

ٱلرِّجَالُ قَوَّٰمُونَ عَلَى ٱلنِّسَآءِ بِمَا فَضَّلَ ٱللَّهُ بَعۡضَهُمۡ عَلَىٰ بَعۡضٍ.[73]

> Men are responsible for women due to the right which Allāh Almighty has given them over the women.

Moreover, Imām Bukhārī narrates the tradition of the Prophet Muḥammad:

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[70] Ibn Taghrī-Birdī, *al-Nujūm al-Zāhira*, 217.

[71] Ibn Qudamah, *Al-Mughni*, 10:36.

[72] Abu Abdullah Muḥammad bin Aḥmad bin Abu Bakr Al-Qurṭubī, *al-Jama' li-Ahkām al-Qurān* (Kairo: Dar al-Kutub al-Misariya, 1964), 13:183.

[73] Al-Qur'ān, 4:34.

لَمَّا بَلَغَ رَسُولَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: أَنَّ أَهْلَ فَارِسَ قَدْ مَلَّكُوا عَلَيْهِمْ بِنْتَ كِسْرَى، قَالَ: لَنْ يُفْلِحَ قَوْمٌ وَلَّوْا أَمْرَهُمُ امْرَأَةً.[74]

> When it was informed to the Prophet that the people of Persia had crowned the daughter of Khosrau as it is their ruler. The Prophet said: Such people as ruled by a lady will never be successful.

Imām Ibn Qudāmah, an eminent Ḥanbalī Jurist, further elaborates that a male *qāḍī* attends meetings of disputes as well as assemblies of men, and the profession of *qāḍī* requires expert opinion, excellence in intelligence and intellect. While the woman lacks the intellect and expert opinion because she does not attend assemblies of male and she alone as a witness is never acceptable in any matter even if she has thousands of females as witnesses with her, except they have a man with them in witnesses. He has also quoted the verse 282 of *surah al-Baqarah* while stating that Allāh Almighty has warned about their misguidance and forgetfulness. She is not suitable for the greatest Imamate nor for the supreme authority upon any country as the Prophet, his caliphs and their successors have not allocated any woman to the seat of a judge nor for the headship of countries. And, if it was permissible then all the history must not be silent of it.[75]

However, A Mālikī jurist, Ibn Rushd (595 A.H) has further disclosed the roots of discrepancies between the opinions and stated that the first group, which exclusively disqualifies a woman from being a judge, ambiguated and confused the status of a woman judge with the status of greatest Imāmate, and they have also made an analogy of a woman upon a slave due to the reason of less expert opinion and intellect.[76] In addition to it, Imām Nawawī has elaborated that it is mandatory for a *qāḍī* to sit in the

[74]Al-Bukhari, *Saḥiḥ al-Bukhari*, 6:8, Ḥadīth no: 4425.
[75] Ibn Qudamah, *Al-Mughni*, 10:36.
[76] Ibn Rushd, *Bidayatul Mujtahid*, 4:243.

sittings of jurists, witnesses and disputes of men while, a woman cannot sit in the gatherings of men as it is prohibited due to the fear of infatuation with her.[77] Further, Imām Ibn Rushd has disclosed the second group that permits, accepts and qualifies a woman to be a judge in financial matters, has rooted their opinion in the ruling of acceptance of a woman as a half-witness in financial matters. The third group which exclusively qualifies a woman to be a judge in all matters, has based its opinion upon the ruling that every person who can make judgement in disputes is eligible to be a judge and it is a general rule according to this group. This group has further elaborated that this rule is a general and a greatest imamate is excluded and particularized from it through the consensus of all jurists. So, woman cannot be a supreme authority of any state according to the consensus.[78]

However, the opinion of Ḥanafī Jurists which qualifies a woman to be a judge is quoted by many jurists like Muḥammad Amīn Ibn 'Abidīn,[79] Abū Bakar Al-Kāsānī,[80] Abdullāh bin Maḥmūd[81], Ibn Qudāmah[82] and Kamāluddīn Ibn al-Hammām.[83] But many of the jurists considered it to be a wrong perception of the opinion. As according to them, Muḥammad Amīn Ibn 'Abidīn has cited the text of al-Ḥaskafī which acknowledges that the appointing authority is a sinner in this matter due to the existence of *khabr* (*ḥadīth*) of unsuccessful people ruled by a lady in *Ṣaḥīḥ* al-Bukhari.[84] In addition to it, some critics of Ḥanafī view have also pointed out the non-existence of a female on the status of *qāḍī* in the history of Islamic era, even

[77] Al-Nawawī, *Al-Majmoo' Sharh al-Muhadhib*, 20:127.
[78] Ibn Rushd, *Bidayatul Mujtahid*, 4:243.
[79] Ibn 'Abidin, *Radd al-Muḥtār*, 5:353.
[80] Al-Kasani, *Bada'i al-Sana'i*, 7:3.
[81] Al-Mosalī, *Al-Ikhtiyār li Tāleel Al-Mukhtar*, 2:84.
[82] Ibn Qudamah, *Al-Mughni*, 10:36.
[83] Kamāluddin Muḥammad bin Abd al-Wahid al-Sivasi - Ibn al-Hammām al-Ḥanafi, *Fath al-Qadīr* (Beirut: Dar al-Fikr), 7:253.
[84] Ḥaskafi, *Durr al Mukhtar*, 476; Ibn 'Abidin, *Radd al-Muḥtār*, 5:440.

it spread over with the majority of Ḥanafī Chief Justices.[85] Dāmād Afandī has also agreed with the al-Ḥaskafī while elaborating it in his *Majma'al-Anhur*.[86]

Nevertheless, Ḥanafī jurists have elaborated certain origins of their ruling regarding permissibility of appointment of woman as a judge in matters except *qiṣāṣ* and *ḥudūd*. They said that everything which is not forbidden through argument (*dalīl*) is allowed. Any person who is eligible to understand the dispute, his decision is legitimate and his appointment in the judiciary is lawful.[87] Hence, a righteous and a qualified woman, who can understand the affairs of dispute, can be appointed in matters other than *qiṣāṣ* and *ḥudūd* without any objection.

9. Female Judges in Pakistan

After analyzing the opinions of the jurists of distinct schools of thought, it is easy to further analyze the case study of Pakistani law and build a principle regarding entrusting the duties of the *qāḍī* to a woman. Although in Pakistan, the first appointment of a woman judge dates back to 1974. A first woman judge, Khalida Rashid Khan, was appointed as a civil judge in the history of Pakistan and eventually she was elevated to the High Court as a judge in 1994.[88] However, women representation was increased to more than one third of family courts through appointment of female judges in 2009.[89] Moreover, Ashraf Jehan was first female judge to be appointed to

[85]Hafiz Muḥammad Anwar, *Wilayat ul Mar'a fi al-Fiqh al-Islami* (Riyadh: Dar Balensiyah Publications and Distributors, 1999), 227.

[86]Damad Afandi, *Majma'al-Anhur fi Sharh Multaqat al-Abhur* (Bairut: Dār Ahya al-Thurāth al-arabī), 2:168.

[87]Ibn Rushd, *Bidayatul Mujtahid*, 4:243.

[88]Rubya Mehdi, "Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam," in *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* (Leiden: Brill, 2017), 206. DOI: https://doi.org/10.1163/9789004342200_009 .

[89]Livia Holden, "Women judges in Pakistan," *International Journal of the Legal Profession* 26, no. 1 (2018): 89. Available at: https://doi.org/10.1080/09695958.2018.1490296 .

the Federal Shariʿat Court in the history of Pakistan. Prominent empowerment of women in the male-dominated judiciary has been shown in the current year when Honorable Mrs. Ayesha A. Malik was appointed as a judge of the Supreme Court of Pakistan on January 24th of 2022. In addition to it, many female judges are currently working in civil and criminal courts. The appointment of women judges was a challenging task in Pakistan. Many public debates, petitions and criticisms were made.[90] As mentioned previously, the opinions of all jurists elaborate prohibition for the woman judge in *ḥudūd* cases but today women judges are deciding cases under the *ḥudūd* laws.[91] The qualification and admissibility of women to the judiciary had been challenged twice in Federal Shariʿat Court correspondingly in 1982 and 2010. One of the significant petitions filed in Federal Shariʿat Court is Ansar Burney versus Federation of Pakistan and others. This petition challenged the qualification of women on certain grounds such as discharge of functions as *qāḍī* without observing the veil, obligation of *qāḍī* were never entrusted to women during the period of the Holy Prophet as well as after him in the history of Muslim era, and the testimony of a woman is worth half that of a man, and likewise her share in inheritance with her brother.[92] The first and third argument were rejected by the court while stating that the court did not contemplate the seclusion of women to be an injunction of Islam and the rules of evidence and inheritance do not have any connection with the question of the qualification of a woman. On the other hand, it was also held that an argument of no woman has ever served as a judge during the times of the Holy Prophet could not serve as a proof for the disqualification of a woman. Further, the

[90]Mehdi, "Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam," 207.

[91]Imran Aḥsan Khan Nyazee, *Islamic Jurisprudence* (Rawalpindi: Federal Law House, 2013), 139.

[92]PLD 1983 Federal Shari'at Court 73, Ansar Burney vs. Federation of Pakistan and others, 73-93.

court has also discoursed the philosophical and historical survey to overcome and evaluate certain other objections regarding sovereignty of men over women. In addition to it, the verse of *surah Al-Baqarah* was quoted by the court while eliminating discrimination between a man and a woman on the basis of sex. The court also incorporated it under the violation of Article 25 of the Constitution of Islamic Republic of Pakistan of 1973 and cited the text of the article that special provision may be made for the protection of children and women.[93] The court affirmed that the petitioner has failed to refer any injunction of Islam under which a woman could be barred from holding the office of a judge.[94] A new petition, *Murtaza versus Federation of Pakistan and others*, was filed in Federal Shariʿat Court in 2010. But this petition was dismissed while stating that the arguments are almost identical to the arguments of *Ansar Burney versus Federation of Pakistan*.[95]

10. **Conclusion**

It is to be concluded from the above-mentioned explanation that all the schools of thought have determined different conditions for the qualification of a judge, and they are agreed in most of the requirements like, Islam, sanity, perfection of senses, freedom, righteousness, and knowledge about *aḥkām al-sharīʿah*. On the other hand, they disagree on certain requirements like a female, blind and non-Muslim. Further, a bit comparison has been established regarding the qualifications of a judge within Islamic law and Pakistani legal system where any qualification is disregarded or conflicted in Pakistani law. According to the majority of

[93]Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010), 3; Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73.

[94]Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73.

[95]Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010).

Ḥanafī jurists, the general doctrine for appointment of a judge includes conditions such as Islam, being sound mind and mature, free, righteous, knowledgeable about *aḥkām al-sharīʿah* and a male in *qiṣāṣ* and *ḥudūd* cases. While, they have agreed on the appointment of a female in financial and family matter (cases in which she can be witness). A non-Muslim can also be appointed as a judge for his religious fellows as per their opinion. Although, other three school of thoughts disagreed with this doctrine. Jurists have also recommended certain supplementary conditions such as sagacious, honest, God-fearing, pious, honorable, respected, lenient and many others. On the other hand, sometimes, importance had been given to merit and education of a person rather than religion in the history as *Al-Majallah al-Aḥkām al-ʿAdalīyyah* did not mention Islam as an element of qualifications of a judge.

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Comparison of Family Laws of Pakistan and Code of Hammurabi: A Legal Analysis with Reference to Existing Statutes and Case Laws

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Abstract

The institution of family is considered a basic and essential building block in any society. It bears huge significance as it is the foundation of civilization and social relationships. Laws govern such relationships and provide security and protection to this institution. In the same vein, Hammurabi, the King of Babylon circa 1792-1750 BCE, codified many laws concerning marriage, divorce, slavery, commerce, and punishment for various crimes under the code of Hammurabi. It retains the primitive features of ancient Mesopotamia. This article is limited to the discussion of family laws. The article attempts to deliberate on both legislations with a special focus on comparative analyses of both legal regimes. When discussing family laws, the article refers to both judicial rulings and the compendium of family laws of Pakistan. An analysis of the code of Hammurabi, family laws in Pakistan, and precedents of superior courts is carried out. The comparative study of both legal regimes reveals that their family laws share many similarities in respect of the contract of marriage, dower, and dissolution of marriage. Similarly, the laws of maintenance are also discussed in detail. The analytical study reveals that both schemes have certain differences in other respects too.

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1. Introduction

In the history of mankind, human beings strive to protect their interest and promote their goals. This urge has motivated them to suggest certain laws and regulations. These laws are designed in such ways as to resolve their conflicts, regulate interactions, and guide a just order in society. In his celebrated work *Spirit of Law*, Montesquieu mentioned that the laws must conform to the needs of the society in which they prevail. To meet the requirement of justice, the Babylonian king of ancient *Mesopotamia,* Hammurabi enacted the corpus juris of Babylonian laws. It consists of a myriad of laws pertaining to economic provisions, family laws, criminal laws, and others, outlining standards of justice for the subjects. The family laws in the code of Hammurabi cover the relationships between husband and wife and their shared rights and obligations. In addition, these laws provide a mechanism for the annulment of marital bond, alimony, gift, maintenance, and custody of the child. The code of Hammurabi (COH) and family laws in Pakistan share the same concern about the entire family system. The ancient code of Hammurabi and the family laws in Pakistan have similar features to some extent in respect of marriage, maintenance, dissolution of marriage, dower, and custody of the child. However, the procedure for agitating the family matter differs between the two legal doctrines.

2. Institution of Marriage

Marriage is a tie that shields individuals from actions that may put them closer to breaking the law. It is a union of men and women who share the same desire to know and love one another. Marriage is a highly noble

institution that establishes rules for family life and children. It teaches couples and their families to love one another, cooperate in doing good, and ward against evil. In order to live a content life, man and woman enter into this sacred contract.[1] Marriage is a union based on consensual and contractual relationships. It is considered a contract that includes betrothal, nikah, and formal wedding party (*rukhsati*).[2] The Hammurabi code also suggests the same concept of marriage. Article 156 of the code speaks about the first formality of the marriage contract, that is, betrothal.[3]

In addition, this contractual relationship, as per Pakistan's legal system, is a tool to legalize sexual intercourse between spouses to procreate their offspring.[4] The ancient Babylonian code also confirms the belief that the aim of this matrimonial union is the upbringing of the children as stated in Article 138 that where a man wishes to claim separation from his wife then he must restore her dowry and pay silver equal to her ransom before he can leave her and it is subject to the condition that has not given birth to any of his own children.[5]

Both legal regimes assign the same sanctity to the contract of marriage and firmly believe in the concept of marriage. First and foremost, there are certain prerequisites that determine the status of marriage in both doctrines of law. Due to the existence of such elements the contract of marriage acquires a legal position and legal proceedings can be initiated in a court of law. In the family jurisprudence of Pakistan for the solemnization of *Nikah*, the elements of this contract must be in existence such as proposal,

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[1] Yusma Natasya Perdana, Abidin Abidin, and Kamaruddin Kamaruddin. "The Impact of Underage Marriages on Family Welfare." *International Journal of Contemporary Islamic Law and Society* 3, no. 2 (2021): 32-43.

[2] 'Dowry and Bridal Gifts (Restriction) Act', Pub. L. No. XLIII (1976), sec. 2 (c).

[3] 'Code of Hammurabi' (1700 B.C. E), art. 156.

[4] Mst. Mumtaz Bibi versus Qasim and others, PLD 228 (Islamabad High Court, 2022).

[5] Карпенко, Константин Викторович. "О некоторых особенностях семейных отношений по законам Хаммурапи." *Вестник МГИМО Университета* 5 (2012): 172-181.

acceptance, and presence of two male or one male and two female witnesses.[6] On the contrary, Article 128 of the said code contemplates sexual intercourse as one of its essential ingredients, in addition to the others. It clearly states that where a man concludes a marriage contract with any woman but does not consume it means that he has no legal bond with her at all. The absence of which renders the marriage contract a nullity. [7] While in the context of family laws of Pakistan, any willful sexual intercourse between the couple amounts to fornication.[8]

It is a well-settled exposition of the law, deducible from a plethora of dictums laid down by the superior court that the marriage must be solemnized in the presence of witnesses as required by the law, either the two male witnesses or one male and two females. The regulations, established by the code of Hammurabi, have also drawn attention to this stipulation of the marriage contract which determined the legality of the contract.[9]

Under both laws, the guardian has the right to marry his/her child of his own free will, but the son has the right to defile the marriage contract upon reaching puberty.[10] The code agrees with the marriage law of Pakistan. A guardian can enter into a contract on behalf of the minor.[11] Such marriages must still be dissolved or confirmed by a court in Pakistan. This marriage can be dissolved under Hammurabi's law by simply paying the wife's dower.[12] However, under Pakistani law, the wedding must be

[6]Mst. Saman Naseer versus Additional District Judge, Lahore, and others, CLC 549 (Lahore High Court, 2020).

[7] 'Code of Hammurabi' (1700 B. C. E), art. 128.

[8]'Pakistan Penal Code', Pub. L. No. XLV (1860), sec. 496 B.

[9] Ion Tutuianu, "Civil and Criminal Rules of The Babylonian Law*." Studies and Scientific Researches. Economics Edition* 18 (2013): 110.

[10] Ibid.

[11] Muhammad Ifzal Mehmood and Noraini Binti Md Hashim, "Marriage Without Wali's Consent: A Paradigm Shift in the Family Structure of Pakistan" 29, no. (S1) (2021): 135-151.

[12] Code of Hammurabi, art. 156.

dissolved by the court, and after separation, both laws grant her the right to a second marriage with the man of choice.[13]

3. The Concept of Dower

The Sumerian Family Laws recognized the women's right to dower and preserved their ownership in the bride price as explicitly mentioned in Article 160 of the code. In addition to paying the dower amount for his wife, the husband has a duty to bring certain items into his father-in-law's home. However, the father of the girl has the right to refuse his proposal. in such a case the husband has the right to recover his belongings[14] but apparently this right exists where the father gives his consent to the marriage. Where the husband no longer wishes to live with his wife and wants to claim separation, he can certainly make it but the law of the code obliges him to pay the purchase price and to return the articles that the wife brought with her.[15]

Dowry articles are considered the property of women, and a man's excess is only limited to its use. When a woman dies, such articles devolve upon her children, and her father's family if she is childless. If the marriage ends in divorce, the woman forfeits the dowry articles; however, unless the marriage ends due to her fault, the woman forfeits it as a penalty.[16] Besides, the code embodies other provisions that deal with the Mehr and dowry articles. Article 137 of the Hammurabi code led to the conclusion that the husband can alienate his wife as of right, but it is mandatory for the husband to leave her with an amount of dowry irrelevant to the fact that the couple is childless or have children.[17] In this regard, the Hammurabi code and the Dowry and Bridal Gifts (Restriction) Act, of 1976 find a striking parallel.

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[13] 'The Dissolution of Muslim Marriages Act', Pub. L. No. VIII (1939), sec. 2 (vii).

[14] Code of Hammurabi, art. 160.

[15] Ibid. 138.

[16] Tutuianu, "Civil and Criminal Rules of The Babylonian Law", 110.

[17] Code of Hammurabi, art. 137.

As both laws respect the absolute ownership of the bride in the gifts and property transferred to her. She can retain it with no strings attached.[18]

The dower is an obligation imposed on the Muslim husband under the Dowry and Bridal Gifts (Restriction) Act of 1976, and it is an intrinsic and integral part of this marital contract. It can take any form in the nature of the property having some monetary value.[19] The amount depends upon the consensus of the parties. The parties of the marriage contract mutually decide and determine the nature and the amount of it.[20] There are certain modes of dower. It can either be prompt or deferred. In addition, it can also be specified and unspecified. The amount of dower must be paid as per the mode already decided. A perusal of section 10 of the Muslim Family Law Ordinance 1961 reveals that where no manner of dower is mentioned it must be paid as a whole and on demand.[21] The code of Hammurabi makes no mention of such specification rather the concept of dower is explained only.

4. Dissolution of Marriage

The contract of marriage assigns certain rights and responsibilities to the spouses in the jurisprudence of both family laws. More than 4000 years ago, the regulation offers certain provisions for separation between married couples.[22] The right to repudiate the marriage contract is vested in both husband and wife. Both legal regimes generated rich jurisprudence when it comes to the rights of the spouses. Like COH, in the Pakistani legal system, the husband has the unilateral right of Talaq Man, and the wife can also seek

[18] Dowry and Bridal Gifts (Restriction) Act, sec. 5.
[19] Dowry and Bridal Gifts (Restriction) Act, 1876, sec. 2 (b).
[20] Muhammad Qayyum Anjum Versus Additional District Judge, Muzaffargarh and 2 others M L D, 416 (Lahore High Court, 2022).
[21] 'The Muslim Family Laws Ordinance', Pub. L. No. VIII (1961), sec. 10.
[22] Code of Hammurabi, art. 137,138,139, 141,143,156 & 159.

dissolution through talaq-e-tafweez,[23] Khula, and any other ground mentioned in the *Dissolution of Muslim Marriages Act, of 1939*.[24]

The ancient COH, like Muslim family law, also recognized both judicial and extra-judicial forms of divorce.[25] The Babylonian code exhaustively enacted different modes of separation. It is not only divorce through which the spouses decide to live apart rather the option of judicial separation is also available to the wife. If the wife is aggrieved with the malevolent behavior meted out to her by the husband. She can take her matter to the court and seek dissolution on this ground alone. However, the onus of proof will always lie on her in such a case. In case of failure to prove her stance will subject her to punishment.[26] Likewise, the interpretation of section 5 of the *Dissolution of Muslim Marriages Act, of 1939* is certain that in case of dissolution of marriage, the woman need not forfeit her amount of dower rather she can retain it.[27]

To alleviate the suffering between the spouses, Muslim Personal Law also takes different forms of separation including judicial and extra-judicial. In order to safeguard the interests of all stakeholders: man, woman, children, and society at large certain rules are also integral part of such modes. To revoke the contract of marriage through such modes the initiating party must be well-versant in the rules and procedures.[28] Those modes that empower the husband to repudiate the contract of marriage are *Talaq, Zihar, and Illa.* On the other hand, the wife can exercise her right of

[23] The Muslim Family Laws Ordinance, sec. 8.

[24] The Dissolution of Muslim Marriages Act, sec. 2.

[25] Lucy Carroll, "A note on the Muslim wife's right to divorce in Pakistan and Bangladesh." *New Community* 13, no. 1 (1986): 94-98.

[26] Charles F. Horne, "The Eleventh Edition of the Encyclopedia Britannica, 1910-by the Rev. Claude Hermann Walter Johns, MA Litt. D. The Code of Hammurabi Introduction Charles F. Horne, Ph. D."

[27] The Dissolution of Muslim Marriages Act, sec. 5.

[28] Lawal Mohammad Bani, and Hamza A. Pate. "Dissolution of Marriage (Divorce) under Islamic Law." *JL Pol'y & Globalization* 42 (2015): 138.

separation through *Talaq-e-Tafweez, Khula, and Li'an.* Any couple can dissolve their marriage by mutual consent through the mode of *Mubarrat.*[29]

Man is not required to keep his wife if he prefers to live apart from her, but he must pay back some of the dowry and property if he does so. Where the woman is at fault in case of separation, she is in no position to raise a claim for dowry.[30] The husband has large discretion as to divorcing his wife. It is striking to note that the husband can annul the marriage contract with the barren wife, but the COH regulated the restitution of the dower in this regard. However, the husband cannot leave her at the mercy of others if she is under some other chronic illness.[31]

In the same vein, analysis of various precedents, that have been already laid down by the superior courts in Pakistan, reveals that where any woman is subjected to mal-treatment and an abusive partner is perpetrating violence -physical and mental- against his spouse. The right to dissolve marriage or separation accrues under such compelling circumstances.[32] It is pertinent to note that such a female is not obliged by the law to surrender the dower amount to her husband as compensation for such separation if it is claimed through *khula* coupled with cruelty. The condition precedent of restoration[33] of dower is no longer mandatory in the current jurisprudential debate of family laws in Pakistan. [34] In the contrast, under section 10 of the *Family Court Act of 1964* it is the discretion of the family court to pass a decree of the like nature.

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[29] Shagufta Omar, "Dissolution of Marriage: Practices, Laws, and Islamic Teachings." *Policy Perspectives* 4, no. 1 (2007): 91-117.

[30] Tutuianu, "Civil and Criminal Rules of The Babylonian Law." 110; Code of Hammurabi, art. 156.

[31] Code of Hammurabi, art. 148.

[32] Farhan Farooq versus Salma Mehmood, Y L R 638 (Supreme Court (AJ&K), 2022)

[33] The Family Court Act, sec. 10.

[34] Safeer Ahmad versus Mst. Gulshan Bibi and others, C L C 634 ([Lahore (Rawalpindi Bench), 2022].

The power of the husband in the matter of divorce is not unconditional or unfettered and the wife could not be divorced at the caprice of the husband. The husband must take into account the circumstances which warrant the use of such power. Certain conditions are mentioned in Article 141 of the Code of Hammurabi which allowed the husband to release his wife such as upon her intention of leaving the husband's house, accruing debt, trying to ruin his house, ignoring her husband, and being found guilty by a court of law. These circumstances disentitle the wife for her claim of any gift, but She must remain in her husband's household as a servant if he refuses to release her and marries another woman."[35]

From the point of view of Babylonian legislation, the law established other grounds pertaining to the dissolution of marriage mentioned in the COH, Article 136 states that if a man flees his home and later on his wife moves in with another man. Subsequently, when he comes back and wants to take his wife back, the runaway man's wife is not permitted to return to her husband because he fled his home and ran away.[36] It contemplated that when the whereabouts of the husband are not known to the wife, she can claim separation from him and is not bound to return to his wedlock with him upon his arrival. This ground is an important addition to the dissolution of a marriage by a wife. It is noteworthy to mention that the DMMA stands in resemblance with the COH as it regulates the dissolution of marriage on the ground of husband, *interalia*. However, the act stipulated a time period of four years for a missing husband.[37]

The COH draws attention to other grounds where the marital union is subject to conflicts and disagreements. Such conflicts can be on different issues ranging from financial to parenting issues. In a case when there are persistent and heated arguments between the couple, the wife can take back

[35] Code of Hammurabi, art. 141.
[36] Ibid., art. 136.
[37] The Dissolution of Muslim Marriages Act, sec. 2.

her dowery and make a return to her father's house as enumerated in Article 142 of COH as when a woman and her spouse argue, she must have good reasons, such as their incompatibility. On the contrary, if her husband abandons her and she is innocent, she must return to her parent's home after taking dowry from her husband.[38]

The rationale behind Section 2 of the *Dissolution of Muslim Marriages Act, 1939* is the same as COH. The contract of marriage is considered a sanctimonious relationship founded on love and harmony between them. When the spouses no longer honor their rights and obligations and this union turns into a hateful relationship, both of them are free to claim separation. The antagonistic attitude is sufficient to exercise the right of separation. The above-mentioned provision stated different grounds which entitle the wife to end her marital life with her husband.[39]

5. The Practice of Polygamy as a Social Institution

Hammurabi's law permits second marriage on certain conditions, such as i f the husband has children from his first wife, he is not entitled to marry fo r a second time, and if his wife is suffering, he can get a second wife witho ut the first wife's consent. The practice of marriage with multiple wives is common in Pakistan's marital culture. Nonetheless, the case of a polygamous union in the family law of Pakistan is different from the COH. In Islamic marital jurisprudence, a male Muslim can take up to four wives, but that permission must qualify certain exceptional circumstances and stringent conditions. there is no blanket permission for polygamy, as clearly stated in Quran that if one is allowed to marry as many women as one like two, three, or four but if one cannot treat them fairly, then only one will be more appropriate to avoid unfair conduct.[40]

[38] Code of Hammurabi, art. 142.

[39] Mst. Seema and another versus Wajid Ali Shah and others, P Cr. L J 849 (Sindh, 2022)

[40] Al-Qur'an, 4:3.

Contracting second marriage is legally permissible in Pakistan but it is not an unqualified right and is subject to certain restrictions. The dictates of polygamy, as imposed by MFLO, must be followed in order to avoid legal penalties. In addition to equitable treatment, a husband will be penalized if he decides to marry a second wife without first securing authorization from the arbitration council and the wife. Non-compliance with the relevant provision of law regarding polygamy invites punishments under Pakistani law.[41] Section 6 of the Muslim Family Law Ordinance 1961 (MFLO) explicitly incorporated the limitation imposed upon polygamous marriage:

> No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance…. (4) If a person contravenes the provision of:
>
> 5) If a man marries a second time without the Arbitration Council's consent, he must (a) pay the full amount of dower due to the first wife or wives immediately either whether promptly or later. Where the husband does not comply with it then it may be recovered as arrears of land revenue, and (b) face a fine of 500,000 rupees and up to a year's simple imprisonment if found guilty after a complaint.[42]

Besides the punishments, a wife can invoke the jurisdiction of the family court for dissolution of marriage under section 2 of DMMA, 1939 if she finds that her husband enters into a second marriage contract without

[41], Hira Shahjehan, and Sami Ur Rahman. "Laws Relating to Polygamy in Pakistan: Rights of the Polygamous Wives." *Islamabad Law Review* 5, no. 1/2 (2021): 47-64.

[42] The Muslim Family Laws Ordinance, 1961 sec. 6.

obtaining her consent as elaborated in the said section. It entitled women to seek dissolution on various grounds which includes taking additional wife against the dictates of MFLO.[43]

In the family law of Pakistan, there is a standard protocol for second marriage and punishment for those who flouted the law, but in Hammurabi's code, there is none except for the separation of first wife. As per article 144 of the Babylonian code, where there is no issue with the first wife and the couple has children then the husband is not permitted to contract a second marriage.[44]

Article 145 of the Code of Hammurabi stated that if a man marries a woman who does not bear him children and he plans to wed another woman, he must ensure that the second wife is not given the same rights as his first wife before bringing her into the home.[45]

Article 148 of the Code of Hammurabi stated, "If a man takes a wife, and she is seized by disease, if he then desires to take a second wife, he shall not put away his wife, who has been attacked by disease, but he shall keep her in the house which he has built and support her so long as she lives."[46]

Both legal regimes do not recognize plural marriages as a matter of absolute rights for a man. They speak for taking a second wife and allowing it but under a different set of circumstances and conditions. The conditions and circumstances which necessitate polygamy are the points of divergence between both doctrines. There is no mention of the element of consent in COH in this context. Contrarily, consent is the cardinal condition for a man's right to polygamy under the MFLO. The presence of consent from the first wife and permission of the chairman

[43] The Dissolution of Muslim Marriages Act, sec. 2 (ii (A)). 9
[44] Code of Hammurabi, art. 144.
[45] Ibid., art. 145.
[46] Ibid., art. 148.

union council concerned are the prerequisites of a valid subsequent marriage and correct legal procedure. The absence of which renders such a contract a nullity in the eyes of law.[47]

Moreover, equal treatment in terms of time and resources is the clear commandment of Allah as mentioned in *surah al-Nisa*. The husband is duty-bound to deal with his wives fairly. If the husband cannot fulfill such a condition, he is not permitted to contract subsequent marriages. The scheme of Islamic jurisprudence does not forbid the man to marry another woman rather he is allowed but he is required to adhere to the condition of *Adl* (justice) as prescribed by Allah.

Unsurprisingly, the COH justified second marriage but that too in situations where the first wife is childless or ill and discouraged in any other case. In case of non-observance of the letter of the law for second marriage in Pakistan, the husband is liable for the punishments mentioned in MFLO. However, there is no such scheme of punishment and penal provision available under COH.

6. Laws of Maintenance (*Nafaqah*) for Wife

The Arabic word *Nafaqah* is derived from the word *infaq* which means to provide for good purpose. The provision of necessities of life comes under maintenance. All four schools of thought hold various opinions regarding the scope of maintenance. To achieve the goals of social justice for the marginalized section such as destitute wives, this duty is imposed upon the husband. In matrimonial matters, it is incumbent upon the husband to support his wife and provide her with sufficient means of sustenance.[48] The same role of men has been prescribed in Holy *Quran, ahadith,* and *ijma.* As stated in Surah *Nisa* Verse 34; “Men are in charge of women by [right of]

[47] Ishtiaq Ahmad versus the State and others, P L D, 187 (Supreme Court 2017)

[48]Azizah Mohd, and Badruddin Hj Ibrahim. "Muslim Wife's Rights to Maintenance: Husband's Duty to Maintain a Working Wife in Islamic Law and The Law in Malaysia." *IIUMLJ* 18 (2010): 103.

what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard."[49]

The responsibility to fulfill the economic needs of the wife thus lies on the shoulder of the husband. He is duty-bound to make ends meet for her wife and family by virtue of the marriage. The wife can claim it as a matter of right and ask her husband for it. The husband cannot deny it one or the other pretext rather legally and morally obliged to support her.

As to the Sunnah of the Prophet (pbuh), JÉbir (r.a.) said that the Prophet (pbuh) said:

> Fear Allah concerning women! Verily you have taken them on the security of Allah and intercourse with them has been made lawful to you by words of Allah. You too have right over them, and they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner…[50]

Concerning *Ijma* all the jurists hold a unanimous opinion on the subject of maintenance. It is noteworthy to mention that even his financial status does not absolve him of his duty. There is no disagreement on the payment of maintenance to the wife. He has to bear the expenses of her daily life. However, this obligation of the husband is also subject to the obedience of the wife. Only an obedient and devoted wife can seek the reward of maintenance.[51] A wife who does not offer herself to her husband and

[49] Al-Qur'an, 4:34.
[50] Mohd, et al. "Muslim Wife's Rights to Maintenance,"103.
[51] Ibid.

refrains from performing matrimonial duties cannot claim any kind of provision from her husband.[52]

Under Muslim law, the wife is entitled to maintenance as long as the wedlock subsisted and this right lasts till the life of such marriage. All the schools of thought agreed with this. However, where marriage is dissolved through revocable marriage the wife is also entitled during such an *iddah* period. In the event of the death of her husband, she cannot claim the sustenance allowance from his property. Her right to maintenance dies with the death of her husband.[53]

A hand-to-mouth existence for the wife, while the husband lives a lavish life, is not envisaged by Islamic laws. The obligation of men to provide maintenance stands on a higher pedestal than the wife. There is no single opinion on the quantum of maintenance as per different schools of thought. Different verses of the Quran reveal that there are no upper and lower limits on the payment of maintenance.[54]

The determination of the amount of maintenance is subject to the financial status of the husband. The courts during fixation of maintenance must gauge the strength of the husband while taking into consideration the assets and property. However, it must be reasonable and fair enough to let the spouse live a dignified life with comfort.[55]

The state of Pakistan is constitutionally obliged to protect the wife in case of any injustice.[56] For this reason, under section 9 of the Muslim Family Law Ordinance 1961, an efficacious avenue of relief is available to

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[52] Rukhsana Ambreen versus District and Session Judge, Khushab and 2 others, C L C 1512 (Lahore, 2021).

[53] Tarannum Siddiqui, "Maintenance Rights in Muslim Personal Law." *International Journal of Humanities & Social Science Studie*s II, no. III (2015): 161-169.

[54] Fayyaz-ur-Rehman, "Islamic Law of Maintenance for Wives in Pakistan and Afghanistan since 1960." Ph.D. diss., University of Peshawar, 2004.

[55] Arslan Aijaz versus Mst. Sanober and 2 others, Y L R, 450[Sindh (Hyderabad Bench), 2022].

[56] 'The Constitution of the Islamic Republic of Pakistan,1973', art. 35.

the desecrated wife. She is empowered under the said section to compel the defaulting husband through Arbitration Council to pay the required amount.[57] In addition, the husband's failure to provide maintenance to his wife furnishes her with grounds for divorce. The aggrieved wife can resort to the dissolution of her marriage where the husband is unable to cater her provision of life for a period of two years.[58]

The Muslim family laws have discussed in detail the rulings pertaining to maintenance. On the contrary, the legal code of Babylonian code has not explicitly incorporated any specific provision of maintenance for the wife. However, certain articles explained the provision of maintenance. Article 148 of the code illustrated that it is the duty of the husband to look after the ailing wife. He is instructed not to abandon her in the event of any disease but rather obliged to take care of her in such a condition.[59]

The COH also contemplated that during the subsisting of marital life, the provisions of necessities are the obligation of the men. Maintenance is an integral part of the marriage. He has to provide all those things which are essential to support life. The same is envisaged in Article 133 of the said code. Where she violates the sanctity of the marriage contract, her husband is empowered to punish her in a grave manner. Another consequence of this breach is that she is not entitled to maintenance by her husband.[60] It clearly explains that the event of her disobedience or her status as rebellious makes her disentitled for the maintenance.

Under the circumstances which led to the severance of their conjugal life, the husband is no longer liable to provide maintenance. She is entrusted with the duty to guard her chastity and take care of her husband's house and

[57] The Muslim Family Laws Ordinance, sec. 9.
[58] The Dissolution of Muslim Marriages Act, sec. 2.
[59] Code of Hammurabi, art. 148.
[60] Ibid. art 133.

property. Where she is unable to perform her duties cheerfully and breaches the covenant of marriage, she is disqualified for the claim of maintenance. Her husband is absolved from his financial obligation.[61]

The COH did not extend the maintenance beyond the period of marriage. The claim of maintenance arises out of the marriage contract only. It is the continuation of this contract that gives rise to maintaining a wife. The wife cannot claim it after the dissolution of their marriage. In addition, there is no quantum of maintenance determined under the ancient code of Babylonian, but various articles of the code signify that the rank, financial status, and condition of the husband is the determinative factor in deciding the amount of maintenance. Furthermore, there is no mention of the procedure for the protection of the wife, in a case where the husband is unable to provide the maintenance as compared to the statutory laws of Pakistan.

5. Conclusion

To sum up, the ultimate aim of both legal regimes is the protection of the family unit in different ways. They are confirmed to the dictates of their respective circumstances. It can be safely said that in most of the cases, Muslim family laws and Babylonian laws are in harmony with each other. Islamic law drew on pre-existing customs and practices. Under Islamic law, the adoption of earlier customs is generally accepted as long as they do not contradict the teachings of Islam. Likewise, Islamic family laws were also shaped by pre-existing customs and traditions. They have adopted a number of the family laws of this surviving set of laws, the Code of Hammurabi, while neglecting all other provisions which stand in direct clash with the shariah rulings. Muslim family law has incorporated the contract of

[61] Ibid art 141 & 143.

marriage along with its essentials but rejected its concept of sexual intercourse as one of the requirements.

Marriage is regarded as a sanctimonious contract having the same goal under both doctrines. Like COH, the statutory family laws in Pakistan prescribe marriage as a contract having certain prerequisites. However, sexual intercourse before the solemnization of marriage is an essential condition under Babylonian law. Furthermore, both legal doctrines do not prescribe the binding of men and women together in a state of extreme discord. The right to separation is recognized for both men and women when they cannot keep the bond of marriage. Both laws enjoin the guardian to contract the marriage of its minor, but the son has the right to annul the marriage contract once he or she reaches puberty. The code is in accordance with Pakistani marriage law. The Sumerian Family Laws agree with the Muslim Family laws in Pakistan in the provision of dower. When the marriage vows are recited, the husband is obliged to pay the dower. The true owner of Mahr, regardless of the type of property, is the wife. The dower and dowry articles under both laws belong to the wife. Unlike Hammurabi's code, under Islamic law, various modes of dower are discussed at length. The marriage bond is supposed to be a source of mutual love and affection. When both spouses remain unable to maintain it and there is the likelihood of hatred union then they are under no obligation to live with each other. Different efficacious remedies are available to them under both legal regimes. They both can seek judicial and extra-judicial divorce. Contracting another marriage during the existence of the first marriage is allowed by the family law of both regimes. It is noteworthy to mention that the circumstances and conditions required for it are distinct from each other. There are various provisions in the family laws of Pakistan that protect the right of maintenance of wife and sufficiently guarded it through statutory provisions and precedents. Similarly, the code of Hammurabi also discussed

the role of husband in fulfilling the duty of maintenance. However, the significant family laws that is enforced at present has considerably touched this issue and provided legal remedy if the husband neglects his duty. To meet the requirements and the needs of their respective societies, the code of Hammurabi and family laws in Pakistan were enacted. The intent of the lawgiver is to protect their interest and advance their goals. These laws outline standards of justice for the subjects and ensure to secure the goals through such family laws.

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Juristic Deliberations on Quranic Approaches of 'Convenience' in Sharīʿah Injunctions: An Appraisal

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Abstract

Islam is considered to be the religion of nature due to its originality and suitability to human nature for all times. It continues to be successful in the developed world, and elsewhere because its call is in accordance with the *fitrah* or natural inclinations of mankind. Islamic law proposes inverse connectivity between flexibility and hardship. In Islamic law, flexibility is the organizing norm of legal intelligence in its manifestations. Generally, hardship restricts personal freedom to exercise the rules. In contrast, many benefits radiate from flexibility as facilitates the performance of obligations, bending without abandoning the concepts of time and place commitments. Convenience serves as an accommodation principle for persons with disabilities. By removing hardship, flexibility supports convenience and creativity. Whenever, there is any difficulty performing any religious obligation, Muslims jurists' derived the principle element of comfort provided by the Qur'ān. In this regard, the focus of this paper is to throw light on the notion of ease and leniency. Whenever, there is any difficulty performing any religious obligation, Muslims jurists made deliberations to explain injunctions of Divine law by providing an element of convenience. In this regard, the focus of this paper is to highlight the juristic approaches to interpret the notion of ease and leniency in the Qur'ān regarding Islamic *Sharīʿah* Injunction for the betterment of human society.

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1. Introduction

The wisdom and expediency of *Sharīʿah* rules is that they take into account the strength and capabilities of ordinary people and individual and collective situations. *Sharīʿah* rules are applicable for the majority of Muslims in normal circumstances. On the other hand, when the conditions are not normal, rules become easier and more convenient. Every person is obliged to follow the rules according to his ability and capacity, and no burden and responsibility is placed on the individual beyond his strength. When a task is not within the power and courage of a person, then he is not obliged to do it. Allāh knows the needs, natures, and difficulties of mankind very well, the lack of pain, capacity and gradualness were highlighted so that His servants would be safe from difficulties, hardships, and sufferings. If the Qur'ānic commands are examined, it is very prominent that Allāh Almighty does not bind His servants to such commands. Rather, He demands from His servants' actions that are within their power and strength. Allāh Almighty has made the rules of the *Sharīʿah* soft and easy for every individual. He has given leave and relaxation for the sick, travelers, forced and disabled people who have little strength and in the same way, he has not made the young and the insane obligatory, so that they are not burdened.

The Qur'ān has the honor and position that it is an easy book, its rules are based on ease and convenience, and hardship and difficulty has been eliminated in them. Guidance is from Allāh in *surah Al- Maryam*:

> So, O Muhammad (PBUH), We have simplified this word and sent it down in your language so that you may give glad tidings to the pious and warn the unbelievers.[1]

[1]Al-Qur'ān, 19:97.

Allāh Almighty has described the similar commands in *Surah Al-Dukhān*:

> O Prophet, We have made this book easy in your language so that these people may receive advice.[2]

Islamic traditions state that Allāh has elevated the Muslim community and granted it benefits and privileges. According to Muslim scholars, Prophet Muhammad (PBUH) and his community were the only ones to benefit from concessions; preceding groups were not given the same privilege. In respect to the authority of *Qatādah*, who claimed that this society had been endowed with three things has documented a tradition that refutes this claim. They are Allāh has not made any hardship in religion, and He made Prophet Muhammad (PBUH) a witness for this community, and Allāh has granted people the right to call Him directly without the need for any intermediary. Allāh Almighty has said in *Surah Al-Aʿla*:

> And We will provide you with this easy (adherence to the *Sharīʿah*).[3]

In the Qur'ānic injunctions, extreme gentleness and ease have been observed for the people in *Surah al-Qamar*:

> We have made this Qur'ān an easy source of advice, then who is there to accept advice.[4]

Allāh Almighty has said in *Surah Al-Baqarah*:

> Allāh wants to be gentle with you, He does not want to be harsh.[5]

Muslims have been taught from the first generation onward that Allāh has made things easier for His followers, loosened the rules, and removed suffering in religious affairs. The greatest standards of distinction and perfection, as well as the spirit of law of judgements, all exhibit this quality

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[2]Al-Qur'ān, 44: 58.

[3]Al-Qur'ān, 87: 8.

[4]Al-Qur'ān, 54:17, Allāh has repeated this verse three times in this Surah so that *Yasr* is well explained in the Qur'ānic commands.

[5]Al-Qur'ān, 2: 185.

of removing difficulty. Even if there are many reasons to remove the burden, Imām Ṭabrī writes in his explanation that Allāh Almighty has given permission for the believers to break their fast in case of travel and illness. Until the completion of the journey, the days in which they break the fast should be made up. In the case of illness, leave until recovery. He has made this easy because of hardship in the affairs of human beings. He has made it mandatory that he knows well the hard work and intensity in this responsibility.[6]

All the affairs that Allāh Almighty has enjoined upon His servants, despite their ease and convenience, whenever there is any difficulty or obstacle in their payment, it will create justification for further mitigation and relaxation. In this regard, Syed Muhammad Rasheed Raza writes that Allāh Almighty does not want to make people suffer with his commands, but he intends to ease them in view of their good and benefit. This is a basic principle of religion, and the rest of the commands also return to it. *Al-Mushaqah Tajlaybu al-Taysir* is derived from this verse.[7]

The facilities that Allāh has provided for His servants in the affairs of God cover all the *Sharīʿah*. It is not possible to describe them in detail. The hardships that are not within human strength and ability, Allāh Almighty has not made them responsible, they are as obligated as they have strength and power.

2. Qur'ānic Methods of Maintaining Convenience in Sharīʿah Matters

Allāh has therefore chosen for us a religion best suited to the nature of mankind, a religion that goes neither to the extremes of hardship nor of

[6]Muhammad bin Jarir bin Yazid Tabri, *Jami al-Bayan on Taweel al-Qur'ān* (Dar Hajr, 1422 AH), 3:218.

[7]Muhammad Rashid Ibn Ali Reza, *Tafseer al-Manar* (Al-Hiyyat al-Masriyyah al-Aama, 1999), 2:132.

laxity, but instead provides a middle path. In other words, a religion of ease, for example, He has given many facilities to achieve purity, in Ramadan. Many holidays have been given in the month of Mubarak, conveniences have been highlighted in the days of *ḥajj*, *tasirfermai* in the day of murder, *zihār* (the husband compares his wife to the forbidden things and then wants to take back his word). In the expiation that the *Sharīʿah* explained, three things were explained in it, the goal was to keep it as a sacrifice, while explaining the expiation, of the faith (whether to break it after the oath or not), Allāh has spoken of the matter of ease with His servants.[8] This level of compulsion is called emergency. Emergency situations mean the situation in which a person is forced to take refuge in something to protect his religion, life, property, intellect and race. The general rule changes into situations of reflex and compulsion. There is a scope from Allāh for His servants so that they do not get into any more trials in the narrowness of the situation.[9]

Gradual (in the early stages, the rulings were soft and flexible so that they could be easily understood and obeyed. As soon as the conditions became in harmony with the divine purpose, then Allāh revealed the rulings continuously in various fields and diverse aspects of life. Its action also illustrates the extreme mercy and gentleness of Allāh with His servants. Just look at the order of prohibition of alcohol and other indecent things that Allāh did not prohibit them once and for all, but he adopted a gradual approach.[10] If he wanted, he would immediately forbid his servants from drinking alcohol and other indecencies, but he never did so, so as not to burden on his servants. Its action is also an expression of Allāh's merciful compassion and great love for His servants.[11]

[8]For details see, Al-Qur'ān, 5:6; 2:158; 3:97; 5:95; 4:92; 58:3; 5:89.
[9]For details see, Al-Qur'ān, 2:173; 5:3; 5:145.
[10]Al-Qur'ān, 16:115; 16:106.
[11]For details see Al-Qur'ān, 16:67; 2:219; 4:4; 5:90.

The presence of all these steps in the Islamic affairs is a good interpretation and explanation of the aspect of convenience in the laws of Islam, and in the same way, it is an interpretation and explanation of the elimination of hardship, in the rules of Islam.

3. Mitigation and Convenience in Sharīʿah Matters by the Lawgiver

In religious discourses, hardship is categorized into two sorts. The first is true or actual difficulty, which is defined as anything that has a legitimate reason or is perceived as a result of outside barriers, such as a difficult voyage or illness. The second type of hardship is imagined or presumed, and it relates to an occurrence for which no clear reason can be identified is not affected by any external problems. The reason is that legal decisions are not made based on presumptions, fancies, or imaginations, this form of hardship has no effect on granting concessions or lessening the burden. Hence, our discussion is limited to actual suffering. In this regard, Al-Sheikh ʿAbdul Raḥmān bin Nāṣir Al-Saʿdī says that is, Allāh wants to make the path of His pleasure easy for you. Therefore, all the matters that Allāh Almighty has made obligatory on His servants have actually been made easier. It has either completely abolished this obligation or has given it various kinds of reductions.[12]

Basically, the creation of man is less strong he wants to get rid of difficulties and hardships. He likes gentleness and mitigation for himself, that is why Allāh has preferred ease and mitigation for humans instead of hardship. Allāh Almighty has said in *Surah Al-Nisā*':

> Allāh wants to lighten the restrictions on you because man was created weak.[13]

[12]Abd al-Rahman bin Nasir Al-Saadi, *Tafsir al-Karim al-Rahman fi TafsirKalam Al-Manan al-Ma'roof Tafsir al-Saadi* (Mussat al-Rasalat, 2000), 1:8.

[13]Al-Qur'ān, 4:28.

Evidence of the occurrence that Allāh has made life easier for Muslims and does not burden them with the task of carrying out laws. Religion takes into account the psychology and nature of people. It attempts to appease human nature and recognises people's strengths so they may use them positively and carry out religious commandments without difficulty or aggravation. Human nature is neither repressed, abandoned, unchecked, or unguided. Justifications are offered whenever a legal decision appears to be strict or challenging to follow. The ease and elimination of hardship in judicial judgements and required actions are extremely obvious. Each decision or instruction that appears to be burdensome has the appropriate support. Generally, little interference with human potential or nature is seen. Imām al-Shawkānī says in his explanation, in the decree of Allāh (the leave has passed for you) or there is a description of that thing in which there is a reduction for you. Man has been created so weak that he is unable and helpless to control his self and control his passions, even if he fulfills the orders with effort, so in this position he is more in need of mitigation. Therefore, Allāh has intended to reduce and ease it.[14]

The Qur'ān makes it clear that Allāh only burdens a soul with what it is capable of carrying without detracting from its potential to achieve. One of a human being's ability to pray more than five times per day, observe fasting for more than a month at a time, and make pilgrimages more than once in a lifetime, but Allāh does not set a maximum or minimum; rather, He grants to everyone what is possible, whether in devotional actions or worldly issues. Syed Tantawī says that all those matters of power and righteousness, whether they are orders or prohibitions, which you have been made obligated to do, Allāh, the Exalted, has reduced the rules of the *Sharīʿah* with you, so that you may increase in obedience, response and

[14]Muhammad bin Ali bin Muhammad Al-Shukani, *Fath al-Qadir* (Beirut: Dar al-Kalam al-Tayyib, 1414 AH), 1:522.

gratitude. And man has been created weak, it means that he is not going to stick to the hard work of obedience. Therefore, it is due to the mercy of God to reduce the hardship. And ease and reduction in labor is one of the bright distinctions of the *Sharīʿah*, which has been explained by the Holy Qur'ān.[15]

Man should be obliged not only in worship, but in every matter whether it is social or economic, as much as there will be a check in it, and whatever is not in his courage and power, he will be softened and mitigated.

4. Convenience in Performance of Sharīʿah Injunctions

Less suffering means that suffering has been given to a minimum in God's commandments, and convenience have been kept to a maximum, because with the abundance of suffering, many hardships and difficulties arise, due to which people escape from the limits and laws try to adopt. Ibn ʿArabī writes about lack of suffering that this is a great principle and one of the members of the Muslim *Sharīʿah*, due to which Allāh has given us honor and respect over other nations, that He has not raised any difficult issue from us and has not made us obliged to do hard work.[16]

Maulānā ʿAbdul Raḥman Keilānī says "Allāh Almighty has explained the whole of His law of punishment and reward." In other words, the work that is beyond the capacity of a human being will not be held back from the person, but the holding back will be only on that which is within the power and ability of the person and where the person is forced, there will be no restraint. But the decision of this authority, capability and capacity should be made by a person with a very good intention because

[15]Muhammad Sayyid Tantawi, *Al-Tafsir Al-Wasit* (Cairo: Dar Nahza Misr, 1997), 3:123.

[16]Muhammad bin Abdullah Qazi Ibn al-Arabi, *Ahakm al-Qur'an* (Beirut: Dar al-Kitab al-Ilamiya, 1424 AH), 264.

Allāh knows the secrets of the hearts.[17] Allāh Almighty has said in *Surah Al-Baqarah*: Allāh Ta'ālā hurts every soul according to its magnitude.[18]

5. Juristic Approach on Convenience

Imām Baghawī says the revelation of this verse removes the hardship and in it there is an answer to a hidden question such as they said have you made us obligated according to your power. Therefore, he argued that Allāh does not limit his soul except for its expansion, which means that it is according to their strength, and expansion is the name of man's strength, and there is no restriction on it.[19] An unable or disabled individual is excused, which is one of the general principles for comfort and the reduction of hardship. If a human being is capable of carrying out a responsibility or obligation, Allāh has made it essential; if not, it is not. Allāh never wants to burden a person or proclaim an action to be required without taking into account that person's talents, potential, strengths, or other factors.

Imām Qurṭabī writes in his magnificent book "and suffering" is transitive towards two verbs, one of them is omitted and it is an expression or a thing, so Allāh Almighty has blessed us with pleasure and bounty. If He willed, He would have made us tasks that are difficult and painful, such as standing firm for one against ten, for a person to emigrate and leave his homeland, and to completely separate from his family, his homeland, and his business. He did not bind us to work that is hard work and things that cause pain and suffering, as He did to the people before us. Rather, Allāh

[17]Al-Qur'ān, 2: 286; In addition, Allah Almighty repeated this principle in the Qur'an on several occasions so that this principle should be kept in mind in every human affair; Al-Qur'ān, 23: 62.

[18]Abdul Rahman Keilānī, *Taisir al-Qur'an* (Lahore: Maktaba al-Salam, n.d.), 1:24.

[19]Abu Muhammad al-Husain bin Mas'ud bin Muhammad bin Al-Fara Al-Baghwi, *Maalam al-Tanzil fi Tafsir al-Qur'an* (Beirut: Dar Ihyaya al-Trath al-Arabi, 1420 AH), 1:402.

has given us ease and softened us and removed from us the burden and yoke that was placed on the people before us.[20]

In essence, Allāh desires ease for people and has no intention of making anything He has ordained for them in terms of concession for fasting difficult or burdensome. A soul does not exert any effort in an easy action, nor does it burden or exhaust the body. The challenge is something a soul struggles with when trying to influence the body. Sheikh Al-Thaʿlabī says "Allāh does not charge the soul except by expansion" means "expansion" and these are the things of the soul that it does not have the power of. They are obligated to things, so Allāh said: "Allāh desires ease from you" and He said in one place: "What has He made upon you in religion min *Ḥaraj*" (He has not imposed any hardship on you in religion and said ((That fear Allāh according to your ability) Sufyān bin ʿUyaynah was asked about this decree of Allāh, the Exalted, and he said that there is only ease in it, not hardship, and by Allāh, the Exalted. He did not oblige the man with his power and if he made him oblige with his power, he would have to work hard.[21]

The Qur'ān describes Islam as a flexible and easy faith. Allāh does not injure or stress anybody beyond what they can handle and has eliminated difficulty from this society. According to exegetes, the lines above make it clear that Allāh wants this community to be at ease and flexible, not to experience adversity, sorrow, or anguish. Imām al-Maraghī writes, Allāh has made every soul responsible for the action that he can do and there is no difficulty in performing it. Therefore, He has not made any seller or seller of goods obligated to carry out their weight and power. Do the measurement from the point of view that no grain or load is increased,

[20]Abu Abd Allah Muhammad bin Ahmad Imam Qurtubi, *Al-Jami al-Ahkam al-Qur'an* (Cairo: Dar al-Kitab al-Masriyyah, 1964), 3:430.

[21]Ahmad bin Muhammad bin Ibrahim Al-Thalabi Abu Ishaq, *Al-Kashf and Bayan on Tafsir al-Qur'an* (Beirut: Dar Ihya Al-Trath al-Arabi, 2002), 2:306.

but it has made it obligatory to regulate weight, measure and equality on it. When they enter into marriage, there should be no injustice, more or less, which is generally believed.[22]

In other words, it is man's duty to try to fulfill the rules according to the power. Things that are not in human power, Allāh Almighty forgives them. Syed Abul ʿAla Maudūdī writes that is, the responsibility of man to Allāh is according to his capacity. It will never happen that a person does not have the ability to do a thing and may Allāh ask him why he did not do such and such a thing. Or avoiding a thing is actually beyond his power and may Allāh blame him for why you did not abstain from it. But it is another thing that the person who decides his destiny is not himself. Only Allāh can decide what a person actually had the power of and what he did not have.[23]

Allāh Almighty has not imposed such a burden on His servants that it is beyond their human scope, and it is difficult for the human soul to carry it out. Allāh Almighty obliges man to do that which man can do easily and conveniently without spending all his energy. From this verse, it is also derived that people should be kind to each other in matters. One should not grip each other on minor things; it creates an atmosphere of hatred and mischief.

6. Easiness in Exercising Sharīʿah Injunctions

Allāh Almighty has removed all the unnecessary restrictions in *Sharīʿah* matters that used to create difficulties in practical life and social development. Allāh Almighty gave the Prophet Muhammad a revelation of His instructions. The main goal of Islamic Revealed Law is to make it easier for people to implement it in daily life. God showed His generosity by creating rules based on the idea of removing obstacles and making life

[22]Ahmad bin Mustafa Al-Maraghi, *Tafsir Al-Maraghi* (Egypt: Shirkat Maktabat Wa Matabat Mustafa al-Babi al-Halabi, 1946), 8:70.

[23]Abul Ala Syed Maududi, *Tafhim al-Qur'an* (Lahore: School of Humanity Building, 1992), 1:244.

easier. He bestows love and kindness upon his followers, enabling them to follow His directives. His instructions are consistent with His mandates and provide support for the alleviation of affliction wherever they are detailed in the Qur'ān and the Prophet's Patterns. Imām Ibn Kathīr writes that Allāh has not made you obliged to do something that was not in your power, nor has He imposed on you something that was unbearable for you, and He has not given you a way to escape from it.[24]

It is also a special grace and favor of Allāh that He has always kept the door of His mercy open for His servants to get rid of all kinds of sins and crimes in the Islamic *Sharīʿah*. There is no such sin in the universe. Muftī Muḥammad Shāfiʿī writes that there is no narrowness in the religion. Some scholars have stated that there is no sin in this religion that cannot be forgiven by repentance. And there will be no escape from the punishment of the hereafter. Unlike the previous nations, there were some sins among them that could not be forgiven even by repentance. Hazrat Ibn ʿAbbās said strictness means that it is severe. Some people said that hardship means that a person cannot bear. There is no commandment in this religion that is unbearable for the individual.[25]

Syed Maudūdī writes that in other words, your life has been freed from all the unnecessary restrictions that were imposed by the jurists, Pharisees and popes of the previous nations. There are neither restrictions on thought and thought that hinder the progress of knowledge, nor restrictions on practical life that hinder the development of civilization and society. A simple and easy belief and law has been given to you, with which you can go forward as much as you want.[26]

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[24]Ismail Ibn Umar Abu Al-Fida Ibn Kathir, *Tafsir Al-Qur'an Al-Azim* (Dar Tayyaba, 1999), 10:99.

[25]Mufti Muhammad Shafi, *Ma'arif Al-Qur'an* (Karachi: Idara Al-Aarif, 1981), 6:289-290.

[26]Tafhim ul-Quran, 3:254.

One of Allāh's methods or pieces of wisdom that He used in response to the erroneous claims made by doubters doubting the veracity of the Message was the gradual disclosure of the Scripture. This method of gradual revelation demonstrates that Allāh really wanted His Prophet (PBUH) and his Companions to have an easy life rather than a difficult one. Sheikh ʿAbdul Karīm Yūnus writes Indeed, this religion is based on ease and convenience. Only those who grasp it easily benefit from it, the heart accepts it, and the chest stays happy. Its case is like the case of food. The body benefits from it only when the heart feels good and wants it. And its food is pleasant, and its chewing and swallowing are very pleasant. And there is a *ḥadīth*: Do not make your soul (happy) angry in the worship of Allāh. It causes hardness of heart, and he takes up things that are difficult, even though he has something easy.[27]

Allāh Almighty has made it clear in several verses about the elimination of unnecessary restrictions and illegal closures in *Sharīʿah* matters that there is no scope for creating hardship in this religion. Allāh Almighty says:

I have not placed any hardship on you in religion.[28]

Shaykh Abū Al-Ḥasan al-Mawardī says that the elimination of hardship in this religion is done through five rewards: 1. It is redemption from sin through repentance, 2. It is a release from the oath through *kaffārah*. 3: Indeed, this is a mention of offering and delaying during the times of fasting, charity, and sacrifice. This is the opinion of Ibn ʿAbbas. 4: Verily, he has given permission to shorten the prayer and to skip fasting during the

[27]Abdul Karim Yunus Al-Khatib, *Al-Tafsir al-Qur'an* (Cairo: Dar al-Fikr al-Arabi, n.d), 9:1106-1107.

[28]Al-Qur'ān, 22:78; apart from this, Allah Ta'ala has mentioned this principle in other places; Al-Qur'ān, 5:6; 33:37 and 50 have also guided towards it.

journey. 5: There is no action in the religion of Islam that does not lead to salvation from sin. Indeed, this is normal.[29]

Shaykh Abū al-Muzaffar Manṣūr bin Muḥammad explains "Allāh Almighty's decree (*Wama jaʿalaykum fi al-din min harij*) in it, if someone says that there is a lot of harm in religion without any problems, then this decree of Allāh Almighty has no meaning." We say that there are many sayings in it. 1: Hardship means narrowness. In the verse, it is meant here that there is no narrowness in the religion as it is emancipated. It means when the sinner becomes in his sin. So Allāh has made repentance for him as a form of repentance, and when he breaks his oath, Allāh has made for him a form of expiation of the oath as a form of expiation. 2: Verily, Allāh has not made every soul obligated to do anything beyond its strength, and we have mentioned this earlier. Can't pay by tax, sit down and pay. If you can't read sitting down, then read by pointing. And when fasting becomes difficult for him due to travel or illness or old age, then he should leave the fast and all the reasons for leaving are the same".[30]

In the religion of Islam, a lot of care has been given to the helpless, wherever there is an excuse for them, Allāh, the Exalted, has made it easy for them by eliminating their difficulties, so that they do not face difficulties in fulfilling the commandments. Allāh says:

> Weak and sick people and those who do not find a way to participate in *jihād*, there is no problem if they stay behind, as long as they are loyal to Allāh and His Messenger with sincerity of heart. There is no room for objection to such benefactors and Allāh is Oft-Forgiving and Most Merciful.[31]

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[29]Ali bin Muhammad bin Muhammad Abul Hasan Al-Mawardi, *Tafsir al-Mawardi al-Nakat al-Ayun* (Beirut: Dar al-Kitab al-Ilamiya, n.d), 4:42.

[30]Mansur bin Muhammad bin Abdul Jabbar Abul Muzaffar Al-Maruzi, *Tafsir al-Qur'an* (Riyadh: Dar al-Watan, 1418 AH), 3:458.

[31]Al-Qur'ān, 9: 91.

Ending hardship and embarrassment for disabled and forced people, Allāh Almighty says:

> There is no harm if a blind, or lame, or sick person (eats from someone's house) and there is no harm in it for you to eat from your own houses or from the houses of your fathers, or from the houses of your mothers and grandmothers or from the houses of your brothers, or from the houses of your sisters, or from the houses of your uncles, or from the houses of your paternal aunts, or from the houses of your maternal uncles, or from the houses of your aunts, or from those houses whose keys I am in your custody, or from the houses of my friends. There is no problem whether you eat together or separately. However, when you enter the houses, greet your people, good prayers, appointed by Allāh, blessed and pure. This is how Allāh reveals the verses to you, expecting you to act with understanding.[32]

Abū al-Saʿūd al-Amadī says in his interpretation of this verse: "Allāh's saying (*Lays ali al-Ami Haraj wa la laali al-Arajharajwa la ali al-Miridhharaj*) means to stay behind in the battle with excuses and worries. Of course, becoming obligatory depends on one's ability, and the disadvantage of paying more attention to the affairs of countless pilgrims is to widen the scope of the scope."[33]

In all the rules of Islamic *Sharīʿah*, hardship have been negated, wherever there is no hardship in the capacity and strength of the servants, they will not be made obligatory. If any person puts more burden on himself or on another person than he can bear, he will violate the spirit of *Sharīʿah*

[32]Al-Qur'ān, 24:61.

[33]Muhammad bin Muhammad Abu al-Saud Al-Amadi, *Tafsir Abi al-Saud Irshad al-Aql al-Salim* (Beirut: Dar Ihya' al-Tarath al-Arabi, n.d), 8:109.

and become a sinner in the sight of Allāh. The principles of ease, permission, lack of suffering and non-harm given by Islam should be taken into consideration because due to the neglect of these principles, laws and rules and regulations, the individuals of the society are worried about suffering from extreme difficulties.

7. **Conclusion**

In *Sharīʿah* matters, one should take advantage of facilities given by Allah Almighty. This is Allāh's special mercy and kindness to His servants. Some people, instead of accepting the leave given by Allāh Almighty for the sake of attaining a little piety, bind themselves in unnecessary restrictions, which is against the scope and convenience of Islamic *Sharīʿah.* Just as hardship in *Sharīʿah* matters are the intention of Allāh, similarly leave and convenience are also favored by Allāh, so denying them is tantamount to divine sin. In the law of Allāh, every person is obliged according to his strength and capacity, no burden has been placed on anyone beyond his ability and strength. The success of a Muslim lies in the fact that he works with moderation and balance in every matter.

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